

1914. FINAL PART (Section I—Criminal).

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THE CURRENT INDEX OF INDIAN CASES, 1914

FINAL PART—SECTION I—CRIMINAL.

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" Bombay " " XXXVIII.
" Calcutta " " XLI.
" Madras " " XXXVII.
Allahabad Law Journal, " XII.
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the end & XIX, Pts. 1 to 6 (s.e.)
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WHOSE APPRECIATION AND ENCOURAGEMENT
IN CONNECTION WITH THIS COMPILATION
THE COMPILERS DESIRE VERY GRATEFULLY TO ACKNOWLEDGE.

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.*
A.L.J.	...	...	...	Allahabad Law Journal.*
A.W.N.	...	...	...	Allahabad Weekly Notes.
B.	...	...	...	Indian Law Reports, Bombay Series.*
B.H.C.	...	...	...	Bombay High Court Reports.
B.L.R.	...	...	...	Bengal Law Reports.
Bom. L.R.	...	...	...	Bombay Law Reporter.*
Bur. L.R.	...	...	...	Burma Law Reports.
C.	...	...	...	Indian Law Reports, Calcutta Series.*
C.L.J.	...	...	...	Calcutta Law Journal.*
C.L.R.	...	...	...	Calcutta Law Reports.
C.W.N.	...	...	...	Calcutta Weekly Notes.*
C.P.L.R.	...	...	...	Central Provinces Law Reports.
Cr. L.J.	...	...	...	Criminal Law Journal of India.*
I.A.	...	...	...	Law Reports, Indian Appeals.*
Ind. Cas.	...	...	...	Indian Cases.*
L.B.R.	...	...	...	Lower Burma Rulings.*
M.	...	...	...	Indian Law Reports, Madras Series.*
M.H.C.	...	...	...	Madras High Court Reports.
M.L.J.	...	...	...	Madras Law Journal.*
M.L.T.	...	...	...	Madras Law Times.*
M.I.A.	...	...	...	Moore's Indian Appeals.
N.L.R.	...	...	...	Nagpur Law Reports.*
N.W.P.H.C.	...	...	...	North-West Provinces High Court Reports.
O.C.	...	...	...	Oudh Cases.*
P.R.	...	...	...	Punjab Record.*
P.L.R.	...	...	...	Punjab Law Reporter.*
P.W.R.	...	...	...	Punjab Weekly Reporter.*
S.L.R.	...	...	...	Sind Law Reporter.*
T.L.R.	...	...	...	Travancore Law Reports.
U.B.R.	...	...	...	Upper Burma Rulings.*
W.R.	...	...	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	...	...	Applied.
Appr.	...	...	...	Approved.
D. or Distd.	...	...	...	Distinguished.
Disc.	...	...	...	Discussed.
Diss.	...	...	...	Dissented from.
Exp.	...	...	...	Explained.
F.	...	...	...	Followed.
(F.B.)	...	...	...	Full Bench.
Obs.	...	...	...	Observed.
(P.C.)	...	...	...	Privy Council.
R. or Refd. to	...	...	...	Referred to.
(S.B.)	...	...	...	Special Bench.

(N.B.)—(1) This publication embodies Cases from the Reports marked above with asterisks.

(2) In the Punjab Record and the Punjab Law Reporter, the cases are known by their numbers and not by the pages where there are printed ; (e.g.) 4 P.R. 1911 would mean Case No. 4, in the Punjab Record of 1911. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

(3) For Cases from Reports other than those published in India, the volumes and pages are printed exactly in the manner they are to be found in the original cases wherein they are referred to.

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OF

INDIAN CASES, 1914.

FINAL PART.

SECTION I—(CRIMINAL CASES).

Abetment.

- (1) *Abetment — Presence — Inaction — Criminality—Probability compatible with innocence—Conviction, justification for.*

Where, in a murder case, a co-accused stated that she remained an unwilling spectator while the offence was being committed by the other accused.

Held, that the alleged omission of a co-accused to intervene or raise an alarm did not constitute an abetment of murder, inasmuch as her inaction did not constitute criminality.

Where the circumstances of a case point to the conclusion that the accused committed the offence, but there is also a reasonable probability compatible with his innocence, there is no sufficient justification for the conviction of the accused. *Sarju Prasad v. Emperor*, 15 Cr. L.J. 617 = 25 Ind. Cas. 625.

STUART and KANHAIYA LAL, A.J. CS.

(2) Appellate Court whether entitled to alter conviction for principal offence into one of abetment—Abettor present at commission of offence whether can be convicted of principal offence. See CRIM. PRO. CODE, No. 313, 15 Cr. L.J. 694.

(3) Abettor of forgery—Whether can be convicted of the offence of using the document as genuine. See PENAL CODE, No. 30, 15 Cr. L.J. 568.

Accomplice.

- (1) *Accomplice, competency of, as witness—Corroboration required, nature of.*

An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad, but there is an established practice, founded on the judicial experience of generations, which requires corroboration by some untainted evidence and that in a material

Accomplice—(Concluded).

particular pointing not only to the crime but to the participation of the accused in that crime. *Siar Nonia v. The King Emperor*, 18 C.W. N. 550 = 15 Cr. L.J. 438 = 24 Ind. Cas. 174.

JENKINS, C.J., and SHARFUDDIN, J.

- (2) *Evidence—Accomplice — Corroboration—Conviction thereon.*

Though it had been held in recent cases that a conviction based upon the evidence of an accomplice or even on the confession of a co-accused is not illegal, it has been also repeatedly and uniformly laid down that it is quite unsafe to convict a man on such testimony unless there is reliable corroborative evidence in material particulars. *P. S. Narayana Iyer v. Emperor*, (1914) M.W.N. 868 = 15 Cr. L.J. 417 = 24 Ind. Cas. 153.

WALLIS and SADASIVA IYER, JJ.

(3) Suspected participator in crime appearing as prosecution witness—Weight to be attached to his statement. See EVIDENCE ACT, No. 29, 15 Cr. L.J. 410.

Accused.

(1) Prosecution against one of two accused withdrawn—Such accused if competent witness—Confession and prior statements of such accused if should be produced for cross-examination and contradiction. See CRIM. PRO. CODE, No. 372, 18 C.W.N. 1213.

(2) Right of accused to cross-examine prosecution witnesses after charge framed—Duty of Magistrates. See CRIM. PRO. CODE, No. 245, 11 P.R. 1914 (Cr.).

* (3) Sessions trial for murder—Application by defence counsel for postponement of cross-examination till next day—Refusal by Sessions Court—Effect—Accused prejudiced—Re-trial by another Sessions Court ordered. See CROSS-EXAMINATION, No. 1, 41 C. 299.

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Accused—(Concluded).

(4) Re-calling of warrant after acquittal of co-accused—Jurisdiction of District Magistrate to issue fresh warrant on same materials. See PENAL CODE, No. 10, 18 C.W.N. 580.

(5) Examination of accused before completion of prosecution evidence—Legality. See PENAL CODE, No. 23, 15 Cr. L.J. 486.

(6) Nature of defence which accused can set up—Duty of Court—Deficiency in prosecution evidence—Defence not bound to fill up—Right of defence to comment on such deficiency—Case of fraud set up by defence—Opportunity of explanation to prosecution. See PENAL CODE, No. 118, 18 C.W.N. 498.

(7) Explanation consistent with innocence of accused—Duty of prosecution. See PENAL CODE, No. 55, 1 P.R. 1914 (Cr.).

(8) Witness for prosecution—Order to turn the witness into a co-accused in the trial. See WITNESSES, No. 1, 16 Bom. L.R. 259.

Acquittal.

(1) Complaint by servant on behalf of master—Acquittal on death of complainant—Complaint of same offence by another servant—Previous acquittal if bar to Magistrate's taking cognizance of second complaint. See CRIM. PRO. CODE, No. 228, 18 C.W.N. 1211.

(2) High Court when will interfere in revision with an order of acquittal. See ACT IX OF 1890 (RAILWAYS), No. 1, (1914) M.W.N. 124.

(3) Setting aside of acquittal in revision on application of complainant—Powers of High Court. See CRIM. PRO. CODE, No. 248, 19 C.W.N. 184.

(4) Acquittal of accused under S. 247, Crim. Pro. Code, procured by his own trick—Whether a revision or appeal lies against the acquittal—Admission of additional evidence in appeals—Powers of Court—Grounds for setting aside order of acquittal—English and Indian Law. See CRIM. PRO. CODE, No. 229, 26 M.L.J. 160.

(5) Order of acquittal on account of complainant's absence, passed on a date not fixed for hearing of the case—Effect. See CRIM. PRO. CODE, No. 227, 18 C.W.N. 1180.

(6) Fighting in the course of which a person was killed—Accused charged under S. 325, I. P.C.—Compounding of the offence by the relations of the deceased—Order of acquittal—Legality—Revision—Re-trial. See CRIM. PRO. CODE, No. 280, 7 S.L.R. 200.

(7) Order of acquittal set aside by High Court in revision on merits, on the application of the complainant. See CRIM. PRO. CODE, No. 249, 18 C.W.N. 1244.

(8) Summons case—Non-appearance of complainant on date fixed for argument and consequent acquittal of accused if proper. See CRIM. PRO. CODE, No. 280, 18 C.W.N. 584.

(9) Acquittal on charge of murder if bar to trial on charge of culpable homicide—Acquittal on charge under S. 302/34, I.P.C., if bar to

Acquittal—(Concluded).

trial on charge under S. 302/114, or 302/109, I.P.C. See CRIM. PRO. CODE, No. 302, 18 C.W.N. 723.

(10) Accused when entitled to acquittal on revision. See CRIM. PRO. CODE, No. 335, 28 P.W.R. 1914 (Cr.).

(11) High Court's power to alter acquittal on one of two alternative charges into conviction. See PENAL CODE, No. 118, 18 C.W.N. 498.

(12) Re-calling of warrant after acquittal of co-accused—Jurisdiction of District Magistrate to issue fresh warrant on same materials. See PENAL CODE, No. 10, 18 C.W.N. 580.

Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—BURMA ACTS.
- 5.—MADRAS ACTS.
- 6.—N.W.P. ACTS.
- 7.—PUNJAB ACTS.

1.—Imperial Acts.

Act XIII of 1859 (Workman's Breach of Contract).

(1) *Artificer, workman or labourer—Head-carpenter—Whether falls under the term—Liability to prosecution.*

A person who is a 'carpenter-contractor' or 'head-carpenter' under whose supervision and direction the house was to be built by journeyman-carpenter, is 'an artificer, workman or labourer' within the meaning of the Workmen's Breach of Contract Act, and is not exempted from liability to prosecution under the Act. *Sein Yin v. Ah Moon Shooke*, 7 L.B.R. 82 = 15 Cr. L.J. 235 = 23 Ind. Cas. 187.

TWOMEY, J.

Reference :—7 M. 100, D.

(2) *Agreement to convey clay within the Act.*

A conveyance of clay by the personal labour of the person who undertakes the same is 'work' within the meaning of the Workmen's Breach of Contract Act.

The requirements to make the Act applicable discussed. *Mamu Beari v. Emperor*, 16 M. L.T. 235 = (1914) M.W.N. 651 = 27 M.L.J. 392 = 15 Cr. L.J. 651 = 25 Ind. Cas. 979.

AYLING and TYABJI, JJ.

(3) *Contract to be performed in foreign territory—Applicability of the Act.*

An order cannot be passed under Act XIII of 1859 to enforce the performance of a contract, if such performance is to take place in foreign territory. *Siana Karuppan*, 16 M.L.T. 803.

OLDFIELD, J.

Reference :—10 M. 21, R.

(4) *Contract providing for portion of wages going periodically in reduction of advance—Effect.*

DIGEST OF CASES.

J.—Imperial Acts—(Continued).

Act XIII of 1859 (Workman's Breach of Contract)—(Continued).

A contract to the effect that the workman shall work for wages, deducting from his wages a certain sum periodically to make good an advance, is within the Act XIII of 1859. *Jelagan Subramania Naidu v. Singara Mudali*, 27 M.L.J. 616.

MILLER, J.

References :—7 M. 191 ; 23 M. 209, F.

(5) Contract to work for twelve years.

A contract to work 8 hours a day for 12 years, for wages not shown to be above the market-rate, and to live in any house that may be provided, being otherwise a form of slavery, is illegal.

Where an advance made to a workman is merely a loan, Act XIII of 1859 does not apply. *In re Ambu*, 15 Cr. L.J. 384 = 23 Ind. Cas. 752.

SANKARAN NAIR, J.

(5-a) Contract to perform agricultural work—Stipulation to pay penalty in the event of non-performance—Applicability of the Act.

The preamble and the other provisions of the Act show that it was not intended to apply to a contract to perform agricultural services (a).

Where a contract prescribes a penalty for its breach, the remedy prescribed by this Act cannot be availed of (b). *Crown v. Khuda Baksh*, 38 P.R. 1914 (Cr.).

SHADI LAL, J.

References :—(a) 7 B. 379, R. (b) 96 P.L.R. 1914, R.

(6) S. 2—Stores received as advance—Inapplicability of the section—Stores not 'money.'

Where a workman received advance in the shape of stores and not in cash, it cannot be said that he received 'money' as required by S. 2, Act XIII of 1859, and that section is therefore inapplicable to such a case. *Crown v. Chiragh*, 23 P.R. 1914 (Cr.) = 15 Cr.L.J. 603 = 25 Ind. Cas. 515.

SHADI LAL, J.

(7) S. 2—Orders passed under S. 2 (1) part 1 or part 2—No appeal lies against either order.

Where a Magistrate ordered the appellant, under the first part of S. 2 (1) of the Workman's Breach of Contract Act, to repay a sum of money received by him as advance, and where, on his failure to comply with that order, the Magistrate sentenced him, under the second part of S. 2 (1) of the Act, to a term of imprisonment. *Held*, that no appeal lies from either of the orders. *Thajiro wd. Faizo v. The Crown*, 7 S.L.R. 80 = 15 Cr.L.J. 372 = 23 Ind. Cas. 740.

PRATT, J.C.

References :—33 B. 25 ; 6 S.L.R. 165 ; 9 C. 878, R.

1.—Imperial Acts—(Continued).

Act XIII of 1859 (Workman's Breach of Contract)—(Continued).

(8) S. 2—Written agreement—Contract of service for two years—No reference to manual labour—Re-payment of advance out of last 2 months' wages—No 'workman' within the meaning of the Act—No 'advance'—Applicability of the Act—Proceeding under S. 2, part 1 of the Act—Not a criminal proceeding—No jurisdiction to interfere.

R entered into a written agreement which made no reference to manual labour to serve S at his butcher's shop for two years on a monthly wages of Rs. 30, receiving Rs. 60 in advance for which he agreed to give credit from the pay of the last 2 months. The only service expressed in the contract was that of sales and rendering account of sales. R left service without lawful excuse in the third month and the Magistrate ordered him to re-pay the advance of Rs. 60 under S. 2 of the Workman's Breach of Contract Act.

Held, that R was not a workman within the meaning of the Act, and that the Act did not apply (a).

Held, also, that the sum of Rs. 60 was only a loan re-payable out of wages and not an advance made on account of any work which the workman shall have contracted to perform (b).

A proceeding under the first part of S. 2 of the Act is not a criminal proceeding and the Judicial Commissioner has no jurisdiction to interfere with such a proceeding (c).

Held, per *Kemp, A.J.C.* that, in this case, though R might have left service without lawful excuse, there was no 'wilful' refusal by him to perform. *Ramzan v. Noor Mahomed Yacub*, 7 S.L.R. 100 = 15 Cr. L.J. 883 = 23 Ind. Cas. 751.

PRATT, J.C., and KEMP, A.J.C.

References :—(a) 14 Bom. L. R. 956 ; 36 C. 917, R. (b) 13 Bom. L. R. 543, R. (c) 33 B. 25, R.

(9) S. 2—Power of Magistrate—Imprisonment and order for performing the work and repay advance.

A Magistrate has no power to order a workman both to repay the advance made by the employer and to perform the work and to suffer imprisonment. He can only pass an order for imprisonment when the workman neither repays the advance nor performs the work according to his contract. *Tirka v. Itwari*, 12 A.L.J. 678 = 15 Cr.L.J. 592 = 25 Ind. Cas. 844.

BANERJI and CHAMBER, JJ.

(10) S. 2, order under—Right of appeal from the order—Proper orders to be made under S. 2.

No appeal lies to the Sessions Court from the order of the Magistrate under S. 2 of Act XIII of 1859.

The Magistrate, while making an order under S. 2 of Act XIII of 1859, cannot make an order

I.—Imperial Acts—(Continued).**Act XIII of 1859 (Workman's Breach of Contract)—(Continued).**

of imprisonment in default, but such an order could be made after there has been non-compliance with the order of re-payment or carrying out the contract. *Anukul Chandra Roy v. Kamarali Sardar*, 18 C.W.N. 1271=15 Cr. L.J. 697=26 Ind. Cas. 145.

IMAM and CHAPMAN, JJ.

- (11) S. 2—*Workman told not to do any more work—Settlement to repay balance advanced—Failure to pay—Workman, liability of.*

If an employer tells his workman not to do any more work and arrives at a settlement with him for the re-payment of the balance due, the case is taken out of the Workmen's Breach of Contract Act, the liability of the workman becomes purely a civil liability and his failure to act on the settlement cannot bring the case back under the Act. *Jugaram v. Nga Tun Baw*, U.B.R. (1914), 2nd Qr., 18=25 Ind. Cas. 990=15 Cr. L.J. 662.

SHAW, J.C.

Reference:—4 L.B.R. 365, *Distd.*

- (12) Ss. 2, 3—*Workman, agreement by, to work for a fixed period in lieu of advance made to him by the employer—Contract contemplated by the Act.*

Held, that an agreement by a workman at Mirzapore to do work in a certain factory for a fixed period of time and until re-payment in a particular manner of an advance made to him by the owner of the factory, is a contract contemplated by Act XIII of 1859, and the accused must continue to work until he has worked for the period stipulated for and paid up the sum taken in advance; he is also liable to the penalties imposed upon a workman under S. 3 of the Act. *C. J. Lucas v. Ramai Singh*, 12 A.L.J. 152=23 Ind. Cas. 185=15 Cr.L.J. 233.

KNOX and KARAMAT HUSAIN, JJ.

- (13) Ss. 2, 3—*Contract, breach of—Form of order by Criminal Court—Case of Civil nature.*

The Magistrate, upon a complaint under Act XIII of 1859, gave the option to the debtor of paying off the debt or working it off.

Held, that the irregularity was one of which the creditor and not the debtor could complain.

The contract provided for re-payment of advance made to the debtor in a period over three years, and the debt was to be worked off by work, and the debtor was not to pay by cash or taking money from any other shop-keeper. And the contract prohibited the debtor from selling his work to any other person.

Held, that the contract bound down the debtor to work for the creditor and for no other person until the loan was paid off, and it could not be enforced under the Act. The Crown

I.—Imperial Acts—(Continued).**Act XIII of 1859 (Workman's Breach of Contract)—(Concluded).**

v. Amir Bakhsh, 61 P.L.R. 1914=22 P.W.R. 1914 (Cr.)=16 Cr.L.J. 423=24 Ind. Cas. 169.

CHEVIS, J.

Reference:—23 P.R. 1913, F.

- (14) Ss. 2, 3—*Contract to work for more than three years—Effect of S. 21 (g), Specific Relief Act—Contracts under Act XIII of 1859 when not enforceable—Contract providing a penalty for breach—Effect. Crown (through Jhanda Singh) v. Muhammad Din*, 23 P.R. 1913 (Cr.)=26 P.L.R. 1914=15 Cr. L.J. 166=22 Ind. Cas. 742. See Final Part, 1913, Col. 4.

- (15) Ss. 2, 5—*Contract to do some work, by a workman earning his living by laying and burning bricks—Criminal breach of contract—Workman—Expiry of the term of contract—Magistrate's power to order refund.*

A contract to do some work by one who is a workman earning his living by laying and burning bricks is not a contract to supply bricks and falls within the purview of Act XIII of 1859.

Where a workman, or labourer neglects or refuses to perform the work which he has contracted for, the mere fact that the time for which the contract was entered into has elapsed is no bar to a Magistrate passing an order for the refund of the money that may have been advanced to him by his master or employer. *Bharosa v. King-Emperor*, 12 A.L.J. 490=15 Cr. L.J. 599=25 Ind. Cas. 351.

TUDBALL, J.

References:—11 C.W.N. 247; 35 C. 1023, R.

- (16) S. 3. See Nos. 12, 13 and 14, *supra*.

- (17) S. 5. See No. 15, *supra*.

Act XLV of 1860.

See PENAL CODE.

Act III of 1867 (Gambling).

- (1) Ss. 3, 4—*Offences under—Joint trial—Legality. See CRIM. PRO. CODE, No. 222, 85 P.R. 1914 (Cr.).*

- (2) S. 13—*Meaning of "public place"—Private property when to be deemed as "public place"—Intention of accused simply to conceal themselves—Whether accused can be convicted of gambling in public place. Vithu v. Emperor*, 9 N.L.R. 164=14 Cr. L.J. 670=21 Ind. Cas. 910. See Final Part, 1913, Col. 6.

Act XXV of 1867 (Newspapers and Printing Presses).

- (1) Ss. 4, 5. See ACT I OF 1910 (PRESS), No. 1, 16 Bom. L.R. 87.

- (2) S. 5. See No. 1, *supra*.

Act IV of 1869 (Divorce).

Decree nisi by District Judge for dissolution of marriage—Direction to deliver up child to

J.—Imperial Acts—(Continued).**Act IV of 1869 (Divorce)—(Concluded).**

husband—Removal of child from husband's custody before confirmation of decree by High Court, if offence. See PENAL CODE, No. 105, 18 C.W.N. 484.

Act XXXI of 1871 (Weights and Measures).

(1) *Fraudulent possession of false weights and measures, what amounts to—S. 266, Penal Code—Joint trial of 68 persons—Legality.* *Crown v. Nanak Chand*, 20 P.R. 1913 (Cr.) = 86 P.L.R. 1914 = 15 Cr. L.J. 11 = 22 Ind. Cas. 155. See Final Part, 1913, Col. 7.

Act I of 1872.

See EVIDENCE ACT.

Act X of 1873 (Oaths).

(1) *Ss. 5, 13—Evidence Act, S. 118—Child's witness—Failure to administer oath—Evidence, whether inadmissible—Insanity of accused, plea of—Time.*

A child's evidence is not inadmissible merely because no oath was administered to it. Although S. 5 of Oaths Act is imperative, still S. 13 of the Act governs cases of this sort (a).

Where an accused pleads insanity, the evidence relating to it must refer to the time when he committed the offence and not to the state of his mind long afterwards. *Golla Chinna Yenkadu v. Emperor*, 15 Cr. L.J. 161 = 22 Ind. Cas. 737.

AYLING and OLDFIELD, JJ.

References:—(a) 16 M. 105; 1 Weir 823, F.; 10 A. 207, Diss.

(2) S. 13—Omission to record deposition as on solemn oaths or affirmation—Effect. See CRIM. PRO. CODE, No. 159, 18 C.W.N. 1923.

(3) S. 13. See No. 1, *supra*.

Act I of 1878 (Opium).

(1) *S. 9—Crim. Pro. Code, Ss. 239 and 537—Joint trial—Misjoinder of parties, not mere irregularity—Possession, illicit, of opium—Opium found in accused's house during his absence, effect of—Suggestion by accused's pleader, whether Court can in its judgment pass remarks upon.*

On a certain day A was arrested and found in possession of a seer of opium alleged to have been purchased by B, A's companion, from C's shop. On A's information D's house was searched on the same day and 6 seers of opium were found there in D's absence. These four persons and D's wife were jointly tried on the following four charges: The first charging all with having on that day engaged in illicit transport of opium, the second and the third charging A and B and D and his wife, with having been on that day in unlawful possession of one and six seers of opium, respectively, and the fourth charging C with having on that day sold opium against the contract terms of the license:

J.—Imperial Acts—(Continued).**Act I of 1878 (Opium)—(Concluded).**

Held, that the above joint trial was illegal and contrary to the provisions of S. 239, Crim. Pro. Code, inasmuch as the accused did not commit the same offence or different offences in the same transaction.

A trial which takes place in defiance of the express provisions of S. 239, Crim. Pro. Code, must be held to be a void trial, and a misjoinder of parties thus taking place is not a mere irregularity which can be cured by applying the provisions of S. 537, Crim. Pro. Code (a).

Where a person was convicted on a charge of being in illicit possession of opium, while the opium was found in his house during his absence:

Held, that the conviction could not be sustained, inasmuch as the possession of the opium could not be attributed to him in the sense required by law.

Where the lower Courts described a suggestion made by the accused's pleader as a daring attempt to mislead the Court, and it was found that the pleader was justified in making the suggestion.

Held, that the lower Courts, apart from their own opinion upon it, ought not to have made the remark, which should be expunged from the record. *Lachchu v. Emperor*, 15 Cr.L.J. 420 = 24 Ind. Cas. 156.

LINDSAY, J.C.

References:—(a) 25 M. 61 = 11 M.L.J. 233 = 3 Bom.L.R. 540 = 5 O.W.N. 866 = 28 I.A. 257 (P.C.) = 2 Weir 271, F.

(2) *S. 9—Mere contemplation of violating a rule, whether punishable.*

A person can be convicted for a breach of the rules framed under S. 9 of the Opium Act only when he does some act in contravention of such rule and not merely for contemplating such violation. *In re P. Venkatasubram Chetti*, 15 Cr.L.J. 667 = 25 Ind. Cas. 995.

AYLING and HANNAY, JJ.

(3) *S. 9 (c)—Opium rules, 1910—Beinchi—Possession of three tolas legal, if bought from licensed vendor.*

The Opium rules, 1910, include *beinchi* in what is there called "defined opium," and allow the possession of such opium by a non-Burman up to three tolas in weight if bought by him from a licensed vendor.

The ruling in *Queen-Empress v. Thila* (a), no longer applies. *Emperor v. Ah Pein Shok*, U.B.R. (1914), 1st Cr., 1 = 24 Ind. Cas. 844 = 15 Cr.L.J. 532.

SHAW, J.C.

References:—(a) U.B.R. (1992-96), 1st Cr. 183, R.

I.—Imperial Acts—(Continued).**Act VI of 1878 (Treasure Trove).**

- (1) Ss. 4, 20—Coolies engaged by employer—Discovery by them of treasure in the course of performance of their work—Liability as 'finders'—Conviction under S. 20 of the Act—Validity—'Finder'—Meaning of the term.

Where two coolies, while engaged by their employers in the cutting of a tree, discovered, in the presence of their employers and several others, a box which, when opened before them, revealed treasure of value, and the box was removed by one of their employers who secretly disposed of them, and the coolies were prosecuted under S. 20 of the Treasure Trove Act and convicted.

Held, that the coolies were 'finders' within the meaning of S. 4 of Act VI of 1878 and that they were rightly convicted under S. 20 of the same Act. *In re Mala Naicker*, 27 M.L.J. 477=15 Cr.L.J. 632=25 Ind. Cas. 640.

SADASIVA IYER, J.

- (2) S. 20. See No. 1, *supra*.

Act XI of 1878 (Arms).

- (1) Ss. 4, 20—"Arms," definition of—Weapon, dangerous and likely to cause death if used—Pole-axe.

The definition of "arms" in the Arms Act is neither exhaustive nor altogether happy (a).

The mere fact that a weapon is dangerous, and, if used, may probably cause death, does not make it "arms" within the meaning of S. 4 of the Arms Act.

A weapon consisting of a plain lathi, a blade and two moveable screws, and so contrived that by loosening the screws the blade may be detached from the shaft made up of the lathi, is not "arms" as defined in S. 4 of the Arms Act, although the weapon may be described as a pole-axe. *Gajja v. Emperor*, 15 Cr.L.J. 685=26 Ind. Cas. 133.

LINDSAY, J.C.

References:—(a) 34 C. 749=11 C.W.N. 971=6 C.L.J. 227=6 C.L.J. 751, R.

- (2) S. 16—Confiscation—Possession of gun without obtaining renewed license—Confiscation of gun illegal—Fine and detention of gun, proper punishment.

An order confiscating a gun because of mere delay in renewing the license to possess it is illegal. The imposition of a fine and detention of the gun in the Police Station till the production of the license would be a proper order. *In re Kattura Rowthen*, 15 Cr. L. J. 21=22 Ind. Cas. 165.

MILLER, J.

- (3) S. 19 (a)—Clasp knives with the outer edge narrowing—For what use primarily intended—Can they be called Arms in ordinary parlance?

Though the exhibit knives were stout formidable ones, the outer edge narrowing as the

I.—Imperial Acts—(Continued).**Act XI of 1878 (Arms)—(Concluded).**

end of the blade is reached, they cannot be called arms as they could not, from their appearance, be said to have been primarily manufactured with the intention of using them—for offence or defence. They are useful for domestic use or for cutting sticks. *King-Emperor v. Ma Thin*, 7 Bur.L.T. 165=15 Cr. L.J. 585=25 Ind. Cas. 387.

HASTNOLL, OFFG. C.J., and ORMOND, J.

- (4) S. 19 (6)—Servant, temporary possession by, on behalf of master. *Charu Chandra Ghose v. The King-Emperor*, 17 C.W.N. 979=14 Cr. L.J. 377=20 Ind. Cas. 137=41 C. 11. See Final Part, 1913, Col. 8.

- (5) Ss. 19 (a), 20—Chhavi defined—Its possession by keeping it hidden—Question of exclusive possession raised for the first time in appeal.

Everything is *chhavi* which has a large axe-like blade, curved or otherwise, with an arrangement of ring or rings for binding it to the handle, and a handle of a considerable length.

Being in possession of a *chhavi* and keeping it hidden is simply punishable under S. 19, cl. (a) of Act XI of 1878. S. 20 is applicable only to those cases where the import or export of an arm is attempted (a).

The question of exclusive possession of an arm cannot be raised for the first time in appeal. *Gahna v. Crown*, 1 P.W.R. 1914 (Cr.)=33 P.L.R. 1914=15 Cr.L.J. 506=24 Ind. Cas. 594.

JOHNSTONE, J.

References:—(a) 9 P.R. 1912=44 P.W.R. 1912 (Cr.), F.

- (6) Ss. 19 (f), 29—Previous sanction of District Magistrate or other authority when necessary for prosecution for offence under S. 19 (f). *Sunder Singh v. Crown*, 24 P.R. 1913 (Cr.)=14 Cr. L.J. 688=21 Ind. Cas. 1008=274 P.L.R. 1914. See Final Part, 1913, Col. 9.

- (7) S. 20. See Nos. 1 and 5, *supra*.

- (8) S. 29. See No. 6, *supra*.

Act XIV of 1879 (Hackney Carriages).

- (1) Ss. 6, 7—Insein Rules, r. 15—Refusal of driver to ply hackney carriage for hire—Liability of driver and owner for such refusal.

The driver of a hackney carriage who refuses to ply it for hire is not punishable for infringement of r. 15 of the Insein Rules under the Hackney Carriages Act, because he cannot properly be said to "keep" the carriage which he happens to be driving. And the "owner" or keeper of a carriage is not punishable for the refusal of his servant, i.e., the driver. It must be shown that the hirer applied to the "owner" or "keeper" and was refused by him. *Emperor v. Kamali Khan*, 15 Cr. L.J. 552=24 Ind. Cas. 960.

TWOMEY, J.

- (2) S. 7. See No. 1, *supra*.

1.—Imperial Acts—(Continued).**Act XVII of 1879 (Dekkhan Agriculturists Relief.**(1) S. 2 (2). See No. 2, *infra*.(2) Ss. 64, 67, 2 (2) (4)—*Bullocks, sale of—Passing of receipt—Money includes bullocks.*

A person purchasing bullocks from an agriculturist is bound to pass a receipt under S. 64 of the Dekkhan Agriculturists' Relief Act, for the word "money" as used in that section includes bullocks. **Emperor v. Govinda Babaji Babde**, 16 Bom. L.R. 683 = 2 Bom. Cr. Cas. 248.

HEATON and SHAH, JJ.

(3) S. 67. See No. 2, *supra*.**Act XVIII of 1879 (Legal Practitioners).**

(1) S. 3 (as amended by Act XI of 1896)—*Order of District Magistrate framing a list of touts—Chief Court's power to revise the order—S. 13, Act XVIII of 1884 (Punjab Courts).*

A District Magistrate, purporting to act under S. 36 of the Legal Practitioners Act, directed that the names of certain persons specified in his order should be included in a list of 'touts' to be hung up in his Court and in Courts subordinate to him. *Held*, the Chief Court has no jurisdiction to revise the Magistrate's order.

Proceedings under S. 36 of the Legal Practitioners Act are neither Civil Proceedings governed by the provisions of the Code of Civil Procedure, nor Criminal Proceedings governed by the Crim. Pro. Code, and as a result neither the Civil nor the Criminal jurisdiction of the High, or Chief, Court can be invoked for the purpose of revising orders passed under that section (a).

S. 13 of the Punjab Courts Act gives the Chief Court a power of superintendence and control only over Civil Courts, and the provisions of that section are not relevant to a case such as the present where the Chief Court is asked to revise the order of a *District Magistrate* who has, in that capacity, taken action under S. 36 of the Legal Practitioners Act. With such an order the Chief Court is not empowered by any provision of law to interfere (b). **Sadar Din v. Crown**, 18 P.R. 1914 (Cr.) = 266 P.L.R. 1914 = 15 Cr. L.J. 601 = 25 Ind. Cas. 513 = 51 P.W.R. 1914 (Cr.)

KENSINGTON, C.J., and RATTIGAN, J.

References:—(a) 21 A. 181; 31 A. 59; 11 C. L.J. 513; 16 Ind. Cas. 895; 11 P.R. (1909), (Cr.); 41 P.R. 1888 (Cr.), R. (b) 3 P.R. 1900 (Cr.), *Diss*.

(2) S. 13—Rule 27 of the rules framed under—Neglect of pleader to appear after receipt of fees—Pleader engaging in trade—Actionable claim—Purchase by pleader—Position of vakil—Professional misconduct—High Court's disciplinary powers. See **PLEADER AND CLIENT**, No. 2, 87 M. 288.

2.—Imperial Acts—(Continued).**Act XVIII of 1879 (Legal Practitioners)—(Concluded).**

(3) S. 13, cl. (f)—*Pleader retaining in his service a man convicted of cheating and who was to be declared a tout &c. and after his enrolment as a pleader's clerk was refused—Making false statement.*

Held, that, a charge of the following description against a pleader constitutes a professional misconduct under S. 13, cl. (f) of Act XVIII of 1879, for which he is liable to be either dismissed or suspended for a certain period (which was six months in the present case).

1. That Mr. M., after having given a very clear promise to the Bar Council to dismiss N. whose name had been entered in the list of suspected touts and to whom notice had been issued to show cause why he should not be proclaimed as a tout, retained N. in his service and that he made a distinctly false promise in order to escape the further action of the Council.

2. That Mr. M. in the 1st instance made a definite promise to escape further action of the Bar Council and he broke that promise, and subsequently when an enquiry was made from him he deliberately made a false statement, false to his knowledge, regarding the employment and notice &c., of dismissal of N. *In the matter of Mr. M.*, 49 P.W.R. 1914 (Cr.) (F.B.)

ROBERTSON, KENSINGTON, RATTIGAN, and SHAH DIN, JJ.

Act IV of 1882.

See TRANSFER OF PROPERTY ACT.

Act VI of 1882 (Companies).

(1) Ss. 48 and 50—*Officers of Company resigning their positions as such without resigning directorships—Liability under S. 50 not affected—Plea of ignorance of law.*

Where a paid Managing Director and the Chief Secretary of a Company were prosecuted for an offence under S. 48, and convicted under S. 50, Companies Act.

Held, that the fact of their having resigned their positions as Managing Director and Chief Secretary, before the prosecution was started, without resigning thereby their posts as directors, would not free them from their liability under S. 50 of the Act.

The plea of ignorance of law cannot be accepted. **Ohhabil Das and Chandar Bhan Hooja v. Emperor**, 164 P.L.R. 1914 = 15 Cr. L.J. 300 = 23 Ind. Cas. 508 = 38 P.W.R. 1914 (Cr.)

KENSINGTON, C.J., and RATTIGAN, J.

(2) S. 50. See No. 1, *supra*.

(3) S. 74—*Penalty—Crim. Pro. Code, S. 439—Revision—Criminal case—Sentence, enhancement of—Discretion of Chief Court.*

Held, that the penalty provided by S. 74 of the Companies Act, 1882, is a fixed and not a maximum penalty. The Magistrate sentenced

I.—Imperial Acts—(Continued).**Act VI of 1882 (Companies)—(Concluded).**

the accused to a fine of Rs. 300 under S. 74 of the Companies Act. The Crown moved for enhancement of the fine.

Held, also, that, though the Chief Court had discretion to refuse to enhance a sentence, yet the present case was one in which enhancement was necessary. *Crowe v. Lala Harkishan Lal*, 37 P.L.R. 1914=16 P.W.R. 1914 (Cr.)=15 Cr. L.J. 260=23 Ind. Cas. 468=19 P.R. 1914 (Cr.).

JOHNSTONE, J.

References:—35 A. 173, F.; 19 P.W.R. 1910=63 P.L.R. 1910; 29 P.W.R. 1913=58 P.L.R. 1913; 7 P.R. 1889; 17 P.R. 1898; 19 P.R. 1905 (Cr.)=78 P.L.R. 1905, R.

- (4) S. 74—*Filing balance-sheet within year—Director resigning before expiry of year—Not liable for failure to file—Mere ceasing to hold necessary qualification shares, effect of—Vacation of office of Directorship.*

A Company is not by law obliged to file a balance-sheet till a year from its registration is complete, and a Director of the Company who resigns office before the expiry of the year cannot be fixed with liability under S. 74, Companies Act, for failure to file a balance-sheet with the Registrar of Joint Stock Companies. Act VI of 1882 is not precise on the point, but under English Law the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director, and this is made clear by S. 85 (3) of the new Act VII of 1913. *Chandar Bhan v. Emperor*, 15 Cr. L.J. 380=23 Ind. Cas. 748=17 P.R. 1914 (Cr.)=39 P.W.R. 1914 (Cr.)=250 P.L.R. 1914.

KENSINGTON, C.J., and RATTIGAN, J.

Act II of 1886 (Income-Tax).

- (1) Ss. 35 and 36—*Prosecution for making false statement not to be ordered except at the instance of Collector—The form of the order to intimate that it has been passed by the Collector.*

A person who has committed an offence under S. 35 of the Income-Tax Act cannot be proceeded against except at the instance of the Collector, and where it does not appear from the order that it was passed by the officer concerned in his capacity as a Collector, it is not legal. *Bankat Lal v. King-Emperor*, 12 A.L.J. 258=15 Cr. L.J. 296=23 Ind. Cas. 504.

RYVES, J.

(2) S. 36—*Collector's order under, whether falls within S. 435, Crim. Pro. Code—Collector deciding objections to assessment of income-tax as Revenue Court—Prosecution ordered for false statement in declaration.* See CRIM. PRO. CODE, No. 819, 15 Cr. L.J. 2.

- (3) S. 36. See No. 1, *supra*.

I.—Imperial Acts—(Continued).**Act XI of 1886 (Tramways).**

(1) *Bye-laws framed under the Act—Break of journey—Necessity for purchase of fresh ticket.* *Nga Ba Thin v. Rangoon Electric Tramway Co.*, 14 Cr. L.J. 564=21 Ind. Cas. 164=7 L. B.R. 53=6 Bur. L.T. 193. See Final Part, 1913, Col. 11.

Act IV of 1889 (Merchandise Marks).

(1) Ss. 2 (2), 4, 7—*Design or pattern covering the whole goods—Not a trade description—Copying such design—No offence.* See TRADE MARK, No. 1, 8 S.L.R. 39.

(2) S. 4. See No. 1, *supra*.

(3) Ss. 6, 7—*Liability of limited company to be convicted and punished—Meanings of words 'he,' 'person,' 'whoever.'* See PENAL CODE, No. 154, 15 Cr. L.J. 337.

(4) S. 7. See Nos. 1 and 3, *supra*.

(5) S. 14—*Counterfeiting trade-mark—Costs of successful party—Costs in appeal.* See PENAL CODE, No. 156, 16 Bom. L.R. 78.

Act VIII of 1890 (Guardians and Ward).

Lawful guardian setting up adverse title to property of minor, whether entitled to guardianship of the person of the minor. See PENAL CODE, No. 100, 15 Cr. L.J. 640.

Act IX of 1890 (Railways).

- (1) Ss. 3, cl. (4), 123, 138—*Railway, meaning of—Staff and Residential quarters, not included—Employees holding over—Ejection—Procedure—Ss. 138 and 122, when applicable—Penal Code, S. 27—Servant's possession—Master's, how far so—S. 141—Use of force—By less than five—Assertion of right, not legalised—Crim. Pro. Code, Ss. 55 and 439—Revision against acquittal—High Court will interfere only in clear interests of justice.*

Although S. 3, cl. (4) of the Railways Act is wide, staff quarters are not part of the Railway.

A summary procedure is laid down, in S. 138, for the recovery, by the Railway, of properties improperly held by the employees who are dismissed or discharged. This section is not concurrent with S. 122 which is intended merely for the administration of the Railway and for removing trespassers on the Railway.

Where there is lawful entry, S. 122 cannot be applied.

S. 27 of the Penal Code is not applicable, as the use by the employee of the premises, as his private residence cannot be said to be on account of his master.

It is wrong to contend that when an act is not a civil wrong, it cannot be a criminal offence. Neither English nor Indian Law supports such a contention.

S. 141 of the Penal Code cannot be read to lay down the measure of violence which a true owner may use in the assertion of his real right. It only provides for a special remedy in

1.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Concluded).**

aggravated circumstances. The High Court will not interfere with an acquittal on revision, except in the clear interests of justice. *Mar-gam Aiyar v. Mercer*, (1914) M.W.N. 124=15 Cr. L. J. 225=23 Ind. Cas. 177.

AYLING and OLDFIELD, JJ.

(2) S. 47. See No. 6, *infra*.

(3) S. 101—*Conviction under, when sustainable—Mere possibility of endangering safety of some person whether sufficient for conviction.* *Ba Lin v. King-Emperor*, 7 L.B.R. 72=22 Ind. Cas. 161=15 Cr. L.J. 17=7 Bur. L.T. 101. See Final Part, 1913, Col. 12.

(4) S. 101, sub-Ss. (a), (b), (c)—“*General Rules and Regulations*” applied to all Railways in India, r. 86—*G I.P. Ry.—Working Instructions in force on and after 1st July 1911—Rule 9 applying General Rule 86 for protection of trains standing outside distant signal—Whether charge for breach of r. 9 should be under sub-S. (a) or (b) of S. 101 of the Railways Act—Construction and application of working rules framed by Railway.* *Bezanji v. Emperor*, 14 Cr. L. J. 676=21 Ind. Cas. 996. See Final Part, 1913, Col. 18.

(5) S. 118—*Passenger—Licensed sweetmeat seller—Standing on foot-board of a carriage in motion to recover dues.* *Emperor v. Ladhu Ramji Jessa*, 15 Bom. L.R. 996=2 Bom. Cr. C. 163=14 Cr. L. J. 654=21 Ind. Cas. 894. See Final Part, 1913, Col. 14.

(6) Ss. 122, 47—*Crossing railway lines without permission—Offence under S. 122—‘Unlawfully’ in S. 122—Meaning—Absence of by-law under S. 47 (1) (g)—Effect—S. 122 not affected by S. 47.*

Where a person crossed the railway lines without permission, in order to go to the goods shed after transacting business with the Station Master.

Held, that his entry was unlawful within the meaning of S. 122 of the Railways Act and that he was guilty of the offence specified in the first part of the section.

The word ‘unlawful,’ as used in S. 122, means ‘without the leave of the Railway Administration’ (a).

Section 47 of the Railways Act has no bearing on the question and no by-law properly made under cl. (g), sub-S. 1 of S. 47, would have reference to a trespass by a member of the general public upon Railway lines as contemplated by S. 122. *Mohan Malik v. Crown*, 4 P.R. 1914 (Cr.)=155 P.L.R. 1914=15 Cr.L. J. 468=24 Ind. Cas. 848.

JOHNSTONE and SHAH DIN, JJ.

Reference:—(a) 80 B. 348, *Rel.*

(7) S. 122. See No. 1, *supra*.

(8) S. 188. See No. 1, *supra*.

2 Cr.

2.—Imperial Acts—(Continued).**Act XI of 1890 (Prevention of Cruelty to Animals).**

(1) S. 6 (1)—*Charge against both coachman and owner, whether illegal.*

There is nothing in S. 6 (1) of Act XI of 1890, restricting the prosecution of either the “coachman or the owner.” The prosecution of both or one after another is not illegal. A conviction of one does not operate as a bar to the trial of the other. *Emperor v. Rice*, 15 Cr. L.J. 695=26 Ind. Cas. 148.

SADASIVA AIYAR, J.

Act IX of 1894 (Prisons).

S. 54—*Disobedience of rules in Jail Manual—Whether penal—Duty of Medical Subordinate to submit to search—Refusal to submit whether offence.* *Imperator v. Gobindram Kirparam*, 7 S.L.R. 49=14 Cr.L.J. 619=21 Ind. Cas. 667. See Final Part, 1913, Col. 15.

Act XII of 1896 (Excise).

(1) S. 36. See No. 4, *infra*.

(2) S. 37. See No. 4, *infra*.

(3) S. 38. See No. 4, *infra*.

(4) Ss. 44, 57, 36, 37, 38—*Notifications of Government under S. 44—Police officer whether an Excise Officer for purposes of S. 57.*

Under the notifications of the Local Government made under S. 44 of the Excise Act, a Sub-Inspector of Police is an Excise Officer for all purposes connected with the excise power conferred on Excise Officers by Ss. 36, 37, and 38 of the Act. And a Police officer, invested with powers of an Excise Officer under S. 44, is to be deemed also an Excise Officer for the purposes of S. 57. *Crown v. Shibban*, 2 P.R. 1914 (Cr.)=138 P.L.R. 1914=15 Cr. L.J. 836=23 Ind. Cas. 688.

RATTIGAN and CHEVIS, JJ.

References:—22 P.R. 1900 (Cr.); 20 A. 70; 30 A. 877; 8 P.R. 1901, F.; 18 P.R. 1910 (Cr.); 9 P.R. 1897 (Cr.), D.

(5) Ss. 48, 53—*Crim. Pro. Code, S. 239—Excise Act, Ss. 48, 53—Joint trial of persons separately accused of offences under the two sections—Conviction to be set aside—Accused raising no objection to joint trial—Possession by mistress in house furnished by her protector—Presumption—Possession on account of protector—Penal Code, S. 27—What proof necessary to raise presumption.*

Where the illicit possession of cocaine is unconnected with its illicit sale by B, the joint trial of A and B under Ss. 48 and 53 of Act XII of 1896, is illegal and a conviction based upon such trial will be set aside, notwithstanding that the accused raised no objection to the joint trial (a).

When a man furnishes a house for his mistress' occupation, he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to

1.—Imperial Acts—(Continued).**Act XII of 1896 (Excise)—(Concluded).**

him or to be in the possession of his mistress on his behalf. But the inference must be inapplicable to articles of which the mistress is in possession illegally or contrary to the provisions of law, especially when the article in question is such that he might well remain in ignorance that it was in his mistress' possession.

To raise the presumption under S. 27, Penal Code, something more than mere possession by the wife or mistress must be proved. **Banwar Lal v. Emperor**, 97 P.L.R. 1914=15 Cr. L.J. 172=25 P.W.R. 1914 (Cr.)=22 Ind. Cas. 748=20 P.R. 1914 (Cr.).

RATTIGAN, J.

References:—(a) 25 M. 61=11 M.L.J. 233=3 Bom. L.R. 540=5 C.W.N. 866=28 I.A. 257 (P.C.)=2 Weir 271, F.

(5-a) S. 49—*Medical Practitioner putting brandy into medicine and selling it to a patient—Whether guilty under S. 49.*

A Medical Practitioner who put a little brandy into one of the medicines prescribed and sold by him to a patient does not thereby contravene the provisions of the Excise Law. **Crown v. Bhagwan Das**, 33 P.R. 1914 (Cr.).

SCOTT-SMITH, J.

(6) S. 51—*Finding of lahan, &c., in a person's premises outside the village under suspicious circumstances—Benefit of doubt—Revision under S. 439, Code of Criminal Procedure.* **Wasakhi v. The Crown**, 43 P.W.R. 1913 (Cr.)=28 P.L.R. 1914=22 Ind. Cas. 752=15 Cr. L. J. 176. See Final Part, 1913, Col. 16.

(7) S. 53. See No. 5, *supra*.

(8) S. 57. See No. 4, *supra*.

(9) S. 60—*Absence of search warrant—Legality of conviction—Oaths Act (X of 1873)—Omission to record the fact that oath was administered—No presumption that it was not administered.* **Syed Ahmad v. King-Emperor**, 11 A.L.J. 933=35 A. 575=22 Ind. Cas. 163=15 Cr. L. J. 19. See Final Part, 1913, Col. 16.

Act X of 1897 (General Clauses).

Doors whether immoveable property. See **ACT V OF 1884 (MADRAS LOCAL BOARDS)**, No. 1, 16 M.L.T. 429.

Act Y of 1898.

See CRIM. PRO. CODE.

Act VI of 1901 (Assam Labour and Emigration).

(1) Ss. 2 (n) 161, 164—"Magistrate," meaning of—*Repatriation, order for, at cost of owner of garden—Order made by Sub-Deputy Magistrate, if legal—Employer not called upon to show cause—Undue influence or coercion, absence of.*

A Sub-Deputy Magistrate, not appointed by the Local Government to perform the functions of a Magistrate under the Assam Labour and

1.—Imperial Acts—(Continued).**Act VI of 1901 (Assam Labour and Emigration)—(Concluded).**

Emigration Act, 1901, acquitted certain persons of offence under S. 164 of that Act, but at the same time passed an order that the proprietor of the garden for which the coolies were recruited should deposit the expenses of repatriation of the coolies. There was nothing to show that there had been any undue influence or coercion and the employer was not called upon to show cause as required by S. 161 that the order was a bad one:

Held, that the order of repatriation at the cost of the employer was bad. **Emperor v. Ritu Chamar**, 15 Cr. L. J. 195=22 Ind. Cas. 979=18 C.W.N. 1143.

HOLMWOOD and SHARFUDDIN, JJ.

(2) S. 161. See No. 1, *supra*.

(3) S. 164. See No. 1, *supra*.

Act XV of 1903 (Extradition).

Ss. 7, 10, 15—*High Court—Jurisdiction—Propriety of warrant—Warrant issued without evidence—No report to Political Agent—Inquiry without warrant issued by Political Agent—Procedure unknown to Extradition Act.* **Emperor v. Gulli Sahu**, 14 Cr. L.J. 673=21 Ind. Cas. 993=18 C. W. N. 869=41 C. 400. See Final Part, 1913, Col. 19.

Act III of 1907 (Provincial Insolvency).

(1) S. 43—*Bad faith of a debtor, Judge's power to take cognizance of—Act of bad faith, effect of.*

Under S. 43 of the Provincial Insolvency Act, a Judge can take cognizance of the bad faith of a debtor at any time, whether before or after the making of the order of adjudication, although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved. **Nanhe Mal v. King-Emperor**, through Raghubir Prasad, 17 O.C. 138.

LINDSAY, J.C.

Reference:—13 O.C. 94; 15 C.W.N. 213, D.

(2) S. 46 (1)—*Additional Judge—Whether subordinate to District Court—Appeal—Order convicting the insolvent—Civil appeal—Practice—Interference with order in appeal.*

Held (by Richards, C.J., and Banerji, J., Knox, J., dissenting) that a Court of an Additional District Judge is not a Court subordinate to the District Court within the meaning of S. 46 (1) of the Provincial Insolvency Act and an appeal from the order of the Additional Judge lies to the High Court and not to the District Court (a).

Held by the Full Bench that an appeal from an order of an Additional Judge convicting the insolvent of concealing his account books is a Civil appeal.

Where an insolvent knew that an enquiry was being made as to whether he had concealed

1.—Imperial Acts—(Continued).**Act III of 1907 (Provincial Insolvency)**
—(Concluded).

his account books and he did not show to the Court that he had not done so and the Court convicted him, *held* that the High Court will not interfere in appeal, even though no proper charge had been made against him (b). *Chhisanji Lal v. King-Emperor*, 12 A.L.J. 1105=36 A. 576=15 Cr. L.J. 658=25 Ind. Cas. 986 (F.B.).

RICHARDS, C.J., KNOX and BANERJI, JJ.

References:—(a) 34 A. 382, F. (b) 19 O.L.J. 480; 7 A.L.J. 602, R.

Act V of 1908.

See CIV. PRO. CODE.

Act IX of 1908.

See LIMITATION ACT.

Act III of 1909 (Presy. Towns Insolvency).

S. 103—Offence under—Presidency Magistrate—No jurisdiction to try. *Lakshmi Narasayya v. Narasimhachari*, 25 M.L.J. 577= (1913) M.W.N. 1000=14 Cr. L.J. 637=21 Ind. Cas. 685. See Final Part, 1913, Col. 19.

Act IV of 1909 (Whipping).

(1) Ss. 3, 4, 5—Abetment—Abettor whether punishable with whipping—Ss. 40, 41, Penal Code—Meaning of 'Special laws'—Scope and construction of Whipping Act. *King-Emperor v. Po Han*, 7 L.B.R. 63=22 Ind. Cas. 147=15 Cr.L.J. 3=7 Bur. L.T. 99. See Final Part, 1913, Col. 19.

(2) S. 4. See No. 1, *supra*.

(3) S. 5—Finding as to age final—Sentence of whipping inadequate but carried out—Other punishment, whether can be awarded.

The finding of a Magistrate as to the age of the accused is final under S. 5 (Explanation) of the Whipping Act.

Where the sentence of whipping has been carried out, no other punishment can be awarded, even if the sentence was inadequate. *Emperor v. Po Ba*, 15 Cr. L.J. 538=24 Ind. Cas. 946.

TWOMEY, J.

(4) S. 5. See No. 1, *supra*.

Act I of 1910 (Press).

(1) Ss. 3, 5, 23 (1)—Order asking for security—Exemption from security—Cancelment of exemption—Press Act (XXV of 1867), Ss. 4, 5.

The accused, the proprietor of a printing press and the printer of a newspaper, in making declarations under Ss. 4 and 5 of Act XXV of 1867, was exempted by the Magistrate from giving any security under S. 3, cl. (1) of Act I of 1910. Later on, the Magistrate rescinded the order and called upon the accused to furnish security in respect of the newspaper. The accused thereupon did not any more print the newspaper and did not furnish the security demanded. He, however, continued to use the press for other work. He was for such user

1.—Imperial Acts—(Continued).**Act I of 1910 (Press)—(Continued).**

convicted under S. 23, cl. (1) of the Press Act, 1910. The accused having applied in revision:

Held, that the conviction could not be upheld; for cl. (1) of S. 23 only covered the disobedience of an order under S. 3 or S. 5, of the Press Act, 1910; and that the order disobeyed was not such an order. *Emperor v. Pandurang Balkrishna Pathak*, 16 Bom. L.R. 87=2 Bom. Cr. Cas. 186=15 Cr.L.J. 297=23 Ind. Cas. 505.

HEATON and SHAH, JJ.

(2) Ss. 4 (1) (c), 17, 19—Whole tone and nature of article going beyond fair comment—Government established by Law in British India includes Local Governments—Court not concerned with motives but with results—Professions of loyalty on other occasions immaterial.

Where the whole tone of an article in a newspaper and the nature of the allegations made went much beyond any legitimate comment on the action of Government and was directly intended to bring Government into hatred and contempt:

Held, that under the circumstances the Chief Court will not interfere under S. 19 of the Press Act with the order of forfeiture of security made by the Government in respect of the Press publishing the newspaper.

The terms 'Government established by law in British India' used in S. 4 (1) (c) of the Press Act include Local Government as well as the Government of India (a).

The Court is not concerned with motives, but with results. Whatever the ostensible motives for an article in a newspaper may have been, if the effect of the article would be to excite either hatred or contempt against any class or section of the subjects of His Majesty in British India, the Government cannot be said to have misapplied the Press Act in forfeiting the security of the Press publishing the paper.

No amount of professed loyalty on other occasions can be taken as nullifying the probable effects of the violent writings contained in the particular articles dealt with under the Press Act, and the order of forfeiture must stand or fall by the terms of those particular articles. *Ghulam Qadir Khau v. Emperor*, 210 P.L.R. 1914=36 P.W.R. 1914 (Cr.)=15 Cr.L.J. 490=24 Ind. Cas. 578=27 P.R. 1914 (Cr.) (F.B.).

KENSINGTON, C. J., JOHNSTONE and RATTIGAN, JJ.

References:—(a) 18 Ind. Cas. 847=14 P.R. 1913 (Cr.)=6 P.W.R. 1913 (Cr.)=14 Cr. L.J. 59=37 P.L.R. 1913, R.

(3) Ss. 4 (Exp. II), 6, 17, 19—Question to be decided—Articles of which the result is not to allay excitement, but to stir up fresh trouble—Vernacular Press—Government to determine how far real danger arises from

1.—Imperial Acts—(Continued).**Act I of 1910 (Press)—(Continued).**

such articles—Court's power to interfere—Application for interference to be rejected or accepted as a whole.

Under S. 19 of the Press Act, the question before the Chief Court would be, whether the Government, in view of the results which are likely to follow in India from violent agitation in the Vernacular Press, is fairly entitled to take exception to writings in the Vernacular newspapers in India, of which the result is not to allay excitement but to stir up fresh trouble.

Where it appears impossible for the Chief Court to say that the Local Government, with which the responsibility rests for determining how far real danger arises from articles of the kind in question, has acted wrongly in taking those articles as ground for issuing orders of forfeiture, it will not set aside the order under S. 19 of the Act.

Expressions of loyalty used by the paper in previous issues are not relevant as an excuse.

According to the terms of S. 19 of the Press Act it is not open to the Chief Court, even if it should desire to do so, to do anything more than either reject the application or set aside the order of forfeiture as a whole. The Court can make no discrimination between the forfeiture of security and the additional forfeiture of the Press which is permitted by the terms of S. 9. *Ghulam Qadir Khan v. Emperor*, 211 P.L.R. 1914=15 Cr. L.J. 493=24 Ind. Cas. 581=37 P.W.R. 1914 (Cr.)=28 P.R. 1914 (Cr.).

KENSINGTON, C.J., JOHNSTONE and RATTIGAN, JJ.

(4) Ss. 4, 12, 17, 19, 22—*Whether mandatory or directory for Local Government to state grounds of opinion—Declaration of forfeiture to be conclusive evidence of forfeiture—Declaration illegal—High Court cannot question legality of forfeiture, High Court, power of—Press Act, scope of—Extension beyond criminal law—Words describing atrocities committed by Christians upon the Mahomedans—Tendency to make Mahomedans hate Christians. Mahomed Ali v. Emperor*, 14 Cr. L.J. 497=20 Ind. Cas. 977=18 O.W.N. 1=41 C. 466. See Final Part, 1913, Col. 21.

(5) S. 5. See No. 1, *supra*.

(6) S. 6. See No. 3, *supra*.

(7) S. 8. *Order for security if revisable by High Court. Aga Syed Jalaluddin Haesain v. The King-Emperor*, 17 O.W.N. 1245=15 Cr. L.J. 145=22 Ind. Cas. 721. See Final Part, 1913, Col. 22.

(8) S. 12. See No. 4, *supra*.

(9) S. 17—"Within two months from the date of such order," meaning of—Limitation Act, 1908, S. 5, not applicable.

The words "within two months from the date of such order" in S. 17 of the Press Act, mean within two months from the date of the order of forfeiture, and cannot be read as meaning within two months from the date on

1.—Imperial Acts—(Concluded).**Act I of 1910 (Press)—(Concluded).**

which notice of the order was served. Under this Act, the remedy given is by way of application and not of appeal, and in the absence of any specific provision in the Act giving the benefit of S. 5 of the Limitation Act to that application, it is not in the power of the High Court to extend the prescribed period, even if the Court held that sufficient cause for delay had been established. *Moulvi Abdul Haq v. Emperor*, 126 P.L.R. 1914=15 Cr. L.J. 222=32 P.W.R. 1914 (Cr.)=22 Ind. Cas. 1006=16 P.R. 1914 (Cr.) (S.B.).

KENSINGTON, C. J., JOHNSTONE and RATTIGAN, JJ.

(10) S. 17. See Nos. 2, 3 and 4, *supra*.

(11) S. 19. See Nos. 2, 3 and 4, *supra*.

(12) S. 22. See No. 4, *supra*.

(13) S. 23 (1). See No. 1, *supra*.

Act II of 1911 (Inventions and Designs).

S. 2 (5)—Design or pattern covering whole goods—No 'design' within the terms of the section. See *TRADE MARK*, No. 1, 8 S.L.R. 89.

Act V of 1912 (Provident Insurance Societies).

(1) S. 2, sub-S. (8), Ss. 6, 21—*Registration if necessary of company with its share-capital divided into shares.*

A company under the name and style of the New King Insurance Co., Ltd., was started for the purpose of carrying on business as a provident insurance society. Two of the directors of the company were prosecuted for having failed to apply for registration under S. 6 of the Provident Insurance Societies Act of 1912 and thereby having committed an offence under S. 21 of the Act. The Chief Presidency Magistrate acquitted the accused on the ground that the company was one which had its share-capital divided into shares and the provisions of the Act did not apply to such a company:

*Held (on appeal by the Local Government).—*That the Provident Insurance Societies Act was intended to prevent a company from embarking in the business of life insurance unless and until it had been registered under the Act and S. 2, sub-S. (8) clearly lays down that, whether the society already in existence is a corporate company before or whether its share-capital is divided into shares or not, registration under the Act is necessary before business can be carried on under the conditions laid down in the Act. *The Deputy Superintendent and Remembrancer of Legal Affairs, Bengal v. Sital Chandra Pal*, 18 O.W.N. 1182.

HOLMWOOD and CHAPMAN, JJ.

*Reference:—*40 C. 570, *R*.

(2) S. 6. See No. 1, *supra*.

(3) S. 21. See No. 1, *supra*.

Act VII of 1913 (Companies).

S. 85 (2). See *ACT VI OF 1882 (COMPANIES)*, No. 4, 15 C.L.J. 380.

2.—Bengal Acts.

Act IV of 1866 (Calcutta Police).

S. 18-B, cl. (c)—Police officer being in possession of money when on duty—Contravention of order of Commissioner of Police—Order contravened, necessity of proof of—Plea of guilty, qualified.

The petitioner was placed on his trial under S. 18-B, cl. (c) of Act IV of 1866 (B.C.) for being, while on duty, in possession of annas four, contrary to an order of the Commissioner of Police. After the examination of one witness, the petitioner pleaded guilty to having the money in his possession. He, however, stated before the Magistrate that at the time in question he was not on duty, but engaged in the private business of a Police officer and also that he had been on duty the previous night. The Magistrate convicted the accused on this plea of guilty. The order the contravention of which was the subject-matter of the prosecution was not proved.

Held, that a copy of the Government order or an extract therefrom or a reference thereto should have been placed on the record.

That the petitioner's plea of guilty was to be looked upon merely as an admission of the fact that he had at the time in question the sum found upon his person.

The High Court set aside the conviction and sentence and directed a re-trial by a new Magistrate. *Gaya Ray v. The Emperor*, 18 C.W.N. 1273=15 Cr. L.J. 703=26 Ind. Cas. 151.

SHARFUDDIN and TEUNON, JJ.

Act II of 1867 (Bengal Gambling).

(1) *Ss. 10, 11—Gambling—Ring-game—Game of mere skill—Meaning of "mere"—Evidence Act, S. 105—Onus that game is game of "mere" skill.*

The words "mere skill" in S. 10 of the Bengal Gambling Act of 1867 import the meaning "pure skill." No form of the ring-game can be a game of pure skill (a).

The games of skill spoken of in S. 10 obviously refer to games where there are two parties pitting their skill against each other. Therefore, a ring-game kept for the profit of a man who does not play himself and does not pit his skill at all against anybody cannot fall within the exception to S. 10 of the Act.

The onus to show that any offence falls within a general exception of the Gambling Act, is upon the accused and it is for him to show, in order to bring the case under S. 10 of the Gambling Act, that the game played is a game of mere skill.

Where in a ring-game it was found that the particular position in which the table was slanted rendered it a matter of almost mere chance whether any ring alighted on the peg or encircled the coin :

2.—Bengal Acts—(Continued).

Act II of 1867 (Bengal Gambling)—(Old.).

Held, that the game was not a game of mere skill and did not fall under S. 10 of the Gambling Act. *Ram Newaz Lal v. Emperor*, 15 Cr. L.J. 276=23 Ind. Cas. 484.

HOLMWOOD and SHARFUDDIN, JJ.

Reference :—(a) 6 C.L.J. 709=6 Cr. L.J. 421, *Diss.*

(2) S. 11. See No. 1, *supra*.

Act III of 1885 (Bengal Local Self-Government).

(1) *Bye-laws—District Board roadside land, encroachment on—Acquisition of right by District Board over land adjacent to road, how to be made.*

A District Board can only take action and acquire right over a *zemindar's* land adjacent to its road under Act III (B.C.) of 1885.

Where some accused were convicted under Ss. 15 and 19 of the District Board Bye-laws for having encroached upon and cultivated land claimed by the District Board to be their roadside land from which its officers had been taking earth, although there had never been any formal acquisition of these lands by the District Board :

Held, that the conviction must be set aside. *Jadu Ghosh v. District Board of Murahidabad*, 15 Cr. L.J. 267=23 Ind. Cas. 475=19 C. L.J. 635.

HOLMWOOD and SHARFUDDIN, JJ.

(2) *S. 139—Bye-law—Encroachment, what is—Highway—District Board road—Right of user by public—Hanging verandah, if invades right of user of public.*

Obiter.—An encroachment is an unlawful gaining upon the right or possession of another man (a).

In the case of a District Board road, the right to the soil ordinarily rests with the owner of the land adjoining the road. But the public have an extended right of user in the road for the protection and control of which the District Boards were created.

A hanging *verandah*, therefore, would be an encroachment if it amounted to an unlawful gaining upon the right of user by the public.

That right extends to all forms of traffic which have been usual or customary, and also all that are reasonably similar or incidental thereto (b).

The question whether a hanging *verandah* amounts to an encroachment would depend in each case upon the question whether in the particular circumstances it constitutes an invasion of the public right of user as described above.

The public have a right of user not merely on the roadway, but also on the side lands.

2.—Bengal Acts—(Continued).**Act III of 1885 (Bengal Local Self-Government)—(Concluded).**

attached to the road. *Hirji Baldeo v. Manbhoom District Board*, 15 Cr.L.J. 187 = 22 Ind. Cas. 763 = 18 C.W.N. 1120.

IMAM and CHAPMAN, JJ.

References:—(a) L.R. 7 Q.B. 69 (73) = 41 L.J.M.C. 25 = 25 L.T. 586 = 20 W.R. 203, *Rel.*
(b) 2 F. and F. 570 = 121 R.R. 816, *Rel.*

Act III of 1899 (Calcutta, Municipal).

(1) Ss. 3, sub-S. (30), 408, 575, 622, sub-S. (3), 645—*Owner—Lessee—Occupier—Property leased in actual occupation of lessees' tenants—Proceeding by owner for facilities to effect improvement—Obstruction by lessee—Owner's liability, if discharged.* *Benode Lal Ghosh v. The Corporation of Calcutta*, 14 Cr. L.J. 490. = 20 Ind. Cas. 746 = 41 C. 164. See Final Part, 1913, Col. 25.

(2) Ss. 3 (32), 408, 574, 575—*Buste land—Debutter property—Shebait not in possession, if an "owner."* *Ratandro Lal Mitter v. Corporation of Calcutta*, 17 C.W.N. 1084 = 21 Ind. Cas. 169 = 14 Cr.L.J. 569 = 41 C. 104. See Final Part, 1913, Col. 25.

(3) S. 408. See Nos. 1 and 2, *supra*.

(4) S. 574. See No. 2, *supra*.

(5) S. 575. See Nos. 1 and 2, *supra*.

(6) S. 645. See No. 1, *supra*.

Act VII of 1905 (Bengal and Assam Laws).

Effect of repeal of. See ACT VIII OF 1912 (BENGAL, BEHAR, ORISSA AND ASSAM LAWS), No. 1, 19 C.L.J. 92.

Act V of 1909 (Bengal Excise).

(1) Ss. 2, cls. (6), (7) and (14), 46, 48—*'Denatured spirit'—'Manufacture'—Denatured spirit, dilution of, with water—Appeal—Crim. Pro. Code, applicability of—Crim. Pro. Code, Ss. 233, 410—Charges, misjoinder of—Summons case—Applicability of Crim. Pro. Code, to trials under Act V of 1909 (B.C.).*

To support a conviction under S. 48 of the Bengal Excise Act, two elements must be established, namely, *first*, that the spirit is denatured spirit, and, *secondly*, that the accused has attempted to render such spirit fit for human consumption.

The definition of 'denatured spirit' in cl. (6) of S. 2 of the Bengal Excise Act considered.

The essence of 'manufacture' as defined in cl. (15) of S. 2 of the Bengal Excise Act is, that it is a *process*. A mere dilution of denatured spirit with water is not a *process* for the manufacture of an excisable article.

The Code of Criminal Procedure, subject to specified restrictions, is applicable to trials under the Bengal Excise Act, before a Magistrate.

2.—Bengal Acts—(Continued).**Act V of 1909 (Bengal Excise)—(Continued).**

The fact that the trial has taken place as a summons case, does not exclude the application of S. 233 of the Code of Criminal Procedure.

Manufacturing excisable article seized and brought into Court, bottling it, possessing it, selling from time to time various other articles not before the Court, and attempting to render denatured spirit fit for human consumption, do not constitute one transaction.

Quere.—Whether a spirit diluted with water is excisable article or intoxicating liquor within the meaning of cls. (7) and (14) of S. 2 of the Bengal Excise Act. *U. N. Biswas v. King-Emperor*, 19 C.L.J. 53 = 18 C.W.N. 486 = 22 Ind. Cas. 425 = 15 Cr. L.J. 73 = 41 C. 694.

MOOKERJEE and BEACHCROFT, JJ.

(2) Ss. 2 (12), 46, 52, 61—*"Possession"—Constructive possession—Crim. Pro. Code, Ss. 236, 237.* *Kali Charan Mookerjee v. Emperor*, 18 C.L.J. 514 = 19 C.W.N. 309 = 41 C. 537 = 22 Ind. Cas. 148 = 15 Cr. L.J. 4. See Final Part, 1913, Col. 27.

(3) S. 46—*Cocaine—Illicit possession—Possession of cocaine exceeding five grains—Burden of proof of authority under which cocaine was obtained.*

Under the Government Notification of November 20th, 1911, it is an offence for any person other than those specified to have any cocaine at all except with medical man's prescription, and then only five grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused. *Makund Sahu v. Emperor*, 15 Cr. L.J. 262 = 23 Ind. Cas. 470 = 18 C.W.N. 1023.

HOLMWOOD and SHARFUDDIN, JJ.

(4) S. 46. See Nos. 1 and 2, *supra*.

(5) S. 48. See No. 1, *supra*.

(6) S. 52. See No. 2, *supra*.

(7) S. 61. See No. 2, *supra*.

(8) S. 67—*Excise officers assaulted before they entered any house or made any arrest or search—Rioting—Separate sentence—Penal Code, Ss. 147, 353.*

A Deputy Inspector of Excise received information, that he would find certain persons in the act of illicitly distilling liquor, if he went to a certain village. He accordingly went with two Sub-Inspectors and a large number of peons, who actually saw the accused and their men removing the distilling apparatus. But before they had time to enter the house and arrest those persons or to make any search whatever, the accused sallied out and proceeded to beat the peons. The accused were convicted of rioting and using criminal force to deter a public servant from the discharge of his duty:

Held, that the assault upon the officers was wholly unjustifiable and the riot was one of a

2.—Bengal Acts—(Concluded).

Act V of 1909 (Bengal Excise) —(Concluded).

very serious and lawless nature, that the Excise Officers were acting under S. 67 of the Excise Act (V of 1909 B.O.) ; that before they had time to do anything lawful or unlawful in respect of any search, they were wantonly assaulted by the accused, and that as there was no search, it could not be said that there was a search not in accordance with law.

A separate sentence should not be passed upon people convicted of rioting for the offence which is specifically stated to have been the common object of the assembly, unless a specific charge is laid against the individual members of committing such an offence. Therefore, persons who are shown to have committed a separate offence under S. 353, Penal Code, should receive a separate punishment, even although the common object of the riot was to commit that offence. *Prakash Chandra Kundu v. Emperor*, 15 Cr. L.J. 251 = 23 Ind. Cas. 203 = 41 C. 836 = 18 C.W.N. 918.

HOLMWOOD and SHARFUDDIN, JJ.

Act VIII of 1912 (Bengal, Bihar, Orissa and Assam Laws).

- (1) Ss. 8, 8, effect of—*Honorary Magistrates, differences of opinion between, settlement of—New Rule under Government Notification*, 1906, if extends to Eastern Bengal—*Bengal and Assam Laws Act (VII of 1905) repeal of, effect of—Crim. Pro. Code, S. 16.*

In Eastern Bengal, the old notification under which a difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of one of them, namely, the Chairman, is still in force.

The provisions of S. 8 of Act VII of 1912, are applicable to notifications which derived their force in the former Province of Eastern Bengal and Assam, from the Act of 1905. *Utfal Shalkh v. King-Emperor*, 19 C.L.J. 92.

IMAM and CHAPMAN, JJ.

- (2) S. 8. See No. 1, *supra*.

3.—Bombay Acts.

Act XIX of 1838 (Coasting Vessels).

- (1) Ss. 4, 7, 13—*Certificate of Registry—Certificate in father's name—On father's death, his son though joint and carrying on business in the same name must obtain new certificate. Emperor v. Haridas Mahashmidas*, 15 Bom. L.R. 994 = 2 Bom. Cr. O. 161 = 14 Cr. L.J. 563 = 21 Ind. Cas. 893 = 38 B. 111. See Final Part, 1913, Col. 28.

- (2) S. 7. See No. 1, *supra*.

- (3) S. 13. See No. 1, *supra*.

Act III of 1886 (Bombay Gambling).

S. 6—Statement that a person keeps a gaming house—Magistrate exercising powers under. See CRIM. PRO. CODE, No. 5, 8 S.L.R. 66.

3.—Bombay Acts—(Concluded).

Act V of 1879 (Land Revenue Code).

- (1) Ss. 189, 197—*Mamlatdar holding enquiry relating to record of rights under—Whether a Revenue Court—Sanction to prosecute. See CRIM. PRO. CODE, No. 170, 16 Bom. L.R. 678.*
- (2) S. 197. See No. 1, *supra*.

4.—Burma Acts.

Act I of 1899 (Burma Gambling).

- (1) Ss. 3, 6, 7—*S. 108 of the Crim. Pro. Code—Common gaming house.*

Though the Inspector of Police should not have added any new items to the list of things seized at a search held under S. 108 of the Crim. Pro. Code, held, that his doing so was not a breach which could invalidate the search.

Though the profits of gambling were devoted to Club Premises and not for the profit or gain of the Club, the place might still come under the definition of "common gaming house" under S. 8 of the Act. *Htaung v. King-Emperor*, 7 Bur. L.T. 163 = 15 Cr. L.J. 523 = 24 Ind. Cas. 835.

TWOMEY, J.

- (2) S. 6. See No. 1, *supra*.

- (3) S. 7—*Presumption—Witnesses to search—Respectable inhabitants, meaning of. See CRIM. PRO. CODE, No. 24, 15 Cr. L.J. 441.*

- (4) S. 7. See Nos. 1 and 3, *supra*.

Act VI of 1907 (Burma Village).

- S. 19 (1)—*Conviction under—Necessary elements of the offence.*

To support a conviction under S. 19 (1), Village Act, it is necessary to show that the accused had built their houses without the permission of the Deputy Commissioner and later than the year 1908 in which year the present Village Act came into force. *King-Emperor v. Nga Nya*, U. B. R. (1919), 3rd Qr. 180 = 15 Cr. L.J. 250 = 23 Ind. Cas. 202.

SAUNDERS, J.C.

5.—Madras Acts.

Act V of 1882 (Forest).

- (1) S. 21—*Offence under—Applicability of S. 79, I.P.C.—Belief of accused that he was justified in his act—Effect. See PENAL CODE, No. 18, 15 M.L.T. 124.*

- (2) Ss. 26, 53, 55—*Offence compounded—Whether further proceedings can be taken against accused.*

The accused in this case was charged with an offence under S. 26 of the Forest Act. This offence being compoundable, he paid a certain sum as compensation for the Forest authorities. On such payment, S. 53 of the Act provided that no further proceedings shall be taken against such person. Held, therefore, that on such payment the proceedings in progress must lapse and the Magistrate had no jurisdiction to

5.—Madras Acts—(Continued).**Act V of 1882 (Forest)—(Concluded).**

convict the accused. *Re Narayana Padayachi*, 37 M. 280—15 Cr. L.J. 680—25 Ind. Cas. 1008.

NAPER, J.

(3) S. 53. See No. 2, *supra*.

(4) S. 55. See No. 2, *supra*.

Act IV of 1884 (Madras District Municipalities).

(1) Ss. 10-A, 39-A, 268 and 280—*Complaint by Secretary withdrawal of—Municipal Council—Crim. Pro. Code*, S. 248.

It is not open to a Municipal Council to withdraw a complaint duly instituted by the Secretary of the Municipality under S. 248 of the District Municipalities Act (Madras). *S. Paramasunda Nadar v. Karunakara Doss*, 15 Cr. L.J. 299—23 Ind. Cas. 507—27 M.L.J. 617.

SANKARAN NAIR and AYLING, JJ.

(2) S. 39-A. See No. 1, *supra*.

(3) S. 268. See No. 1, *supra*.

(4) S. 280. See No. 1, *supra*.

Act V of 1884 (Madras Local Boards).

S. 81 (2)—*Doors whether can be distrained under—Doors not 'moveable property'—General Clauses Act—Assault on the bill-collector—Conviction under S. 353, I.P.C.—Legality.*

Doors ought not to be distrained under S. 81, cl. (2) (i) of the Local Boards Act, as they are not moveables. The bill-collector, when he proceeded to distrain the doors, cannot be said to have been acting in the lawful discharge of any duty imposed on him as a public servant, and the conviction under S. 353, I.P.C., for assaulting the bill-collector, is not therefore sustainable. *E. C. Chinaswamy Pillay v. Chairman of the Arkonam Union*, 16 M.L. J. 429—15 Cr. L.J. 637—25 Ind. Cas. 837.

SADASIVA IYER, J.

Reference:—14 M. 467, R.

Act III of 1888 (Madras City Police).

(1) Ss. 43, 46, 47 — *Gambling—Gaming materials found on premises—Presumption.*

The presence of cards, counters and so-called *hundi* boxes on the premises, is a strong presumption that it is used as a common gaming house, and the owner of it when he makes a profit out of it is presumed to keep a common gaming house, and the persons present on the spot are guilty of gaming, in the absence of rebutting evidence. *Deakachari v. Emperor*, 15 Cr. L. J. 408—23 Ind. Cas. 1008.

WALLIS and SADASIVA AIYAR, JJ.

(2) S. 46. See No. 1, *supra*.

(3) S. 47. See No. 1, *supra*.

5.—Madras Acts—(Continued).**Act III of 1904 (Madras City Municipal).**

(1) S. 409, cl. (19)—*By-law framed thereunder—"Food," meaning of—Aerated waters, whether food.*

The term "food" does not include "drinks" and, therefore, in the absence of a special inclusion, a person exposing for sale aerated waters unwholesome and unfit for human consumption does not commit any offence under by-law 177 framed under S. 409 (19) of the Madras City Municipal Act. *Emperor v. P. R. Ganapathy Iyer*, 16 M.L.T. 585—26 Ind. Cas. 811.

AYLING and HANNAY, JJ.

(2) S. 413—*Rule 5 of the rules framed by Government under—Application to Presidency Magistrate by counter-petitioner to declare that the inclusion of the petitioner as a candidate for the Municipal election by the President of the Madras Corporation was illegal—Order of Presidency Magistrate allowing the application—Whether revision lies to High Court under S. 439, Crim. Pro. Code or S. 15 of the Charter Act.*

An application was made to the Presidency Magistrate by the counter-petitioner to declare that the inclusion of the petitioner as a candidate for the Municipal election by the President of the Madras Corporation was illegal under Rule 5 of the rules framed by Government in pursuance of the powers given to them by S. 413 of Act III of 1904. The Magistrate allowed the application. *Held*, no revision lies against the Magistrate's order, either under S. 439, Crim. Pro. Code, or under S. 15 of the Charter Act.

The Presidency Magistrate in the particular instance is not a Court subject to the appellate jurisdiction of the High Court. He is in the position of a referee between the President and the candidate. The rule declares his decision to be final.

When quasi-judicial functions are delegated to an officer whose decisions are ordinarily subject to the revisional powers of the High Court, he is not with reference to the delegated power necessarily subject to the High Court's appellate or revisional authority. *In re Vijayaraghavulu Pillay*, 16 M.L.T. 128—27 M.L.J. 227—15 Cr. L.J. 593—25 Ind. Cas. 845.

AYLING and SESHAGIRI IYER, JJ.

References:—11 M. 26; 30 M. 326; 23 M.L.J. 591; 25 M.L.J. 536; 21 B. 279; 38 C. 547; (1892) 1 Q.B. 431 (447, 448), R.

Act I of 1908 (Madras Estates Land).

(1) S. 12—*Tenant cutting trees on Jirayati land after execution of Kadappa—No theft.* See PENAL CODE, No. 4, 15 Cr. L.J. 586.

(2) Ss. 73, 212—*Penal provisions not exclusive—Penal Code, S. 424.*

The penal provisions of the Estates Land Act I of 1908 are in addition to, and not in

5.—Madras Acts—(Concluded).**Act I of 1908 (Madras Estates Land)—(Ctd.).**

substitution for, those contained in the Indian Penal Code. Where, therefore, an act is an offence under the Penal Code, but not punishable under the Estates Land Act, the accused can be tried for it. *In re Sivanupandia Thevan*, 15 Cr. L.J. 295 = 23 Ind. Cas. 508.

TYABJI, J.

(3) S. 163. See No. 4, *infra*.

(4) Ss. 212, 163—*Landlord and tenant—Decree for ejectment.*

Where a landlord has obtained a decree for ejectment against the ryot prior to the coming into force of the Madras Estates Land Act, the tenant cannot be prosecuted and convicted under S. 212 of the Madras Estates Land Act for being in possession of the land without the landlord's consent. That section would apply only if the decree could be treated as one passed under S. 163 of the Act. *Prati Appala Raju v. Mutharaju Surpa Raju*, (1914) M.W.N. 396 = 27 M.L.J. 676 = 15 Cr. L.J. 620 = 25 Ind. Cas. 628.

SANKARAN NAIR, J.

(5) S. 212. See No. 2, *supra*.

6.—N.W.P. Acts.**Act I of 1891 (U. P. Water Works).**

S. 46 (a)—*Supply of water for domestic purposes—Repairing a house not a domestic purpose—Construction of statutes.*

The Municipal water used for repairs of a house is not used for "domestic purposes."

A provision in an enactment imposing penalty must be construed strictly.

S. 46 (a) of the Water Works Act does not impose any penalty on the person on whose behalf, but without whose knowledge and sanction, the Municipal water is used for the repairs of a house. *Sat Narain Prasad v. King-Emperor*, 12 A.L.J. 288 = 15 Cr. L.J. 291 = 23 Ind. Cas. 499.

RAFIQ, J.

Act I of 1900 (U. P. Municipalities).

(1) *Disobeying a written notice—Validity of notice contested on the ground that it is not a lawfully issued notice—Magistrate—Duty of.*

S. 152 of the Municipalities Act is no bar to the accused setting up the defence that the notice was not lawfully issued by the Board, and the Magistrate enquiring into it was bound to call upon the prosecution to produce evidence to show that it was a notice lawfully issued by the Board or by the authority of any person to whom the powers exercisable by the Board as a whole had been lawfully delegated. *Hazari Lal v. King-Emperor*, 12 A.L.J. 312 = 36 A. 227 = 15 Cr. L.J. 574 = 25 Ind. Cas. 326.

PIGGOTT, J.

8 Cr.

6.—N.W.P. Acts—(Continued).**Act I of 1900 (U.P. Municipalities)—(Contd.).**

(2) Ss. 87, 88 and 147—*Disobedience of notice, under one section—Prosecution under another—Legality of notice to make construction—Construction after 15 days—Effect of.*

Where a notice is issued by the Board under S. 88 but not under S. 87, there can be no prosecution under S. 87.

Where a person applies to the Board for permission to build, and on notice not being taken of that application, he sends a written reminder to the Board and after 15 days of the receipt by the Board of that reminder makes the construction complained of, held that the Board should be taken to have sanctioned the construction and there can be no prosecution of the applicant under S. 97 (5). *Ram Nath v. Municipal Board of Muttra*, 12 A.L.J. 740.

BANERJI, J.

(3) Ss. 87 and 147—*Addition of Masonry edging to a kutcha chabootra—Material alteration.*

The addition of a masonry edging to an already existing *kutcha chabootra* which causes no change in its shape or situation is not a material alteration of the *chabootra*, and no previous sanction of the Municipal Board is necessary for such alteration.

Held also that no one can be convicted of a possible offence which he might perhaps commit in future in regard to the Municipal Bye-Laws. *Radha Ballabh v. King-Emperor*, 12 A.L.J. 227 = 15 Cr. L.J. 240 = 23 Ind. Cas. 192.

RAFIQ, J.

(4) S. 88. See No. 2, *supra*.

(5) Ss. 133, 168—*Resolution of Municipality neither published nor sanctioned as required by S. 133—Breach of such resolution, whether punishable.* *Har Saran Das v. Emperor*, 14 Cr. L.J. 576 = 21 Ind. Cas. 176. See Final Part, 1913, Col. 35.

(6) S. 147—*Disobedience of notice—Prosecution for continued disobedience.*

After a conviction under S. 147 of the Municipalities Act, the person convicted cannot challenge the correctness of the conviction and show the illegality of the Board's notice as often as he is prosecuted for continued disobedience of the order of the Court. *Sital Parshad v. The Municipal Board of Cawnpore*, 12 A.L.J. 595 = 36 A. 430 = 15 Cr. L.J. 571 = 25 Ind. Cas. 323.

CHAMBER, J.

(7) S. 147. See Nos. 2 and 3, *supra*.

(8) Ch. VII, S. 147—*Prosecution for disobedience of notice—Validity of the notice to be considered.*

No one can be convicted of disobedience of a written notice of a Municipal Board for demolition of certain constructions, unless the Court is satisfied that what he had disobeyed is a notice lawfully issued by the Board under the

6.—N.W.P. Acts—(Concluded).

Act I of 1900 (U.P. Municipalities)—(Concl'd.).
 powers conferred upon it by the Municipalities
Act. King-Emperor v. Piar Ali, 12 A.L.J. 254
 = 36 A. 185 = 15 Cr. L.J. 377 = 23 Ind. Cas. 745.

RYVES and PIGGOTT, JJ.

References :—9 O.C. 29; 20 A. 501, R.

(9) S. 168. See No. 5, *supra*.

Act II of 1911 (Motor Vehicles).

S. 13 (b)—'Employs,' meaning of—*License to drive a motor.*

Held, that the 'employs' as used in S. 13 (b) of the Motor Vehicle Act (II of 1911) means 'has' or 'retains' in his employ and not 'takes into his employ.'

Held further, that the section provides *impri-
 mis* for the case of a man who at the time in
 question is driving a Motor Vehicle without a
 license, and therefore clearly refers to the case
 of a license in force at the time of such driving.
**Mahammad Ali Mahammad Khan v. King-
 Emperor**, 17 O.C. 311 = 15 Cr. L.J. 677 = 25
 Ind. Cas. 1005.

KENDALL, J.C.

7.—Punjab Acts.**Act XVIII of 1884 (Punjab Courts).**

(1) S. 13—Chief Court's power of superintendence over orders of Criminal Courts. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 1, 18 P.R. 1914 (Cr.).

(2) S. 33—Power of Superintendence—Whether enlarges power of transfer under S. 526, Crim. Pro. Code. See CRIM PRO. CODE, No. 408, 5 P.R. 1914 (Cr.).

Act III of 1911 (Punjab Municipal).

(1) Ss. 219 and 221—*Disobeying orders which are not in themselves precise—No offence.*

Held, that unless a Municipal Committee itself passes a precise order the extent of which cannot be doubted, no offence committed by disobeying such an order or doing anything against it. **Pirithi Singh v. The Crown**, 2 P.W. R. 1914 (Cr.) = 5 P.L.R. 1914 = 15 Cr. L.J. 191 = 22 Ind. Cas. 767.

JOHNSTONE, J.

(2) S. 221. See No. 1, *supra*.

Act V of 1912 (Colonization of Government Lands).

S. 33—*Omission to do a thing whether an offence—Construction of Penal Acts—Retrospective effect.* **Miran Bakhsh v. Crown**, 26 P. R. 1918 (Cr.) = 9 P.L.R. 1914 = 15 Cr. L.J. 146 = 33 F.W.R. 1914 (Cr.) = 22 Ind. Cas. 722. See Final Part, 1913, Col. 37.

Actionable Claim.

Purchase of, by pleader—Professional misconduct. See PLEADER AND CLIENT, No. 2, 37 M. 238.

Additional Judge.

Whether subordinate to District Court—Appeal from decision of Additional Judge where lies. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 2, 12 A.L.J. 1105 (F.B.).

Admission.

Admissions to police officers—Evidentiary value—Distinction between admissions and confessions. See EVIDENCE ACT, No. 10, 41 C. 601.

Aerated Waters.

(1) Aerated waters whether 'food'—Exposing unwholesome aerated waters for sale—Whether punishable. See ACT III OF 1904 (MADRAS CITY MUNICIPAL), No. 1, 16 M.L.T. 585.

Affidavit.

Attorney if can make affidavit in answer to rule against him under Court's disciplinary powers—Liability for false statement in affidavit. See CRIM. PRO. CODE, No. 155, 15 Cr. L.J. 49 (S.B.).

Afghans.

Afghan soldier enlisted in the Indian Army—Murder committed by him at Canton—Jurisdiction of Court at Hongkong to try him—Consent of Amir of Afghanistan to exercise of jurisdiction if can be implied. See FOREIGN JURISDICTION ACT (1890), No. 1, 18 C.W.N. 705.

Age.

Murder—Evidence purely circumstantial—Sentence of death or transportation for life—Legality—Age of accused also to be taken into account in imposing sentence. See CIRCUMSTANTIAL EVIDENCE, No. 1, 16 M.L.T. 535.

Appeal.

(1) *Appeal in criminal cases—Duty of appellate Court.*

Where it appeared from the judgment of the Sessions Judge in appeal that he practically called upon the appellants before him to establish to his satisfaction that the first Court had come to a wrong finding:

Held, that this was not the standpoint from which an appeal in a criminal case was to be approached. In an appeal from a conviction and sentence, it is for the appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellants has been established beyond all reasonable doubt. **Kamchan Mullik v. King Emperor**, 18 C.W.N. 1215 = 15 Cr. L.J. 636 = 26 Ind. Cas. 184.

SHARFUDDIN and TEUNON, JJ.

(2) Order under S. 2, Act XIII of 1859—No appeal. See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), No. 10, 18 C.W.N. 1271.

(3) Appeal from decision of Additional Judge whether lies to District Court or High Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 2, 12 A.L.J. 1105.

Appeal—(Concluded).

(4) Application asking a Munsif to take criminal action himself against a person—Sanction to prosecute—Appeal to District Judge. See CRIM. PRO. CODE, No. 849, 12 A.L.J. 684=15 Cr. L.J. 575.

(5) Admission of additional evidence in appeals—Powers of Court. See CRIM. PRO. CODE, No. 229, 26 M.L.J. 1607.

(6) Appellate Court incompetent to refer to the Chief Court a case in which appeal lies to it. See CRIM. PRO. CODE, No. 65, 7 P.W.R. 1914 (Cr.).

(7) Demeanour of witnesses noted by Court—Duty of appellate Court. See CRIM. PRO. CODE, No. 292, 125 P.L.R. 1914.

(8) Letters Patent appeal—Order of single Judge of High Court refusing to interfere under Ss. 435, 439, Crim. Pro. Code, in revision—Appeal—Grounds for interference in—Discretion. See CRIM. PRO. CODE, No. 120, 15 M.L.T. 230.

(9) Several persons convicted at one trial—Different sentences—Right of appeal. See CRIM. PRO. CODE, No. 304, 15 Cr. L.J. 371.

(10) Remand by Appellate Court for additional evidence and fresh finding—Legality. See CRIM. PRO. CODE, No. 315, (1914) M.W.N. 778.

(11) Appellate Court not dismissing an appeal summarily—Appeal how to be disposed of—Power to refer to High Court question of law arising in appeal. See CRIM. PRO. CODE, No. 311, 7 L.B.R. 251.

(12) Distinction between right of appeal against acquittal and right of appeal against conviction. See LETTERS PATENT (N.W.P.), No. 1, 12 A.L.J. 231.

Appeal against Acquittal.

(1) *Public Prosecutor—Legal Remembrancer of Bengal, appeal by—Government of Behar and Orissa—Acquittal, order of—Crim. Pro. Code, S. 417. Emperor v. Gaya Prosad*, 18 C.L.J. 519=18 C.W.N. 279=23 Ind. Cas. 190=15 Cr. L.J. 46=41 C. 425. See Final Part, 1913, Col. 39.

(2) Order of acquittal passed after cross-examination of prosecution witnesses subsequent to framing of charge—Appeal by Government against acquittal—Powers and duties of the High Court. See CRIM. PRO. CODE, No. 246, 18 C.W.N. 665.

(3) Order of acquittal—Reference by District Magistrate—Right of appeal against acquittal—Revision—Practice. See CRIM. PRO. CODE, No. 338, 12 A.L.J. 255.

Appeal to Privy Council.

(1) *Practice—Special leave to appeal—Criminal proceedings.*

It would be against the constitutional duty of the Privy Council to assume the position of a Court of Criminal Appeal. The Privy Council can only interfere where they find that what has been done has been grossly contrary to the

Appeal to Privy Council—(Concluded).

forms of justice or violates fundamental principles. *George Staunton Clifford v. The King-Emperor*, (1914) M.W.N. 11=16 Bom. L.R. 1=19 C.L.J. 107=18 C.W.N. 374=12 A.L.J. 75=15 M.L.T. 84=7 Bur. L.T. 27=22 Ind. Cas. 496=15 Cr. L.J. 144=2 Bom. Cr. Cas. 173=41 C. 568 (P.C.).

LORD CHANCELLOR, LORD MOULTON,
LORD PARKER and LORD SUMNER.

(2) *Leave to appeal to Privy Council—Decision of third judge on reference—Calcutta Letters Patent*, 1865, cl. 41. *Ataur v. King-Emperor*, 18 C.L.J. 121=14 Cr. L.J. 672=21 Ind. Cas. 912. See Final Part, 1913, Col. 89.

(3) *Leave to appeal to the Privy Council in criminal cases, when may be given—Invasion of liberty and just rights of a citizen—Embassament—Criminal and Civil liability, distinction between—Costs against Crown in Criminal appeal. Louis Edouard Lanier v The King*, 18 C.W.N. 98=26 M.L.J. 1=15 Cr. L.J. 305=23 Ind. Cas. 657 (P.C.). See Final Part, 1913, Col. 40.

(4) Privy Council when will interfere with order in criminal case. See FOREIGN JURISDICTION ACT (1890), No. 1, 18 C.W.N. 705.

(5) High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of Letters Patent—Order granting leave whether may be reviewed at instance of Public Prosecutor. See LETTERS PATENT (CALCUTTA), No. 2, 15 Cr. L.J. 52.

(6) Practice of Privy Council in interfering with criminal trials—Misdirection to Jury when sufficient for interference by Privy Council. See PENAL CODE, No. 164, 18 C.W.N. 785.

Arbitrator.

Offences under Ss. 193, 471, I.P.C., committed in proceedings before arbitrator—Sanction to prosecute whether necessary. See CRIM. PRO. CODE, No. 156, 3 P.R. 1914 (Cr.).

Arms.

What are 'Arms.' See ACT XI OF 1878 (ARMS), No. 1, 15 Cr. L.J. 685.

Arms Act.

See ACT XI OF 1878.

Arrest.

Civil warrant not addressed to bailiff by name—Arrest—Legality? See PENAL CODE, No. 68, 15 Cr. L.J. 439.

Assam Labour and Emigration Act.

See ACT VI OF 1901.

Assessors.

Verdict of assessors in answer to questions by Judge—Propriety. See PENAL CODE, No. 118, 18 C.W.N. 498.

Attempt.

Definition of 'attempt.' See PENAL CODE, Nos. 142 and 150, 13 P.W.R. 1914 (Cr.) and 24 P.R. 1914 (Cr.).

Attorney.

(1) *Letters Patent*, cl. 10—*Attorney*—*Striking attorney's name off the rolls*—*Rule, service of*—*Practice*—*Grounds, copy of, to be served on attorney personally*—*Sufficient time to be given*—*Disciplinary action against attorney*—*Misconduct of attorney, by whom to be brought to Court's notice*—*Verification, importance of*—*Suspicion not enough to justify disciplinary action. In re an Attorney*, 14 Cr. L.J. 805 = 19 Ind. Cas. 993 = 41 C. 113 (S.B.). See Final Part, 1913, Col. 41.

(2) *Proceedings under cl. 10, Letters Patent*—*Attorney proceeded against*—*Attorney if can make affidavit in answer to rule against him under Court's disciplinary powers*—*Liability for false statement in affidavit*. See CRIM. PRO. CODE, No. 155, 15 Cr. L.J. 49.

Autrefois Acquit.

(1) *Plea of—Validity*. See CRIM. PRO. CODE, No. 302, 18 C.W.N. 723.

(2) *Application of doctrine of—Burden of proof*. See PENAL CODE, No. 51-a, 15 Cr. L. J. 672.

Bail.

(1) *Suicide by accused—Liability of sureties—Whether bail bond liable to forfeiture. Yijiaragavalu Naidu v. Emperor*, 13 Cr. L. J. 694 = 16 Ind. Cas. 332 = (1913) M.W.N. 77 = 26 M.L.J. 63 = 37 M. 156. See Final Part, 1912, Col. 25.

(2) *Discretion as to granting bail*. See PENAL CODE, No. 164, 18 C.W.N. 785.

Bench of Magistrates.

(1) *Bench of Honorary Magistrates—Presence at every hearing of each Honorary Magistrate deciding a case, necessity of*.

Held, that it is not necessary to validate a judgment of a Bench of Honorary Magistrates that each Honorary Magistrate who decides the case must be present at every hearing when the evidence is heard. *Indar Dut v. King-Emperor*, 17 O.C. 142 = 15 Cr. L.J. 516 = 24 Ind. Cas. 604.

STUART, J.C.

References:—20 C. 870; 23 C. 194; 18 M. 394; 21 M. 246, R.

(2) *Bench of Magistrates—Difference of opinion between Chairman and colleague—Casting vote of Chairman—District of Faridpur—Notification in force in 1905—Whether still in force in Faridpur—Bengal, Bihar, Orissa and Assam Laws Act (VII of 1912), Ss. 8, 8. Ulfat Sheikh v. Emperor*, 14 Cr. L.J. 684 = 21 Ind. Cas. 1004 = 18 C.W.N. 384. See Final Part, 1913, Col. 42.

(3) *Absence of some of the Bench from later stages of a trial—Effect*. See CRIM. PRO. CODE, No. 6, 15 Cr. L. J. 549.

Bengal and Assam Laws Act.

See BENGAL ACT VII OF 1906.

Bengal, Bihar and Orissa and Assam Laws Act.

See BEN. ACT VIII OF 1912.

Bengal Excise Act.

See BEN. ACT V OF 1909.

Birds.

Whether birds can be subject of theft. See PENAL CODE, No. 110, (1914) M. W. N. 168.

Broker.

Money entrusted to broker—Broker to bear all loss—Whether broker liable for criminal breach of trust. See PENAL CODE, No. 122, 15 Cr. L.J. 452.

Buddhist Law.

1.—MAINTENANCE.

2.—MARRIAGE.

—1.—Maintenance.

Validity of marriage of a Chinese Buddhist with a Burman Buddhist—Right of wife to maintenance. See CRIM. PRO. CODE, No. 360, 7 Bur. L.T. 71.

—2.—Marriage.

(1) *Custom—Karens—Marriage—Match-making—Cock and hen eating—Buddhist Law—S. 488, Crim. Pro. Code*.

The Nat-worshipping Karens have peculiar marriage ceremonies of their own. A match-maker brings the parties together; the man goes to the woman's house if the parties were not married before; but the woman may go to the man's house if he is a widower. A cock and hen eating would apparently complete the ceremony, but if the parties profess Buddhism, though Karens, they may marry according to Buddhist Law. *Mg. Saw Tu v. Ma Sa Ma*, 15 Cr. L.J. 590 = 25 Ind. Cas. 342.

HARTNOLL, J.

(2) *Validity of marriage of a Chinese Buddhist with a Burman Buddhist—Right of wife to maintenance*. See CRIM. PRO. CODE, No. 360, 7 Bur. L.T. 71.

Building.

What is a—Open space surrounded by a fence whether a—See PENAL CODE, No. 150, 24 P.R. 1914 (Cr.).

Burma Village Act.

See BURMA ACT VI OF 1907.

Calcutta Municipal Act.

See BEN. ACT III OF 1899.

Calcutta Police Act.

See BEN. ACT IV OF 1866.

Charge.

(1) *Defective charge when immaterial*. See PENAL CODE, No. 167, 20 P.W.R. 1914 (Cr.).

(2) *Charge of house-breaking with intent to commit theft—Different object proved—Necessary that charge should be altered—Notice to accused*. See CRIM. PRO. CODE, No. 253, 15 Cr. L.J. 190.

Charter Act.

(1) S. 15—Application to Presidency Magistrate by counter-petitioner to declare that the inclusion of the petitioner as a candidate for the Municipal election by the President of the Madras Corporation was illegal—Order of Presidency Magistrate allowing the application—Revision whether lies. See ACT III OF 1904 (MADRAS CITY MUNICIPAL), No. 2, 16 M.L.T. 128.

(2) S. 15—Crim. Pro. Code, Ss. 145, 144—Possession given to a person with consent of parties—Nature of—Order under S. 145, Crim. Pro. Code—High Court's power to interfere. See CRIM. PRO. CODE, No. 95, 26 M.L.J. 208.

Cheating.

Evidence of previous and subsequent conduct of accused—Admissibility—Promise to do something in future, whether amounts to—See PENAL CODE, No. 140, 269 P.L.R. 1914.

Chhachh People.

Blood stains and injuries on the persons of—Value of evidence. See EVIDENCE ACT, No. 6, 8 P.W.R. 1914 (Cr.).

Chhavi.

What is "Chhavi." See ACT XI OF 1878 (ARMS), No. 5, 1 P.W.R. 1914 (Cr.).

Child.

Child witness—Failure to administer oath—Evidence whether inadmissible. See ACT X OF 1873 (OATHS), No. 1, 15 Cr. L.J. 161.

China and Corea Order in Council, 1904.

Arts. III, V, XXXV—Jurisdiction over foreigners and British protected persons (Afghan sepoys)—English rules of evidence how far binding on Supreme Court at Hongkong. See FOREIGN JURISDICTION ACT (1890), No. 1, 18 C.W.N. 705.

Circumstantial Evidence.

(1) *Murder—Evidence purely circumstantial—Sentence of death or transportation for life—Legality—Age of accused also to be taken into account in imposing sentence.*

Per Ayling, J.—Where the Court is satisfied beyond reasonable doubt, of the guilt of the accused, the fact that the evidence is circumstantial and not direct is not a factor which should *per se* affect the sentence (a).

There is no unwritten rule or principle standing in the way of the imposition of a death sentence in cases where the evidence is purely circumstantial.

Age of the accused is undoubtedly a point which no Court should leave out of consideration in determining the sentence to be imposed.

The substitution of a death sentence for one of transportation is a measure which must always be undertaken with reluctance.

Per Kumaraswami Sastri, J.—A consideration of the species of evidence on which the guilt of an accused is found should not of itself determine the nature of the sentence (b). And the Court is not bound in every case to pass

Circumstantial Evidence—(Concluded).

the lesser sentence when the evidence is circumstantial. Circumstantial evidence, like any other, must in every case be tested and weighed, and prevail or not by its own inherent proving force.

The age of the accused is a fact that might well be taken into consideration in determining what sentence is to be passed in cases of murder (c). *Munandi v. Emperor*, 16 M.L.T. 535.

AYLING and KUMARASWAMI SASTRI, JJ.

References:—(a) 2 Weir 736, R. (b) 13 M. 426, R. (c) 11 C.W.N. 904, R.

(2) Presumption of innocence in favour of accused—When rebutted. See EVIDENCE, No. 4, 7 S.L.R. 109.

(3) Nature of. See EVIDENCE, No. 3, 15 Cr. L.J. 293.

(4) Murder—Value of—Unsatisfactory evidence of the identification of the body—Effect. See MURDER, No. 3, 40 P.W.R. 1914 (Cr.).

City Municipal Act (Madras).

See MAD. ACT III OF 1904.

Civil Law.

Principles of, when applicable to Criminal cases. See PENAL CODE, No. 140, 269 P.L.R. 1914.

Civ. Pro. Code (1908).

(1) S. 114, O. 47, r. 1—High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of Letters Patent—Order granting leave whether may be reviewed at instance of Public Prosecutor. See LETTERS PATENT (CALCUTTA), No. 2, 15 Cr. L.J. 52.

(2) S. 115—Small Cause Court directing prosecution of a person under S. 476, Crim. Pro. Code—Revision—Powers of High Court. See CRIM. PRO. CODE, No. 355, 17 O.C. 25.

(3) S. 115—Interference in revision when its effect will be to perpetuate wrong order—Dismissal for default—Restoration—Revision. See CRIM. PRO. CODE, No. 157, 15 Cr. L.J. 71.

(4) O. 47, r. 1. See No. 1, *supra*.

Coasting Vessels Act.

See BOM. ACT XIX OF 1888.

Cocaine.

Illicit possession of—Burden of proof. See ACT V OF 1909 (BENGAL EXCISE), No. 3, 15 Cr. L.J. 262.

Colonization of Government Lands Act (Punjab).

See PUNJAB ACT V OF 1912.

Commission.

To examine complainant who is a *pardashin* lady whether may be issued. See CRIM. PRO. CODE, No. 154, 15 Cr. L.J. 348.

Commitment.

(1) *Commitment to Sessions—Magistrate, power of—Magistrate's belief that case is not fit for commitment—Discharge of accused.* *Shah-zad v. Emperor*, 14 Cr. L.J. 491—20 Ind. Cas. 747—12 A.L.J. 150. See Final Part, 1913, Col. 44.

(2) Commitment order when may be quashed. See CRIM. PRO. CODE, No. 205, 7 Bur. L. T. 26.

(3) Conviction—Subsequent commitment to Sessions—Legality. See CRIM. PRO. CODE, No. 284, 15 Cr. L.J. 188.

(4) Trial under S. 354, I.P.C.—Prosecution and defence witnesses examined and cross-examined—Accused committed to Sessions on charges under Ss. 376 and 511, I.P.C.—Legality. See CRIM. PRO. CODE, No. 283, 15 Cr. L.J. 366.

(5) Reasons for commitment to be recorded by Magistrate. See CRIM. PRO. CODE, No. 195, 8 S.L.R. 23.

(6) No evidence to justify commitment—Accused entitled to acquittal—High Court will not quash such commitment. See CRIM. PRO. CODE, No. 203, 27 M.L.J. 593.

(7) Power of Magistrate to commit to sessions after summoning and examining defence witnesses. See CRIM. PRO. CODE, No. 201, 15 Cr. L.J. 704.

Companies Act.

See ACT VI OF 1882.

See ACT VII OF 1913.

Company.

Liability of limited company to be convicted and punished. See PENAL CODE, No. 154, 15 Cr. L.J. 337.

Compensation.

Complainant unable to recover substantial compensation in Civil Court—Right to compensation under S. 545 (b), Crim. Pro. Code, and for prosecution expenses. See PENAL CODE, No. 5, 15 Cr. L.J. 555.

Complaint.

(1) Complaint dismissed once—Subsequent complaint by another complainant on the same facts—Same tribunal—Different incumbent—Enquiry ordered by the High Court. See CRIM. PRO. CODE, No. 325, 12 A.L.J. 106.

(2) Complainant absent—Order saying that case was 'struck off'—Legality and effect of order—Sanction to prosecute for false complaint—Necessity for sanction of Courts in case of fresh complaint. See CRIM. PRO. CODE, No. 250, 17 O.C. 18.

(3) Jurisdiction of Magistrate to summon persons not named in the—Meaning of 'complaint' and 'complainant.' See CRIM. PRO. CODE, No. 2, 18 C.W.N. 921.

(4) Complaint—Facts constituting offence—Personal knowledge of complainant—Not necessary. See CRIM. PRO. CODE, No. 149, 7 S.L.R. 77.

Complaint—(Concluded).

(5) Complaint before District Magistrate—Transfer for inquiry without examining complainant—Irregularity. See CRIM. PRO. CODE, No. 180, 8 S.L.R. 21.

(6) Statement that a person keeps a gaming house—Issue of search warrant and arrest of certain persons in consequence of the statement—Whether statement amounts to complaint. See CRIM. PRO. CODE, No. 5, 8 S.L.R. 66.

(7) Discharge without judicial investigation into the merits of the complaint—Inquiry into the same charge on a second complaint. See DISCHARGE, No. 1, 17 O.C. 273.

Compoundable Offence.

(1) Offence compounded—Proof of compounding not necessary. See CRIM. PRO. CODE, No. 278, 16 Bom. L.R. 939.

Compromise.

Compromise effected out of Court by parties pending hearing of rule issued by High Court, if can be given effect to under S. 345, Crim. Pro. Code. See CRIM. PRO. CODE, No. 277, 18 C.W.N. 1212.

Confessions.

(1) *Confession made before prosecution witnesses out of Court and not recorded by Magistrate, weight of—Penal Code, S. 218—Pay sheets drawn up in Railway offices, whether a "record"—Accused sentenced by Magistrate under two offences, one of which was exclusively triable by Court of Sessions—Sentence under each offence not specified—Objection as to irregularity and want of jurisdiction verbally taken for first time before High Court—Apportionment of aggregate sentence—Conviction and sentence, setting aside of.*

There is nothing in law to prevent a Court acting upon extra-judicial confessions made by the prisoner to prosecution witnesses out of Court and not recorded by a Magistrate. Such confessions may be, though cautiously, considered by the Court.

A pay-sheet drawn up in a Railway Office and setting out certain sums as due by the Railway to certain coolies described as working in a special gang, is a record within the meaning of S. 218, Penal Code.

Where a person was charged before a Magistrate of two offences, one of which was exclusively triable by a Court of Sessions, and the Magistrate awarded an aggregate sentence without specifying any particular sentence awarded in respect of each of the offences, the High Court, on objection as to the irregularity and want of jurisdiction being verbally taken for the first time before it, apportioned the sentence between the two offences and set aside the conviction and sentence in respect of the offence exclusively triable by a Court of Sessions. *Keerl Mal v. Emperor*, 15 Cr. L.J. 503—24 Ind. Cas. 590.

LINDSAY, J.C.

Confessions—(Continued).

- (2) *Practice—Confessions of some of the accused—Trial with others—Procedure to be adopted.*

Some of the accused pleaded guilty to a charge of dacoity brought against them and other persons jointly tried with them. The Judge did not record their conviction but went on with the trial till the end. *Held*, that the Judge had committed an irregularity, inasmuch as he should have recorded the conviction of the confessing accused and then gone on with the trial of the others. *Surjan Singh v. King-Emperor*, 12 A.L.J. 1239.

PIGGOTT, J.

- (3) *Confession—Retracted confession—Value of confession against co-accused.*

The net result of authorities on the value of confessions seems to be this :

(i) That it is not *illegal* to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact ;

(ii) that, *from the point of view of legality, pure and simple*, the fact that a confession has been retracted is immaterial ;

(iii) that the use to be made by the Court of a confession, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind, in accordance with the dictates of common sense, whether it is safe to believe the confession or not ;

(iv) that experience and common sense show that, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remain a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine ;

(v) that, when it is a question of using a confession against a co-accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime, but also, unmistakably, connects the said co-accused with the crime. *Jawan v. Emperor*, 264 P.L.R. 1914 = 15 Cr. L.J. 626 = 30 P.R. 1914 (Cr.) = 25 Ind. Cas. 684 = 50 P.W.R. 1914 (Cr.).

JOHNSTONE and SCOTT-SMITH, JJ.

(4) *Accused making confession—Magistrate enquiring as to its voluntary character at the end of the statement—Effect—Value of confession which is partly false.* *Pullin Tanti v. Emperor*, 40 C 873 = 23 Ind. Cas. 169 = 15 Cr. L.J. 25. See Final Part, 1918, Col. 46.

(5) Confession of co-accused — Conviction based thereon—Legality. See ACCOMPLICE, No. 2, (1914) M.W.N. 368.

Confessions—(Concluded).

(6) Care necessary in recording confession—Questions as to ill-treatment—Magistrate's satisfaction as to voluntariness of confession—Statements in confession inconsistent with medical evidence—Effect—Acquittal of accused. See CRIM. PRO. CODE, No. 132, 15 Cr. L. J. 638.

(7) Magistrate on leave and outside jurisdiction—Accused ignorant of Magistrate's existence—Value of confession. See EVIDENCE ACT, No. 6, 8 P.W.R. 1914 (Cr.).

(8) Distinction between admissions and confessions—Confessions to police officers—Exculpatory statements—Statements leading to discovery of guilt—Admissibility. See EVIDENCE ACT, No. 10, 41 C. 601.

(9) Admission of guilt while departmental enquiry was going on—Whether could be proved in judicial proceeding. See EVIDENCE ACT, No. 26, 12 A.L.J. 306.

(10) Wife charged with murder of step-son—Admission of confession by wife to husband—Confession by the woman in police custody—Confession retracted—Effect—Meaning of 'offence.' See EVIDENCE ACT, No. 34, 10 P.R. 1914 (Cr.).

(11) Confession made before a Magistrate in a Native State—Admissibility. See EVIDENCE ACT, No. 25, 16 Bom. L.R. 261.

(12) Confession—Accused in custody of jailor—Statement made in presence of Police officer—Admissibility in evidence. See EVIDENCE ACT, No. 8, 8 P.R. 1914 (Cr.).

(13) Plea of guilty—When it can be withdrawn—Incriminating statement made in police custody and before Magistrate—Admissibility against the maker and accused jointly tried—Defective statement how to be cured—S. 364, Crim. Pro. Code. See EVIDENCE ACT, No. 9, 44 P.W.R. 1914 (Cr.).

(14) Confession to thugyi on inducement to confess, whether admissible—Questions and answers based on such confession—Admissibility. See EVIDENCE ACT, No. 5-a, 15 Cr.L.J. 631.

Construction.

1.—OF ACTS.

2.—OF DOCUMENTS.

—1.—Of Acts.

(1) Act to be construed so as to avoid inconsistency between its different parts. See CRIM. PRO. CODE, No. 303, 37 M. 119.

(2) Words of a statute—Extended meaning when to be given. See CRIM. PRO. CODE, No. 424, 12 A.L.J. 465.

(3) Penal Acts—Ambiguous language—Meaning of words 'he' and 'whoever'. See PENAL CODE, No. 154, 15 Cr. L.J. 387.

—2.—Of Documents.

Newspaper article ambiguous—Both defamatory and innocent—Interpretation in favour of accused. See DEFAMATION, No. 2, 15 Cr. L.J. 566.

Contempt of Court.

- (1) *Contempt—Receiver—Obstruction of Receiver in discharge of duty—Stranger in possession not to obstruct Receiver but to apply to Court for redress of grievance—Costs against person obstructing Receiver.*

The right of a stranger in possession of property to continue in possession is not affected by an order of a Court appointing a Receiver; but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court to redress his grievance. If he interferes with the Receiver, he does so at his peril. The Court will not permit the Receiver appointed by its authority to be interfered with or dispossessed of the property which he is directed to receive, by any one, even though the order appointing him may be perfectly erroneous (a).

A person, who is guilty of a contempt of the Court's authority, by obstructing a Receiver in the discharge of his duty, may be made to pay the costs as those of a hearing and not of a motion. *Mr. P. Roy Chowdhury v. Nolini Prokash Sen*, 15 Cr.L.J. 65=22 Ind. Cas. 417.

IMAM, J.

References.—(a) 20 Beav. 332 (354); 24 L.J. Ch. 540; 1 Jur. (N.S.) 529; 3 W.R. 381; 52 Eng. Rep. 630; 109 R.R. 442, *F*.

(2) *Criminal offence—Comment on pending case—Offence to be proved by legal evidence—Statement resting on information and belief, no legal evidence—Materials on which application for summary process for contempt, not to be amplified by other materials—High Court—Jurisdiction—Power of High Court to commit for contempt of Mofussil Magistrate—Comment on case pending before Mofussil Magistrate—Comment in newspaper published in Calcutta—Remonstrating against universal house-search—Protesting against harsh treatment of accused—Deprecating Police methods—Request that case should not be tried by Magistrate—Appeal to Government's recognized fairness—Whether contempt of High Court—Interference with due administration of justice—Deterring witnesses from giving evidence—Comments on pending cases deprecated—Summary process of contempt—Technical contempt of Court not enough—Substantial interference with administration of justice necessary. The Governor of Bengal v. Moti Lal Ghosh*, 14 C.L.J. 321=20 Ind. Cas. 81=17 C.W.N. 1253=19 C.L.J. 452=41 C. 173 (S.B.). See Final Part, 1913, Col. 50.

(3) *Practice—Contempt case—Assurance of pleader not accepted by Munsif—Interference in revision. Ram Ball Rai v. King Emperor*, 11 A.L.J. 955=14 Cr.L.J. 687=21 Ind. Cas. 1007. See Final Part, 1913, Col. 51.

Conviction.

(1) *Abandoning—Effect of—Production of a stolen article—Other evidence doubtful. Fatta v. The Crown*, 31 P.W.R. 1913 (Cr.)=314 P.L.R. 1913=21 Ind. Cas. 473=14 Cr.L.J. 601. See Final Part, 1913, Col. 51.

Conviction—(Concluded).

(2) *Criminality—Probability compatible with innocence—No justification for conviction. See ABETMENT, No. 1, 15 Cr. L.J. 617.*

(3) *Enhancing punishment—Relevancy of previous conviction. See EVIDENCE ACT, No. 22, 16 Bom.L.R. 934.*

(4) *Conviction on evidence similar to that given in another case—Legality. See LETTERS PATENT (N.W.P.), No. 1, 12 A.L.J. 231.*

(5) *Repugnancy in judgment—Conviction if can be set aside on such ground—High Court's power to alter acquittal on one of two alternative charges into conviction. See PENAL CODE, No. 118, 18 C.W.N. 498.*

Co-sharers.

Co-sharer building on the common land without permission of the other co-sharer—Permission asked for and refused—Whether criminal trespass. See PENAL CODE, No. 147, 12 A.L.J. 790.

Costs.

(1) *Costs against person obstructing Receiver. See CONTEMPT OF COURT, No. 1, 15 Cr.L.J. 65.*

(2) *Order under S. 145, Crim. Pro. Code—Costs—Failure to assess—Right of legal representative of successful party to obtain costs—Successor in office of the Magistrate—Competency to pass order. See CRIM. PRO. CODE, No. 97, 16 M.L.T. 248.*

(3) *S. 14, Merchandise Marks Act—Costs of successful party—Costs of appeal. See PENAL CODE, No. 156, 16 Bom.L.R. 78.*

Counsel.

Counsel appearing as witness for his client—Evidence recorded—Duties of the counsel—Admissibility and relevancy of evidence of counsel. See EVIDENCE ACT, No. 36, 12 A.L.J. 285.

Court.

(1) *Power of Court to invent rules of procedure. See CRIM. PRO. CODE, No. 97, 16 M.L.T. 248.*

(2) *Income-tax Collector whether a "Court".—Sanction to prosecute. See CRIM. PRO. CODE, No. 175, 16 Bom.L.R. 446.*

(3) *District Registrar whether a "Court".—See CRIM. PRO. CODE, No. 352, 16 Bom. L.R. 946.*

Crim. Pro. Code.

(1) *S. 4. See No. 149, infra.*

(2) *Ss. 4 (1) (h), 190, cls. (a), (c)—Cognizance—Jurisdiction of Magistrate to summon persons not named in complaint, on the evidence for prosecution—Cl. (c), S. 190, scope of—Complaint and complainant, meaning of.*

A complaint was filed against several persons before the Magistrate under Ss. 342, 363, I.P.O., by the husband of a girl against whom the offences were said to have been committed. The Magistrate ordered the complainant to prove

Crim. Pro. Code—(Continued).

his case, but before the date fixed, the complainant filed a petition withdrawing the complaint. The Magistrate, however, examined witnesses on the date fixed and found that there was no satisfactory evidence against the persons complained against, but he summoned two other persons under Ss. 842, 363, 353, I.P.C., holding that there was evidence against them :

Held, that the Magistrate took cognizance under cl. (1) (a) of S. 190, Crim. Pro. Code, and had jurisdiction to try the persons summoned by him.

A Magistrate having taken cognizance of a complaint can also proceed against another person, who, although not mentioned in the complaint, appears on the evidence for the prosecution to have been concerned in the commission of the offence.

Clause (c) of S. 190 deals with cases where there has been neither a formal complaint nor a police report, and independently of these the Magistrate takes the initiative upon information received from any person other than a Police Officer or upon his own knowledge or suspicion.

It is clear from the definition of "complaint" in cl. (h), sub-S. (1) of S. 4, Crim. Pro. Code, that it is not necessary that the complainant should always be the party directly aggrieved by the commission of the offence, and the husband of the girl was a competent person to apply to the Magistrate with a view to his taking action under the Code.

That, in the circumstances of the case, the Magistrate was right in ordering examination of witnesses in order to ascertain if there was any substance in the petition of withdrawal and in the complaint. **Dedar Bux v. Syama-pada Malakar**, 18 O.W.N. 921=15 Cr. L.J. 546=24 Ind. Cas. 954=41 O. 1013.

SHARFUDDIN and TEUNON, JJ.

(3) Ss. 4 (b), 195, 476—*Complaint—No sanction—Revision.*

A Judge passed an order to the following effect: "I complain that R filed two false and forged bonds in the Court of Small Causes, &c." He sent the papers to the District Magistrate for taking action. **Held**, that the order of the Judge was a complaint within the meaning of S. 4 (b) of the Crim. Pro. Code and was not a sanction given by him under S. 195 or 476. **Raja Ram v. King-Emperor**, 12 A.L.J. 881=15 Cr. L.J. 700=26 Ind. Cas. 148.

KNOX, J.

(4) S. 4 (r)—*Pleader—Sanad* not extended to a District—Magistrate's permission to practise before him—*Necessity.* See **PLEADER AND CLIENT**, No. 1, 7 S.L.R. 98.

(5) Ss. 4, 190 (1) (c)—*Statement that a person keeps a gaming house—Issue of search-warrant and arrest of certain persons in consequence of the statement—Whether statement amounts to complaint—Magistrate*

4 Cr.

Crim. Pro. Code—(Continued).

not authorised under S. 190 (1) (c)—Exercise of powers under Bombay Gambling Act, S. 6—Effect.

Where one M made a statement to the Magistrate that H kept a common gaming house in which many persons used to gamble, and in consequence of such statement, the Magistrate issued a warrant under S. 6 of the Gambling Act, directing the search of H's house and the arrest of all persons found therein.

Held, that the Magistrate received no 'complaint' within the meaning of the term as defined in S. 4 of the Code, because it is clear that M's statement did not refer to any offence that was committed before the complaint was made and because it was not made in order to induce the Magistrate to take any action under the Code of Criminal Procedure, but in order to induce him to proceed under S. 6 of the Gambling Act.

Held, also, that the Magistrate who was not specially authorised to take action under S. 190 (1) (c), Crim. Pro. Code, took cognizance of the case only after the accused were arrested and brought before him for trial as the result of the warrant issued by him under S. 6 of the Gambling Act in consequence of the statement made to him. **Hotu, son of Pessumal v. The Crown**, 8 S.L.R. 66=15 Cr. L.J. 657=25 Ind. Cas. 985.

HAYWARD, J.C. and BOYD, A.J.C.

(6) Ss. 15, 16 — *Bench of Magistrates—Absence of some of Bench Magistrates from later stages of a trial, effect of.*

The absence of some of the Bench Magistrates, who were present at the earlier stages of a trial, from the further stages of the trial and at the time of judgment, does not vitiate the trial or invalidate the conviction. **Venkatrama Iyer v. Swaminatha Iyer**, 15 Cr. L.J. 549=24 Ind. Cas. 957=(1914) M.W.N. 867.

AYLING and SESHAGIRI IYER, JJ.

References :—21 M. 246=2 Weir 217, F.; 12 M. 113; 20 O. 870; 23 C. 194, R.

(7) S. 16—*Differences of opinion between Honorary Magistrates, settlement of.* See **ACT VII OF 1912 (BENGAL, BEHAR, ORISSA AND ASSAM LAWS)**, No. 1, 19 O.L.J. 92.

(8) S. 16. See No. 6, *supra*.

(9) S. 17—*Powers of a District Magistrate to distribute work—District Magistrate cannot delegate his powers.*

S. 17, Crim. Pro. Code, empowers a District Magistrate to make rules or give special orders connected with the Code as to the distribution of work among Subordinate Magistrates and Benches of Magistrates. It does not empower a District Magistrate to pass on his powers of calling up cases from Subordinate Courts and re-distributing them. The power of distribution of business cannot be exercised by a Magistrate in charge of a sub-division or by a senior

Crim. Pro. Code—(Continued).

Honorary Magistrate. *Bal Kishun v. Sipahi Lal*, 12 A.L.J. 808=86 A. 468=15 Cr.L.J. 584=25 Ind. Cas. 386.

KNOX, J.

(10) *Ss. 34, 114, 428 and 439—Accused acquitted under S. 328, Penal Code—Subsequent death of the injured—Commitment to Sessions. Sailani v. King-Emperor*, 11 A.L.J. 959=22 Ind. Cas. 336=15 Cr. L.J. 64=36 A. 4. See Final Part, 1913, Col. 56.

(11) *S. 35—Sentence of imprisonment to run concurrently with sentence of transportation for life—Legality. Bogi v. Crown*, 21 P.R. 1913 (Cr.)=50 P.L.R. 1914=15 Cr.L.J. 68=22 Ind. Cas. 420. See Final Part, 1913, Col. 56.

(12) *S. 35—Concurrent sentences, validity of. Debi Dayal v. King-Emperor*, 16 O.C. 370=15 Cr. L.J. 800=23 Ind. Cas. 508. See Final Part, 1913, Col. 56.

(13) *Ss. 45 (c), 250, 435, 439—Compensation for false and vexatious complaint—"Information given to Police Officer," meaning of—Complaint of theft to village headman—Report sent to Station House Officer—Charge by Police—Falsity of charge—Magistrate's order directing payment of compensation whether legal.*

The words "information given to a Police Officer" in S. 250 of the Code of Criminal Procedure include also a report which a village-headman is bound to send, under S. 45 (c) of the Code, on a complaint made to him of the commission of a non-bailable offence (a).

Where a complaint of theft was made to a village-headman and he sent a report of the same to the Station House Officer upon which the Police charged the accused, and that charge the Magistrate found to be false and vexatious :

Held, that an order by the Magistrate directing payment of compensation to the accused by the complainant was not illegal. *Nachimothu Chetty v. Muthusami Chetty*, 15 Cr. L.J. 481=24 Ind. Cas. 167=27 M.L.J. 37=(1914) M.W.N. 804.

AYLING and SESHAGIRI AIYAR, JJ.

References:—(a) 25 M. 667; 18 Ind. Cas. 221=22 M.L.J. 138=(1911) 2 M.W.N. 558=10 M.L.T. 550=18 Cr. L.J. 29, D.; 1 Ind. Cas. 187=32 M. 268=5 M.L.T. 269 (F.B.)=9 Cr. L.J. 170, F.

(14) *Ss. 47, 103 (2)—Meaning and scope of S. 47—Search—Right of 'occupant' to be present at search—Denial of this right, effect of—'Occupant of the place,' Meaning of—Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings—Finding of incriminating articles in a house—Presumption. See PENAL CODE, No. 118, 18 O.W.N. 498.*

(15) *S. 54 (1), Penal Code, S. 558—Cognisable offence—Warrant issued—Arrest without warrant—Credible information of the commission—Obstruction in the discharge of his duty.*

Crim. Pro. Code—(Continued).

Gopal Singh v. King-Emperor, 11 A.L.J. 957=15 Cr. L.J. 179=22 Ind. Cas. 755=36 A. 6. See Final Part, 1913, Col. 58.

(16) *Ss. 54, 165, 166, 550—Police search outside jurisdiction—Legality. See PENAL CODE, No. 98, 8 S.L.R. 1.*

(17) *Ss. 55*110, Ch. VIII—Arrest without a warrant—Proceedings under S. 110. Nepal v. King Emperor*, 11 A.L.J. 596=35 A. 407=14 Cr. L.J. 618=21 Ind. Cas. 666. See Final Part, 1913, Col. 58.

(18) *S. 59—Penal Code, Ss. 224, 224 (1), 109—Village Chowkidar if a Police Officer—Escape from custody—Arrestment. Purna Chandra Kundu v. Hachanali Chowkidar*, 17 O.W.N. 978=14 Cr. L.J. 494=20 Ind. Cas. 750=41 O. 17. See Final Part, 1913, Col. 58.

(19) *S. 94—Production of document or other thing incriminating accused—Issue of summons to accused for—Whether permissible. Surey Kondareddi v. Emperor*, 13 Cr. L.J. 493=15 Ind. Cas. 493=37 M. 112. See Final Part, 1913, Col. 89.

(20) *Ss. 94, 96, 342—'A person' in S. 96, whether includes an accused person—Summons for production of documents, etc.—Search-warrant—Whether enforceable against accused persons—Court's power to invoke aid of others in reading and understanding contents of documents.*

In taking action under S. 96, Crim. Pro. Code, the Court is authorized to go as far as is physically possible in that search. The accused can perhaps defeat the Court by concealing or destroying the document, etc., or by having it concealed or destroyed, taking, of course, the consequences of such action, just as the accused in the dock can, when questioned, under S. 342, thwart the Court in its search for the truth by answering falsely or refusing to answer. But the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from going as far as the sections specifically allow.

The words 'a person' in S. 96 include a person accused in the case.

When the premises to be searched are those of the accused person, the warrant need not be only for the finding of the document, etc., in respect of which the alleged offence has been committed. The words 'document or thing' in the section are general and seem to cover any document, the production and inspection of which are 'necessary or desirable' or will serve the ends of justice (a).

The Court has the power to invoke the aid of persons capable of helping it to read and understand the contents of the books, etc., found. *Municipal Committee, Jhang v. Muhammad Hayat*, 36 P.R. 1914 (Cr.).

JOHNSTONE, J.

References:—(a) 15 O. 109; 38 C. 304; 41 C. 261; 12 C.W.N. 1016; 9 Ind. Cas. 564; 37 M. 119; 5 Bom. L.R. 980, B.

Crim. Pro. Code—(Continued).

(21) Ss. 94, 165, scope of—Search for specified article only—Article in possession of accused if can be searched for—General search for stolen property if authorized. *Bissar Misser v. Emperor*, 19 O.W.N. 1909=14 Cr. L. J. 405=20 Ind. Cas. 229=41 C. 261. See Final Part, 1913, Col. 59.

(22) Chapter VII, Ss. 112, 114 and 167—Power of Magistrate—Writing necessary.

S. 167, Crim. Pro. Code, which authorizes a Magistrate to remand an accused to police custody pending investigation, does not apply to cases in which action is taken under S. 112, Crim. Pro. Code. A Magistrate acting under Chapter VIII of the Crim. Pro. Code has no power to act until after he has recorded an order in writing under S. 112; and no person is to be called upon to show cause under S. 112 until there is before the Magistrate some information recorded by himself which he has reason to believe. *King Emperor v. Rameshwar*, 12 A.L.J. 365=15 Cr.L.J. 288=23 Ind. Cas. 496=36 A. 262.

KNOX, J.

References:—6 A. 132; 14 A. 45; 10 A.L.J. 351, R.

(23) S. 96. See No. 20, *supra*.

(24) S. 103—*Burma Gambling Act* (I of 1899), S. 7—Presumption—S. 103—Witnesses to search—"Respectable inhabitants," meaning of.

Per Parrott, Young and Ormond, JJ. (Hartnoll, Offg. C.J., and Robinson, J., dissenting).—Ward-headmen in towns other than Rangoon are competent witnesses of searches under S. 103, Crim. Pro. Code.

Per Young, J.—It is beyond the province of the judiciary to construe the word "Respectable" in S. 103, Crim. Pro. Code, as meaning "respectable and independent or unconnected with the Police." *Ti Ya v. Emperor*, 15 Cr. L.J. 441=24 Ind. Cas. 321=7 Bur. L. T. 143 (F.B.).

HARTNOLL, OFFG. C. J., and TWOMEY, PARLETT, YOUNG, ROBINSON and ORMOND, JJ.

References:—4 L.B.R. 213 (F.B.)=14 Bur. L.R. 81=7 Cr.L.J. 479; U.B.R. (1908) 2nd Qr. Gambling, p. 1=9 Cr.L.J. 413; 10 Ind. Cas. 796=4 Bur. L. T. 91=12 Cr.L.J. 251; 79 L.J.K.B. 905=(1910) A.C. 409=103 L.T. 81=54 S.J. 599=26 T.L.R. 526; 22 Q.B.D. 513=58 L.J.Q.B. 174=60 L.T. 772=87 W.R. 815; 3 Q.B.D. 346=47 L.J.M.C. 511=37 L.T. 784=29 W.R. 314; 3 O.P.D. 439=47 L.J.O.P. 761=39 L.T. 349=27 W.R. 136; 1 B. & O. 123=25 R.R. 321=107 E.R. 47=2 Doul. & Co. Ry. 241=1 L.J.K.B. (O.S.) 26; 53 L.J.Q.R. 185=12 Q.B.D. 176=49 L.T. 764=32 W.R. 546, R.

(25) S. 103—Police officer adding new items to the list of things seized at a search—Effect—Validity of search. See ACT I OF 1899 (BURMA GAMBLING), No. 1, 7 Bur. L.T. 168.

Crim. Pro. Code—(Continued).

(26) S. 103. See No. 14, *supra*.

(27) S. 106—Conviction by Second Class Magistrate—Appellate Court's power to demand security for keeping the peace.

An Appellate Court, on hearing an appeal from a conviction by a second class Magistrate can also direct the accused to execute a bond giving security to keep the peace. *In re Gunda Ganji Reddi*, 15 Cr.L.J. 192=22 Ind. Cas. 768.

SADASIVA IYER, J.

References:—30 M. 48=1 M.L.T. 403=5 Cr. L.J. 88, Diss.; 1 Criminal Law Reporter, 172, F.

(28) S. 106 (1), (3)—Scope and effect—Conviction by a 2nd or 3rd Class Magistrate—Jurisdiction of Appellate Court to order accused to execute a bond to keep the peace. *In re Solal Goundan*, 14 M.L.T. 235=(1913) M.W.N. 769=25 M.L.J. 408=14 Cr. L.J. 574=21 Ind. Cas. 174=37 M. 153 (F.B.). See Final Part, 1913, Col. 60.

(29) S. 106 (3)—Appellate Court, power of, to order execution of bond for keeping the peace—Original Court, power of, does not control that of Appellate Court. *Bharat Singh v. Emperor*, 14 Cr. L.J. 592=21 Ind. Cas. 384=16 O. C. 281. See Final Part, 1913, Col. 60.

(30) S. 107—Practice—Evidence—District Magistrate dealing with proceedings under S. 107, having outside knowledge—Order on the ground that applicants had instituted a committee to bring certain matters to the notice of authorities—Justification of order.

If a District Magistrate, dealing with proceedings under S. 107 of the Code, possesses knowledge of certain facts which he obtains from sources outside the record, he should not base his judgment upon those facts, but should base it upon evidence relevant to the case.

An order requiring certain persons to furnish security to keep the peace can only be justified upon the finding that each of these persons is likely to commit a breach of the peace or disturb public tranquillity, or is likely to do some wrongful act which may occasion such a disturbance (a).

Certain persons instituted a committee to collect funds in order to persuade the authorities to allow them to carry the Dasehra procession along a certain route, and to enforce, as against any other person who might desire to contest the same, the petitioners' alleged right to do so. Held that, in the absence of a finding that those persons were likely to take the procession forcibly down a particular route unless they were bound down to keep the peace, the order could not be properly passed against them. *Birjandran Prasad v. King Emperor* 12 A.L.J. 1246.

PIGGOTT, J.

References:—(a) 9 A. 452; 7 A.L.J. 161, R.

(31) S. 107—Security to keep the peace—Breach apprehended from opposite party if one party exercises his right, whether ground for demanding security.

Crim. Pro. Code—(Continued).

No security to keep the peace can be demanded from a party simply because the opposite party would commit such breach if the former party would exercise his right. *In re Desai-Charl*, 36 Cr. L.J. 661=25 Ind. Cas. 989.

SADASIVA AIYAR, J.

References:—12 C. W. N. 708=7 Cr. L.J. 504, F.

(32) S. 107. See Nos. 74 and 407, *infra*.

(33) Ss. 107, 112, 117, 118, 119, 145, 253, 403, 495—*Preliminary charge sheet under S. 107—Withdrawal by the Police—Whether bar to subsequent proceedings—S. 495 inapplicable to security proceedings—Order under S. 145 whether bar to order under S. 107 on the same facts—Legality of order of discharge or acquittal where accused not directed to appear at all. In re Muthia Moopan*, 36 M. 315=14 Cr. L.J. 559=21 Ind. Cas. 159. See Final Part, 1913, Col. 62.

(34) Ss. 107, 125—*Security for keeping peace—Bond for keeping peace, cancellation of—District Magistrate, jurisdiction of—Admission of case, wrong, effect of—Revision, High Court's power in—Questions of fact, when to be considered in revision.*

S. 125, Crim. Pro. Code, does not confer upon a District Magistrate either an appellate or revisional jurisdiction, but it confers an original jurisdiction in respect of orders binding down persons to keep the peace. A person so bound down has no remedy by way of appeal to the District Magistrate. The proper course for him is to bring his case in revision before the Sessions Judge (a).

A High Court, having once admitted a case in revision and having fixed a date for the hearing thereof, ought to dispose of it on the merits after hearing the applicant for revision.

In criminal revisions, the High Court does not ordinarily consider questions of fact, except where the matter has been before only one Court below. *Thakur Sheo Singh v. Emperor*, 15 Cr. L.J. 721=26 Ind. Cas. 169.

LINDSAY, J.C.

References:—(a) 32 C. 948=9 C.W.N. 860=2 Cr. L.J. 550, F.

(35) Ss. 107, 145—*Payment to a chaudhri by the dealers in a market for certain duties discharged by him—Dispute between the servants—Ownership of the market and rents and profits thereof not disputed—"Parties concerned in the dispute."*

R had been appointed by certain dealers in a certain market to act as *chaudhri*, in order to regulate the business of that market and so forth, and those dealers agreed voluntarily to pay him at the rate of two pice per head of cattle brought to the market laden with articles for sale. The servants of the lady who admittedly was the owner of the market wanted to enjoy the dues themselves. On a police report of an impending breach of the peace, proceedings were in the first instance instituted under

Crim. Pro. Code—(Continued).

S. 107, Crim. Pro. Code, but the Magistrate finding that the servants of the lady claimed to collect rent as part of the *zamindari* of their mistress cancelled his first order and instituted proceedings under S. 145, Crim. Pro. Code.

Held, that there was no bar to the Magistrate cancelling his first order and instituting proceedings under S. 145, Crim. Pro. Code, provided that the latter proceedings were otherwise justified under that section.

Held also, that the dues claimed by either party being in no way connected with the ordinary rents and profits of the market and not being a perquisite of the *zamindar*, but being only in the nature of a voluntary payment by the dealers in the market to the *chaudhri* appointed by them for the discharge of certain duties, the dispute between the parties did not concern any tangible immovable property or relate to the rents and profits of the market, and S. 145, Crim. Pro. Code, was not applicable.

Held further, that the servants of the owner of the market having stated that they were acting in the interest and for the benefit of their mistress, she must be deemed "a party concerned in the dispute," and for the purposes of S. 145, Crim. Pro. Code, was a necessary party to the proceedings.

Held further, that S. 107, Crim. Pro. Code, was applicable to the case. *Ram Lochan v. King-Emperor*, 12 A.L.J. 162=22 Ind. Cas. 171=15 Cr. L.J. 27=36 A. 143.

RYVES, J.

(36) Ss. 107 and 250—*Person liable—Offence—Trivial accusation—Order for payment of compensation, whether can be passed in cases for security.*

A person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of S. 107, Crim. Pro. Code, is not a person accused of any "offence," and an order for payment of compensation, by a person who brought frivolous accusation against him cannot be passed under S. 250, Crim. Pro. Code. *Bindhachal Prasad Rai v. Lal Behari Rai*, 12 A.L.J. 506=36 A. 382=15 Cr. L.J. 578=25 Ind. Cas. 330.

PIGGOTT, J.

(37) Ss. 107, 526 (8)—S. 526, cl. 8, if applies to proceedings under S. 107—*Adjournment pending application for transfer—Proceeding under S. 107, if a criminal case.*

A proceeding under S. 107, Crim. Pro. Code, is a criminal case, and the provision in cl. 8 of S. 526 of the Code is applicable thereto, and an applicant is entitled to an adjournment of the proceeding to enable him to move for a transfer as is contemplated "in that clause." *Wazed Ali Khan Panee v. The King-Emperor*, 18 C.W.N. 274=15 Cr. L.J. 171=22 Ind. Cas. 747=41 C. 719.

IMAM and CHAPMAN, JJ.

Crim. Pro. Code—(Continued).

(38) *Ss. 109 (a) and (b), 110—Taking precaution to conceal presence to commit crime—Failure to give satisfactory account of himself—Giving false name and secretly delivering letters containing incitement to commit crime.*

A person who gives a false name and delivers letters secretly, containing incitement to commit crime or demanding money for the means of committing crime, falls within S. 109, cl. (a) of the Crim. Pro. Code.

A person who secretly delivers letters arranging for the commission of dacoities is a person, who, in the interests of public peace, should be called upon to give security for good behaviour.

The accused, when charged by A with endeavouring to secretly deliver letters to A's brother, asking him to assist in some nocturnal enterprise in which revolvers and guns were to be used, was unable to give A any satisfactory account of himself :

Held, that this was sufficient to bring him within the meaning of S. 110. **Preo Nath Datta v. Emperor**, 15 Cr.L.J. 255 = 23 Ind. Cas. 207.

HOLMWOOD and SHARFUDDIN, JJ.

(39) *Ss. 109, 122—Magistrate's power to reject surety—Sufficient ground—Defence witness, whether can stand surety—Revision.*

Sureties for good behaviour should not be rejected merely on the strength of the report of a Tahsildar and a Sub-Inspector of Police, without some further proceedings or at any rate without giving the sureties an opportunity of meeting any allegations that may be made against them. The fact that a person offering himself as surety for the good behaviour of another has given evidence in favour of that person in a proceeding under S. 109 or 110, Crim. Pro. Code, which resulted in the passing of an order requiring security, would not be at all a good reason for refusing to accept the surety.

The discretion conferred on a Magistrate by S. 122 of the Code is a wide one and the High Court should not lightly interfere with any reasonable exercise of the same. **Bairagi v. Emperor**, 15 Cr.L.J. 727 = 26 Ind. Cas. 175.

PIGGOTT, J.

(40) *S. 110—Security for bad livelihood—Offence committed different from that for which security given—Security whether liable to be forfeited.* **Udham Singh v. King-Emperor of India**, 15 P.R. 1918 (Cr.) = 334 P.L.R. 1913 = 14 Cr. L.J. 575 = 39 P.W.R. 1913 (Cr.) = 21 Ind. Cas. 175. See Final Part, 1918, Col. 63.

(41) *S. 110—Security for good behaviour—Weight of evidence on both sides—Instances of suspicion—Previous discharge on the same materials.* **Lala v. The Crown**, 39 P.W.R. 1913 (Cr.) = 316 P.L.R. 1913 = 21 Ind. Cas. 475 = 14 Cr.L.J. 603. See Final Part, 1918, Col. 63.

(42) *S. 110—Detention of accused in jail pending inquiry—Illegality—Evidence of general repute.*

Crim. Pro. Code—(Continued).

Detention of a person in jail against whom an inquiry under Chap. VIII of the Crim. Pro. Code, is in progress, is an illegality which vitiates the trial.

The accused, who was Chairman of the Managing Committee of a Municipality, was called upon to give security for good behaviour, upon evidence of general repute which consisted of instances anterior to the date of such appointment—

Held, that the evidence of general reputation must, in cases like the present, be evidence of a reputation which had been acquired since the last appointment to the office of the Chairman. **Emperor v. Bhau Savalaram Kotasthane**, 16 Bom. L.R. 943 = 2 Bom. CrL. Cas. 261.

HEATON and SHAH, JJ.

(43) *S. 110—Bad livelihood—General repute—Evidence to the contrary.*

Held that, where security under S. 110, Crim. Pro. Code, is taken from a person on the evidence of general repute only, that repute should be universal and there should be no doubt about it.

So where security was demanded from a person (who along with his brother was an income-tax payer) on the ground of general repute only and on one occasion his house was searched in connection with the theft of the properties of a man who himself said he had no suspicion, and on the other hand he and several other well-to-do people testified to the petitioner's good character, the Chief Court, on revision side, set aside the order to furnish security for good behaviour. **Jhandu Ram v. The Crown**, 48 P.W.R. 1914 (Cr.).

SCOTT-SMITH, J.

Reference :—2 P.R. 1897 (Cr.). F.

(44) *S. 110.* See Nos. 17, 38, *supra* and Nos. 323, 380, 408, *infra*.

(45) *S. 110 (d)—Forged documents—Obtaining decrees by means of—Neither cheating nor extortion—Applicability of S. 110 (d) to such cases—Joint trial—Association of two persons in the same offence—Proof of.*

The obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code.

S. 110, Crim. Pro. Code, does not apply to the case of a habitual forger having the reputation of bringing false claims upon forged entries in account books (a).

Two persons cannot be tried together unless their association in the same offences was made out. **Crown v. Chuni and Bhuru**, 21 P.R. 1914 (Cr.).

SCOTT-SMITH, J.

References :—(a) 25 P.R. 1884 (Cr.) ; 28 P.R. 1900 (Cr.), R.

(46) *Ss. 110, 112—Proceedings under—Detention in custody on the mere request of the police—Reason to be considered and recorded by Magistrate.*

Crim. Pro. Code—(Continued).

A person, who, after investigation made, has been found not to have been concerned in any cognizable offence and against whom there is no reasonable complaint or suspicion of his having been so concerned, should at once be released and any further detention of him is a detention not warranted by law.

A Magistrate has no jurisdiction to act under S. 110, Crim. Pro. Code, until he has such information before him as will suffice for his making an order in writing setting forth its substance and the further particulars required by S. 112 of the Code. *King-Emperor v. Ganesh*, 12 A.L.J. 386=15 Cr. L.J. 696=26 Ind. Cas. 144.

KNOX, J.

- (47) Ss. 110, 112, 113, 117—*Good behaviour—Security—Warrant case—Opportunity to bring witnesses.*

In a proceeding under S. 110 of the Crim. Pro. Code, the accused person must have time to bring his witnesses and have their evidence recorded. Where the accused had not had this opportunity, the order against him must be set aside. *Keramuddin Sarkar v. Emperor*, 15 Cr.L.J. 858=28 Ind. Cas. 721=41 C. 806.

HOLMWOOD and SHARFUDDIN, JJ.

- (48) Ss. 110, 122, 123—*Bond for security for good behaviour—Particulars to be stated in the order requiring the bond—Grounds for rejecting sureties—Relationship—No such ground—Order specifying a term more than a year—Detention of accused—Reference to Sessions Court—Necessity of—Object of proceedings under S. 110—Summary rejection of petition—When not to be made.*

M was ordered by a Magistrate of the 1st Class to give a bond under S. 110, Crim. Pro. Code, to be of good behaviour for 3 years for Rs. 1,000 with four sureties. M offered four persons as his sureties of whom two were rejected as being his relatives; one as being a mere boy and the remaining one as being a bad character.

Held that particulars as to whether each and all are liable for Rs. 1,000 on occasion arising, or Rs. 1,000 between them, should have been stated in the order so as to prevent misunderstanding later.

Mere relationship is no reason for refusing a surety. On the other hand, a relation is more likely than any other person to have influence over a man and to be able to keep an eye on him, in short, relationship is a recommendation (a).

A Magistrate should, before rejecting a surety, himself enquire into the matters alleged against him, and not delegate such an enquiry to any one (b).

The object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law (c).

Crim. Pro. Code—(Continued).

Where the order for security specifies a term exceeding one year during which accused is to be of good behaviour, the Magistrate in ordering the detention of the accused should, under S. 123, refer the case to the Sessions Court.

The District Magistrate should not summarily reject a petition which was explicit enough merely because it did not contain just the particulars he wanted. *Mahala v. The Crown*, 6 P.R. 1914 (Cr.)=142 P.L.R. 1914.

JOHNSTONE, J.

- References*:—(a) 25 A. 131, *Appr.* (b) 18 P. R. 1906 (Cr.), R. (c) 28 P.R. 1901 (Cr.), R.

- (49) Ss. 110, 526—*Transfer—Magistrate's duty to call witnesses—Practice—Expenses of witness to be realized before issuing summons.*

The Magistrate trying a case is bound by law to hear those witnesses only whose list is sent up by the police along with the case, and, as soon as the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of the persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself only such of them as he thinks necessary. He is not bound by law to, and should not, save in very exceptional cases, call the other witnesses that the police or any one else may from time to time choose to produce.

Held further that, when a Magistrate is of opinion that expenses for calling witnesses should be charged from parties, he should realize the expenses before issuing the summons. *Govind Sahai v. King-Emperor*, 12 A.L.J. 262=15 Cr. L.J. 863=28 Ind. Cas. 781.

KNOX, J.

- (50) Ss. 110, 526—*Transfer of case—Jurisdiction of High Court.*

Held, that a High Court is not competent under S. 526, Code of Criminal Procedure, to pass order of transfer of proceedings under S. 110 of the Code. *Ahmed Bakhsh v. The King Emperor of India*, 154 P.L.R. 1914=15 Cr. L.J. 563=24 Ind. Cas. 971.

RATTIGAN, J.

- References*:—15 A. 865; 4 P.R. 1896 (Cr.); 42 P.R. 1905 (Cr.)=131 P.L.R. 1905; 6 P.R. 1911 (Cr.)=158 P.L.R. 1911; 25 B. 179 28 C. 709, 13 P.R. 1885 (Cr.); 16 C. 781 (787). F.; 26 M. 188; 2 C.L.J. 614; 34 A. 533, *Diss.*; 1 P.R. 1913 (Cr.)=139 P.L.R. 1913, D.

- (51) S. 112—*Security for good behaviour—Surety to be able to control the accused—Condition invalid.*

The condition attached to a surety for good behaviour, demanded under S. 112 of the Crim. Pro. Code, that he should be able to control the accused, is not a desirable condition. *Emperor v. Jiva Natha*, 16 Bom. L.R. 133=2 Bom. Cr. C. 189=28 Ind. Cas. 476=15 Cr. L. J. 268.

HEATON and SHAH, JJ.

Crim. Pro. Code—(Continued).

- (52) S. 112—*Surety—Restriction to local men—Jurisdiction of Magistrate.*

A Magistrate has no jurisdiction to put such a restriction upon the nature of the sureties under S. 112 of the Crim. Pro. Code, as to direct that they should be local; for such a restriction is not contemplated by the section. That is a matter which must be decided subsequently if objection is taken to the sureties on that ground by the Police authorities. *Islam Khan v. Emperor*, 15 Cr. L.J. 254 = 23 Ind. Cas. 206.

HOLMWOOD and SHARFUDDIN, JJ.

- (53) S. 112. See Nos. 22, 33, 46 and 47, *supra* and No. 323, *infra*.

- (54) S. 118. See No. 47, *supra*.

- (55) S. 114. See Nos. 10 and 22, *supra*.

- (56) S. 117—*Proceedings under—Rules of evidence—General repute.*

Enquiries under Ch. 8 of the Code of Criminal Procedure are governed by the ordinary rules of evidence and evidence which is not admissible under the Evidence Act cannot be admitted in proceedings under S. 117 of the Code of Criminal Procedure.

Evidence of general repute may be either evidence as to the general opinion of the neighbourhood or community in which the person concerned lives or to which he belongs, or the personal opinion of the witnesses who are examined. *Bechal v. King-Emperor*, 12 A.L.J. 937 = 15 Cr. L.J. 705 = 26 Ind. Cas. 153.

CHAMIER, J.

- (57) S. 117—*Security demanded—Evidence of co-accused.*

The applicant, with certain others, was called upon to furnish security for keeping the peace. He denied the charge. The Magistrate, relying on the statements of the other accused persons and the police report, ordered the applicant to furnish security; *held* the Magistrate was bound under S. 117, Crim. Pro. Code, to make an enquiry into the truth of the police report, and no such enquiry having been made, the order was bad and must be set aside. *Mul Chand v. King-Emperor*, 12 A.L.J. 1262.

PIGGOTT, J.

- (58) S. 117. See Nos. 33 and 47, *supra*.

- (59) S. 118—*Leave to appeal to Privy Council—Order passed by High Court in Criminal revision—Calcutta Letters Patent (1865), cl. 41. Chintaman Singh v. King Emperor*, 18 C.L.J. 119 = 21 Ind. Cas. 470 = 14 Cr. L.J. 598. See Final Part, 1913, Col. 66.

- (60) S. 118. See No. 33, *supra* and No. 74, *infra*.

- (61) Ss. 118 and 123—*Security for good behaviour—Failure to furnish—Solitary confinement.*

Where a person who has been asked to furnish security for his good behaviour fails to do

Crim. Pro. Code—(Continued).

so, the Magistrate has no power to order solitary confinement. *Kundan v. King-Emperor*, 12 A.L.J. 828 = 36 A. 495 = 15 Cr. L.J. 616 = 25 Ind. Cas. 528.

CHAMIER, J.

- (62) S. 119. See No. 33, *supra* and No. 323, *infra*.

- (63) Ss. 119, 437—*Chap. VIII—Order of discharge under S. 119 cannot be revised—District Magistrate cannot order further inquiry—May start fresh proceedings on fresh materials.*

S. 437, Crim. Pro. Code, does not apply to proceedings under Chap. VIII of the Code.

Therefore, a District Magistrate cannot order further inquiry into the case of a person discharged under S. 119 of the Code, but it is open to him to institute fresh proceedings on entirely fresh materials.

It is proper to give notice to the person discharged before an order for further inquiry is made against him. *Ismail v. A.H. Nolan*, U.B.R. (1914), 1st Cr., p. 3 = 24 Ind. Cas. 843 = 15 Cr. L.J. 531.

SHAW, J.C.

- (64) S. 121. See No. 317, *infra*.

- (65) Ss. 121, 438, 514 and 515—*Forfeiture of security—Appellate Court incompetent to refer to the Chief Court a case in which appeal lies to it.*

Held, that, a District Magistrate, while taking cognizance of a case as an appellate Court, has no power to report it to the Chief Court under S. 438 (1) or any other section of the Crim. Pro. Code. He is bound to decide it according to his own discretion, leaving the aggrieved party to take such steps as may appear advisable to get it set aside by the higher authority, but he is incompetent to divest himself of his powers as an appellate Court merely because he either misunderstands or disapproves of certain published rulings (a).

Held, also, that the headnote of P.R. No. 15 of 1913 (Cr.) is misleading and it goes beyond the terms of the judgment. In it the Chief Court has not overlooked the provisions of S. 121, Crim. Pro. Code, and has not laid down any hard and fast rule prohibiting the forfeiture of security under certain circumstances.

All that the ruling indicates is the necessity for moderation and the reasonable exercise of discretion in determining the extent, if any, to which a conviction would justify the rigorous measure of forfeiture. *Bega Singh v. The Crown*, 7 P.W.R. 1914 (Cr.) = 62 P.L.R. 1914 = 15 Cr.L.J. 485 = 24 Ind. Cas. 573.

KENSINGTON, C.J., and RATTIGAN, J.

Reference:—15 P.R. 1905 (Cr.), R.

- (66) S. 122—*Surety—Good behaviour—Fitness of surety.*

The ground of refusal by a Magistrate to accept a surety for good behaviour under S. 122

Crim. Pro. Code—(Continued).

of the Crim. Pro. Code, must be valid and reasonable and must be dealt with in each case as it arises (a).

Where a Magistrate refused to accept as sureties, under S. 122 of the Code, the brothers of the person bound down to be of good behaviour, because he considered them unfit for the reason that the person bound down was a notorious dacoit and there was a consensus of opinion that his brothers would not be able to keep him in control:

Held, that the reason was a reasonable and valid one. **Asiraddi Mandal v. Emperor**, 15 Cr. L.J. 169=22 Ind. Cas. 745=41 O. 764.

HOLMWOOD and SHARFUDDIN, JJ.

References:—(a) 22 W.R. (Cr.) 37; 6 Ind. Cas. 668=14 C.W.N. 666=11 Cr. L.J. 392=37 C. 446, F.

(67) S. 122—*Surety—Rejection—Order based on Magistrate's personal knowledge—No enquiry—Illegality—Necessity for enquiry before passing order—Nature of enquiry under S. 122.*

Where a Magistrate refused to accept a person as a surety stating that he knew from magisterial experience that such person's innocence of connection with thieves is far from established. *Held*, that the Magistrate was not justified in relying on his personal knowledge and dispensing with an enquiry and taking no evidence at all, and that he should examine the sureties as to their fitness and take, such evidence as the accused may give and base his decision on the evidence so recorded (a).

An enquiry under S. 122, Crim. Pro. Code, is a judicial enquiry and a Magistrate cannot import his own personal knowledge without giving evidence. **The Crown v. Piru Abdulla**, 7 S.L.R. 94=15 Cr. L.J. 378=23 Ind. Cas. 746.

PRATT, J.C. and HAYWARD, A.J.C.

References:—(a) 2 S.L.R. 11; 2 S.L.R. 15; 4 S.L.R. 18, R.

(68) S. 122—*Magistrate—Discretion in rejecting sureties—Police report.*

The Magistrate has a wide discretion under S. 122 to accept or reject a certain surety. This discretion can, however, be exercised after a satisfactory enquiry in accordance with law. Where a Magistrate, acting on police report only, refused to accept certain persons as sureties, *held* that, there having been no enquiry, the order was bad. **Bhawani Singh v. King-Emperor**, 12 A.L.J. 1004.

PIGGOTT, J.

Reference:—27 A. 298, F.

(69) S. 122. See Nos. 39 and 48, *supra*.

(70) S. 123. See Nos. 48 and 61, *supra*.

(71) Ss. 123, 397—*Person committed to prison under S. 123—Not undergoing imprisonment within the meaning of S. 397.*

When a person is committed to prison under S. 123, Crim. Pro. Code, he is not undergoing

Crim. Pro. Code—(Continued).

a sentence of imprisonment within the meaning of S. 397, Crim. Pro. Code. **Crown v. Ghulam Ali**, 7 S.L.R. 203=15 Cr. L.J. 592=25 Ind. Cas. 844.

CROUCH and BOYD, A.J.CS.

Reference:—14 Bom. L.R. 965, Foll.

(72) S. 125—*Security to keep the peace—Petition for cancelment of the bond—District Magistrate giving date for hearing—Petition dismissed without hearing petitioner—Dismissal set aside.*

A case was set down to be heard by the District Magistrate on a certain date while he was on tour in his district: intimation of the date so fixed was given to the accused but they were not informed of the place where the case would be heard: they failed to appear at that place and the District Magistrate dismissed their petition without hearing them.

Held, that the District Magistrate having given the petitioners a date for appearance, should have heard them, and hence the order of dismissal could not be maintained. **Mehr Baksh v. Emperor**, 53 P.L.R. 1914=15 Cr. L.J. 143=22 Ind. Cas. 495.

SHAH DIN, J.

(73) S. 125. See No. 34, *supra*.

(74) Ss. 125, 107, 118—*Order under Ss. 107 and 118—Powers of District Magistrate under S. 125. Mare Gowd v. Emperor*. (1913) M.W. N. 715=14 M.L.T. 328=25 M.L.J. 459=21 Ind. Cas. 146=14 Cr. L.J. 546=37 M. 125. See Final Part. 1913, Col. 67.

(75) S. 133—*Application of—Way or public place.*

S. 133 of the Code of Criminal Procedure empowers the Magistrate to order the removal of an obstruction from any way or public place, and before it can be applied there must be a finding that the obstruction in question is situated in a way which can lawfully be used by the public. **Churaman v. King-Emperor**, 12 A.L.J. 1024=15 Cr. L. J. 722=26 Ind. Cas. 172.

PIGGOTT, J.

(76) S. 133—*Outbreak of small-pox—Parents inoculating their children—Whether can be said to carry on trade or occupation—Order to stop the practice—Illegality.*

Parents inoculating their own children upon an outbreak of small-pox cannot be said to be carrying on a trade or to be engaged in an occupation, and consequently an order under S. 133, Crim. Pro. Code, to stop the practice is illegal and is liable to be set aside. **King-Emperor v. Nga Kyauk Lon**, U.B.R. (1918) 3rd Qr. 180=15 Cr. L. J. 258=23 Ind. Cas. 205.

SAUNDERS, J.C.

(77) S. 133—*Field over which surplus water flows from adjoining fields—Not a channel which may be lawfully used by the public—Flow of water obstructed.*

Crim. Pro. Code—(Continued).

A field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields use to flow into a tank, even if it could be described a channel, is not such a channel as had been or could lawfully be used by the public, and action cannot be taken under S. 133, Crim. Pro. Code, for the removal of any unlawful obstruction from it. *Jagannath Sahu v. Parmeshwar Narain*, 12 A.L.J. 248=15 Cr. L.J. 229=28 Ind. Cas. 181=36 A. 209.

RYVES and PIGGOTT, JJ.

References :—(1906) A.W.N. 190; 22 B. 998, R.; 34 A. 845; 82 C. 930, D.

- (78) S. 133—*Claim of right—Magistrate's duty to decide bona fide of—Magistrate bound to refer parties to Civil Court, if such claim is not mere pretence—Steps which Magistrate may take, if suit not instituted in Civil Court within reasonable time.*

Per *Sharfuddin, J.*—(*Teunon, J., dubitante*).—Sub-S. (8) of S. 133, Crim. Pro. Code, provides that no order duly made by a Magistrate under the section shall be called in question in any Civil Court. From this latter provision it is clear that the provision of S. 133, Crim. Pro. Code, should be sparingly used. Any order passed under the section cannot be questioned in any Civil Court. It is therefore necessary that, if the party against whom the order is contemplated to be passed raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim of the objection is not substantiated, find whether the claim is *bona fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If however he finds that the claim, although not substantiated, is not mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bona fide*, he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the rule absolute. *Manipur Day v. Bidhu Bhushan Sirkar*, 18 O.W.N. 1086=15 Cr. L.J. 698=26 Ind. Cas. 146.

SHARFUDDIN and TEUNON, JJ.

- (79) S. 133—*Jurors nominated by applicant—Validity of—Right of applicant.*

Proceedings were instituted under S. 133 of the Crim. Pro. Code at the instance of H against F. F applied for appointment of Jury which was granted. He nominated two Jurymen. The Magistrate called upon H to nominate two Jurors. H nominated two jurors and the Magistrate appointed a foreman. The Jury by a majority made an order against F. *Held* that it is not illegal on the part of a Magistrate

Crim. Pro. Code—(Continued).

to address any enquiry to the applicant with a view to ascertaining the names of respectable persons living in the neighbourhood who would be willing to serve on the Jury. The Magistrate should see that he does not appoint friends or partisans of the applicant. The criterion in such cases is whether the applicant was allowed to exercise rights not conferred upon him by law. *Farzand Ali v. Hakim Ali*, 12 A.L.J. 1241.

PIGGOTT, J.

References :—23 C. 499; 26 C. 869; (1897) P. R. 4, R.

- (80) S. 133, scope of—*Bona fide claim of private right, by a party—Title—Jury, function of—Procedure, to be followed.*

In a proceeding under S. 133 of the Code of Criminal Procedure, the first party asked for an obstruction of a way to be removed as detrimental to the public interests, and the second party claimed a private right thereto, and the case was submitted to the jury. And the jury collected the evidence and declined to decide the question as it involved the question of private or public right. The matter was referred to the Magistrate who decided upon the evidence that this was a matter for the Civil Courts:

Held, that the section contemplates only an enquiry as to the existence or non-existence of the obstruction complained of, and not an enquiry into a disputed question of title; and it was beyond the scope of the jury to decide whether the way obstructed was or was not a public way. And the Magistrate, having found that there was a *bona fide* claim of private right raised by the second party, was perfectly justified in leaving the determination of the question to the Civil Court. *Mahomed Ahrufuddin v. Saikh Karim Bukhsh*, 19 O.L.J. 631=18 C.W.N. 1148=24 Ind. Cas. 603=15 Cr. L.J. 515.

HOLMWOOD and SHARFUDDIN, JJ.

References :—17 C. 562; 26 C. 870; 12 C. 137; 12 C 696, F.

- (81) S. 133. See No. 120, *infra*.

- (82) Ss. 133, 135, 138—*Time for setting up bona fide claims to land—Right of bringing civil suit.*

Where a conditional order is passed under S. 133, Crim. Pro. Code, and the person against whom the order is made raises a *bona fide* claim that the subject of contention is private property, the Magistrate is bound to investigate the claim and cannot leave it to a jury appointed under S. 138. There is however no authority for holding that, once a jury is appointed, it is open to the person against whom the order is made under S. 133 to set up such a claim and to have it determined by the Magistrate, before the Jury proceeds with the matter (a).

Obiter.—If the jury decided that the order was reasonable and proper, the appellant would not be estopped from bringing a Civil suit to establish his right to exclusive enjoyment of

Crim. Pro. Code—(Continued).

the land (b). *Ah Yway v. Ma Gyi*, 7 Bur. L. T. 28 = 28 Ind. Cas. 467 = 15 Cr. L.J. 259.

TWOMEY, J.

References:—(a) 1 O.L.J. 434 (436), *F.*; (b) 6 O. 291, *R.*

(83) Ss. 133, 137 and 140—*Removal of nuisance—Cause shown—Complainant to produce evidence first—Practice.* *Indar v. King-Emperor*, 11 A.L.J. 931 = 22 Ind. Cas. 167 = 15 Cr. L.J. 23. See Final Part, 1913, Col. 68.

(84) S. 135. See No. 82, *supra*,

(85) S. 137. See No. 83, *supra*.

(86) S. 138. See No. 82, *supra*.

(87) S. 140. See No. 83, *supra*.

(88) S. 144—*Temporary orders in urgent cases of nuisance—High Court—Powers of.*

An order passed under S. 144 of the Crim. Pro. Code, restraining a certain body of people, from exercising the rights of Melvaramdar, in relation to certain lands, is a valid one.

The Madras High Court is more liberal than the Calcutta High Court in the interpretation of S. 144.

The High Court will interfere, if the Magistrate passes a permanent injunction instead of affording a temporary relief in matters of urgency. *Meyyaru Ammal, In re*, (1914) M. W.N. 169 = 15 Cr. L.J. 145 = 22 Ind. Cas. 721.

SADASIVA IYER, J.

(89) S. 144—*Urgent orders in case of danger of breach of peace—Force at disposal of Magistrate insufficient—Procession a luxury—Whether sufficient ground for order under S. 144.*

* Where a Magistrate apprehends that, with the force at his disposal he cannot prevent a breach of the peace, he has jurisdiction to pass a temporary order under S. 144, Crim. Pro. Code, stopping a procession.

The fact that a procession is a luxury, is not a sufficient ground for passing an order under S. 144. *Arumuga Mudali v. S. E. Koo-Perumalawamy Chetty*, 15 Cr. L. J. 30 = 22 Ind. Cas. 174.

SANKARAN NAIR and AYLING, JJ.

(90) S. 144—*Destruction of stray dogs—Order passed asking public not to remove dogs in carts—Order operating in the whole of city limits and five miles beyond.*

By a notification issued under S. 144 of the Crim. Pro. Code, the District Magistrate of Surat ordered "all persons to abstain from removing or causing to be removed or promoting, aiding or abetting directly or indirectly, in any way the removal of any dogs, either in carts, or otherwise, or from preventing or trying to prevent or obstruct directly or indirectly, the poisoning of such dogs in any way and from taking possession of or confining such dogs." The order applied to "Surat City and all places within five miles of Surat City." On an application under revisional jurisdiction:

Crim. Pro. Code—(Continued).

Held, that the order was made without jurisdiction inasmuch as the order was directed neither to a particular individual nor to the public generally "when frequenting or visiting a particular place." *Emperor v. Bhagubai Dwarikadas*, 16 Bom. L. R. 684 = 2 Bom. Cr. Cas. 249.

HEATON and SHAH, JJ.

(91) S. 144—*Object of—Evasion of the law—Arbitrary and successive renewals of order under the section—High Court's power to revise—Charter Act, S. 15.* *Govinda Chetti v. Perumal Chetti*, 25 M.L.J. 370 = 14 Cr. L.J. 599 = 21 Ind. Cas. 381. See Final Part, 1913, Col. 68.

(92) S. 144—*Temporary orders—No power to renew for a further period except by notification of Government.* *Govinda Chetty v. Emperor*, (1913) M.W.N. 1003 = 14 Cr. L.J. 658 = 21 Ind. Cas. 898 = 27 M.L.J. 628. See Final Part, 1913, Col. 68.

(93) S. 144 (2)—*Dispute likely to be settled in Civil Court—No apprehension of breach of peace—Order directing a party to open channel in his own land whether an order under S. 144 (2).*

An order of a Magistrate directing a party to open a channel in his own land is not an order of the kind contemplated by S. 144 (2) of the Code of Criminal Procedure (a).

Where a dispute between the parties is likely to be settled by a Civil Court before the cultivation season, and there is no immediate apprehension of a breach of the peace, it is not a case for interference of the Magistrate under S. 144 (2) of the Code. *O. A. Subramania Aiyar v. Muthu Ambalam*, 15 Cr. L. J. 392 = 23 Ind. Cas. 499.

MILLER and SADASIVA IYER, JJ.

References:—(a) 4 M. 121, *F.*; 13 Ind. Cas. 1000 = 13 Cr. L.J. 184 = 39 O. 560, *Diss.*

(94) S. 144. See Nos. 120 and 169, *infra*.

(95) Ss. 144, 145—*Charter Act, S. 15—Order under S. 145, Crim. Pro. Code—High Court's power to interfere—Possession given by Sub-Magistrate to a person with consent of parties—Not a receiver—Nature of possession—Whether held on behalf of person in whose favour order under S. 145 is passed.*

Under S. 15 of the Charter Act, the High Court has power to interfere with orders passed under S. 145, Crim. Pro. Code, even if no question of the Magistrate's jurisdiction is involved, provided that there has been a gross miscarriage of justice (a).

Possession given to a person by a Sub-Magistrate, who has no power to appoint a receiver under S. 144, Crim. Pro. Code, with the consent of parties, is not possession of the receiver of Court, and cannot be said to be possession, on behalf of a person in whose favour an order

Crim. Pro. Code—(Continued).

under S. 145, is passed (b). **Palani Chetty v. Rathina Chetty**, 26 M.L.J. 208—(1914) M.W.N. 352—15 Cr. L. J. 509—24 Ind. Cas. 697.

SADASIVA IYER, J.

References:—(a) 28 M.L.J. 490—(1912) M.W.N. 1154 (1159); 31 M. 318, R. (b) 27 C. 785; 22 M.L.J. 154; (1911) M.W.N. 44, *Doubled*.

(96) Ss. 144, 145, 146—*Petition for order under S. 144—Notice issued under that section—Action taken under S. 145—Petition dismissed—Attachment of land and crops ordered—Legality of proceedings of Magistrate—Judgment of Civil Court whether binding on Magistrate in proceedings under S. 145.*

A dispute arose between S and M regarding the possession of certain land. On 17-1-1914 M filed a petition asking for an order under S. 144 directing S to abstain from interfering with his possession. This petition was forwarded to the Police for enquiry. Meanwhile on 24-1-1914 M put in another petition objecting to the course of the Police enquiry and asking that harvest of the crops by S should be stopped, that the crops already harvested should be taken possession of by the Village Munsif, and that S should be ordered not to interfere with the lands. On this the Magistrate passed the following order on 24-1-1914:

"Issue notice under S. 144 forbidding both sides to harvest until the question of possession has been settled by this Court. The crops already harvested shall be taken into the custody of the Village Munsif. Order both sides to produce witnesses before me on 5-2-1914." The notice actually issued to both sides on the same date did not purport to be issued under any particular section.

S claimed the land in question under a sale deed from the sons of the admitted original owner K. M claimed as the lessee of K's widow. S filed a judgment of a Civil Court in a suit of 1911 in which it was decided that the widow had no right to lease the disputed lands. S asked for an order declaring him to be entitled to possession and forbidding disturbance by the other side.

On 5-3-1914 the Magistrate took up the case under S. 145, Crim. Pro. Code, and dismissed M's petition, stating that he left himself precluded from deciding the dispute by the judgment of the Civil Court. He also directed the Village Munsif to harvest the paddy and attach all the paddy and the land until an order was obtained from a Civil Court. S applied in revision to the High Court objecting to this portion of the order as illegal and without jurisdiction.

Held that the Magistrate's order, which must be taken to have been passed under S. 146, was illegal and must be set aside.

The proceedings of the Magistrate in so far as they purported to be under S. 145 are void for want of jurisdiction and are void *ab initio*

***Crim. Pro. Code—(Continued).**

by reason of his failure to comply with the requirements of cl. 14 of S. 145. This provision of law is imperative and failure to comply with it destroys the Magistrate's jurisdiction (a).

S. 146 is a sort of corollary to S. 145 and the legality of an order under it depends on its having been preceded by legal proceedings under S. 145 and on the holding of an enquiry as to the fact of possession ending in the Magistrate's either finding that neither of the contending parties is in possession or being unable to satisfy himself as to which was in possession (b).

The whole proceedings under S. 145 being illegal, the order made in this case under S. 146 cannot stand on a better footing. *Held* also that the existence of the Civil Court judgment did not affect the Magistrate's jurisdiction to take proceedings under S. 145, Crim. Pro. Code. The whole scheme of the Chap. XII in the Crim. Pro. Code contemplates an enquiry solely with reference to the fact of actual possession, irrespective of title (c). **Subbarama Aiyar v. Mariya Pillai**, 16 M.L.T. 52—(1914) M.W.N. 798—15 Cr. L.J. 559—24 Ind. Cas. 967.

AYLING, J.

References:—(a) 32 C. 552, R.; 36 M. 275, D. (b) 40 C. 105, R. (c) 26 C. 625; 32 C. 395, D.

(97) S. 145—*Final order—Award of costs—Bill of costs presented by party—Magistrate's direction to tax costs and include the same—Failure of the office to do so—Death of successful party—Application by his son to have the costs taxed—Sustainability—Magistrate's successor in office—Competency to pass order—Legal representative—Magisterial proceedings.*

In proceedings under S. 145, Crim. Pro. Code, the Sub-divisional Magistrate passed a final order directing the counter-petitioners, among other things, to pay the petitioner's costs. Within 3 days after the order, two memoranda for taxing costs were put into the Court by the petitioner. The Magistrate passed an order directing the inclusion of the costs. But through some negligence in the Magistrate's office, costs were not actually taxed. Nearly three years later the petitioner's son applied to the Magistrate's successor-in-office for costs being assessed, the petitioner having died in the interval. The son's application was rejected.

Held that the application by the son is sustainable and he is entitled to have the costs assessed.

The Code of Criminal Procedure contains no special provisions for bringing on record representatives of the deceased parties. All that the Court has to see is that the appeal or application has not abated by reason of the death of one of the parties.

Held, also, that the successor of the Magistrate who decided the case has jurisdiction to assess the amount of costs (a).

Per Sadasiva Iyer, J.—Courts should always lean in favour of that view of the law which

Crim. Pro. Code—(Continued).

would enable a party who has got an order in his favour to obtain the fruits of that order, and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper. Courts have power within reasonable limits to invent rules of procedure for this purpose, when the legislature has not enacted such rules, unless the legislature prohibits them from doing so. *Subblah Servai v. Chokkalinga Thevan*, 16 M.L.T. 248 = (1914) M.W.N. 790 = 27 M.L.J. 618 = 15 Cr. L.J. 676 = 25 Ind. Cas. 1004.

SADASIVA IYER and SPENCER, JJ.

References :—(a) 23 C. 87 ; 21 C. 609 ; 22 C. 384 ; 21 C. 887, *Rel.*

(98) S. 145—*Omission to record preliminary order before summoning opposite party—Omission to affix copy on the property in dispute—Revision—Parties to revision.*

Held, that the omission to record preliminary order before issue of summons to the opposite party or to affix a copy of it to a conspicuous place at or near the subject of dispute as required by cls. (1) and (3) of S. 145, Crim. Pro. Code, is not fatal to the jurisdiction of the Court to proceed with the case under S. 145, Crim. Pro. Code, where an order directing the parties to put in written statements has been once recorded and they have understood the nature of the proceedings.

Held, also, that the Chief Court will not interfere on revision with the order of a Magistrate under S. 145, Crim. Pro. Code, where it is inconvenient and unnecessary to do so, even though such order is based on irregular procedure, as it is not usually the practice of the Chief Court to interfere on revision in a Civil or quasi Civil case when the party asking for revision has got a regular remedy at his command.

Held, further, that the omission to make a joint owner of the property a party to the revision is immaterial, where no mention is made of such joint owner in the order of the Magistrate and only one man has been declared to be in possession. *Muhammad Sharif v. L. Dhanpat Rai*, 15 P.W.R. 1914 (Cr.) = 68 P.L.R. 1914 = 15 Cr.L.J. 27 = 23 Ind. Cas. 487.

JOHNSTONE, J.

Reference :—25 W.R. 47, R.

(99) S. 145—*Revision by High Court—Order on merits.*

In a case under S. 145, Crim. Pro. Code, when the Magistrate has, on perusal of the written statements of the parties, decided that the possession of the first party was of an agent and that the second party the principal was entitled to possession, *held*, the decision being on the merits, the High Court will not interfere in revision. *Vaidyanatha Iyer v. Suppalu Ammal*, (1914) M.W.N. 795 = 15 Cr. L.J. 669 = 25 Ind. Cas. 997.

SPENCER, J.

Crim. Pro. Code—(Continued).

(100) S. 145—*Omission of Magistrate to give effect to presumption arising from recently published record-of-rights, is a question of jurisdiction.*

The omission of the Magistrate in making an order under S. 145, Crim. Pro. Code, to give effect to the presumption arising from the entries in a recently published record-of-rights is not a question going to the jurisdiction of the Magistrate, and the High Court cannot interfere on that ground. *Chintamani Jena v. Jagannath Ramanuja Dass*, 19 C.W.N. 123.

HOLMWOOD and RICHARDSON, JJ.

(100-a) S. 145, *inquiry under—Magistrate, duty of.*

In an enquiry under S. 145, Crim. Pro. Code, it is the duty of the Magistrate to determine who is in actual possession of the property at the time of his preliminary order.

Quære.—Whether proceedings under S. 145 of the Code can be taken where the two parties are in the position of principal and agent? *Vaithianatha Aiyar v. Suppalu Ammal*, 15 Cr. L.J. 708.

AYLING and HANNAY, JJ.

References :—24 A. 443 = A.W.N. (1902) 111 ; 31 C. 48 = 7 C.W.N. 825 (F.B.) = 1 Cr. L.J. 49, R.

(101) S. 145—*Refusal of process against witness—Final order without jurisdiction. Gajjuddi Howladar v. Ainuddi Howladar*, 18 C.W.N. 94 = 15 Cr. L.J. 79 = 22 Ind. Cas. 431. See Final Part, 1913, Col. 70.

(102) S. 145—*Finding as to possession essential—Civil Court's view, whether conclusive.*

The decision of a Civil Court on the question of possession is not conclusive in proceedings under S. 145, Crim. Pro. Code. The Magistrate must arrive at his own finding. *Annasawmy Aiyangar v. Muthukumara Pillai*, 15 Cr. L.J. 663 = 25 Ind. Cas. 991.

SADASIVA IYER, J.

(103) S. 145. See Nos. 33, 35, 95 and 96, *supra*.

(104) S. 145 (1)—*Jurisdiction—Order under S. 145, provision of cl. (1), not complied, effect of.*

Without compliance with the requirements of S. 145 (1) of the Crim. Pro. Code, a Magistrate's order under the section is without jurisdiction and illegal. *Autar Kurmi v. Emperor*, 15 Cr. L.J. 424 = 24 Ind. Cas. 160.

BANERJI, J.

References :—25 A. 587 = A.W.N. (1903) 109 ; 20 Ind. Cas. 751 = 11 A.L.J. 696 = 14 Cr. L.J. 495 = 36 A. 19, R.

(105) S. 145 (4)—*Jurisdiction—Jurisdiction, exercise of, defective—Possession, proof of, absence of.*

Crim. Pro. Code—(Continued).

Where in a proceeding under S. 145 of the Code of Criminal Procedure, instituted in 1918, the Magistrate declared possession in favour of the opposite party as evidenced by certain documents of title relating to a period, 10 years prior to the proceeding, without taking further evidence, oral or documentary, to see whether that possession continued up to the date of the proceeding, the High Court set aside the order of the Magistrate as made without jurisdiction, being contrary to the provisions of cl. (4) of S. 145. **Juthan Singh v. Ramnarayan Singh**, 19 C.L.J. 856=18 O.W.N. 700=15 Cr. L.J. 202=22 Ind. Cas. 986.

HOLMWOOD and SHARFUDDIN, JJ.

- (106) *Ss. 145 and 146—Disputes as to immovable property likely to cause breach of peace—Title, question of, not to be determined—Possession, mere fact of, to be determined—Attachment of property, jurisdiction of Magistrate as to—Evidence to be received and considered.*

The question of title does not arise in proceedings taken under S. 145, Crim. Pro. Code. There the Magistrate has simply to determine with which of the parties possession lies at the time.

Under S. 146, Crim. Pro. Code, a Magistrate has got no jurisdiction to issue any order for attachment of property unless and until he has made the inquiry contemplated by S. 145, Crim. Pro. Code, that is to say, unless he has received and considered the evidence produced before him by the parties. **Inayat Ullah v. Amanat Hussain**, 15 Cr. L.J. 470=24 Ind. Cas. 350.

LINDSAY, J.O.

- (107) *Ss. 145, 146. See PENAL CODE, No. 33, 18 O.W.N. 1245.*

(108) *Ss. 145, 146, 147, 369—Review—Crim. Pro. Code, S. 369, Court's power under.* **Ram Dulare v. Ajudhya Singh**, 16 O.C. 192=21 Ind. Cas. 477=14 Cr. L.J. 605. See Final Part, 1913, Col. 72.

(109) *Ss. 145, 148—Order directing payment of the costs of the other side without specifying the amount—Amount assessed in a separate order—Legality.* **Emperor v. Medapati Ammireddi**, 14 M.L.T. 195=(1913) M.W.N. 771=21 Ind. Cas. 170=14 Cr. L.J. 570. See Final Part, 1913, Col. 78.

- (110) *Ss. 145, 185—Application to cases under S. 145—Offence.*

S. 185 refers only to cases where some offence is being enquired into or tried. It has no application to proceedings under S. 145 of the Code. **Rudra Pratab Sahi v. Dewan Singh**, 12 A.L.J. 890=15 Cr. L.J. 520=24 Ind. Cas. 608.

KNOX, J.

- (111) *Ss. 145, 356—Memorandum of evidence if sufficient in a proceeding under S. 145—Applicability of sub-S. (3), S. 356.*

Crim. Pro. Code—(Continued).

Where, in a proceeding under S. 145, Crim. Pro. Code, the Magistrate only made a memorandum of the evidence purporting to act under sub-S. (3), S. 356:

Held (in setting aside the final order of the Magistrate under S. 145, Crim. Pro. Code)—That the provisions of sub-S. (3), S. 356, are imperative.

That the provisions of sub-S. (3) apply only to cases in which the evidence recorded under the first sub-section is not recorded in the Magistrate's own hand. **Sadananda Mondal v. Krista Mondal**, 19 O.W.N. 124.

SHARFUDDIN and TEUNON, JJ.

- (112) *Ss. 145, 435—Order of the Magistrate, whether final—Revision.*

The High Court has no power to revise an order passed by a Magistrate under S. 145. **Syeda Khatun v. Lal Singh**, 12 A.L.J. 844=36 A. 233=15 Cr. L.J. 572=25 Ind. Cas. 324.

RYVES and PIGGOTT, JJ.

References :—31 A. 150; 26 A. 144, F.

- (113) *Ss. 145, 435, 526, cl. (8)—Proceeding under S. 145, S. 526 if applies to.*

A party to a proceeding under S. 145, Crim. Pro. Code, is not entitled to an adjournment of the case under sub-S. 8 of S. 526, Crim. Pro. Code. **Lakhan Chandra Roy v. Fakub Mondal**, 18 O.W.N. 393=15 Cr. L.J. 369=23 Ind. Cas. 727.

IMAM and CHAPMAN, JJ.

- (114) *Ss. 145, 522—Infructuous order directing restoration of immovable property if bar to proceeding under S. 145.*

An infructuous order under S. 522, Crim. Pro. Code, which was never carried out, is no bar to the jurisdiction of the Magistrate taking proceedings under S. 145, Crim. Pro. Code, in respect of the same property. **Probhat Chandra Chatterjee v. Prasanno Kumar Sen**, 18 O.W.N. 1088=15 Cr. L.J. 700=26 Ind. Cas. 148.

HOLMWOOD and SHARFUDDIN, JJ.

- (115) *S. 146—Both parties found to be in joint possession—Order under S. 146—Legality.*

A Magistrate has no jurisdiction to pass an order under S. 146, Crim. Pro. Code, on his finding that the contending parties are in joint possession of the disputed property. **Mohammad Koolayappa Rowthan v. Sheikh Abdul Khadir Rowthan**, 27 M.L.J. 169=15 Cr. L.J. 572=25 Ind. Cas. 824.

AYLING and SESHAGIRI IYER, JJ.

References :—9 O.W.N. 887; 1 O.L.J. 632; 10 O.W.N. 1038; 11 C.W.N. 512; 17 O.W.N. 205, R.

- (116) *S. 146. See Nos. 96, 106, 107 and 109, supra.*

(117) *Ss. 146 (2), 435 (3)—Jurisdiction—Ultra vires order—Criminal Revision—Power of Chief Court.*

Crim. Pro. Code—(Continued).

A Sub-Divisional Magistrate attached certain lands and appointed a Receiver under S. 146 (2), Crim. Pro. Code, till a competent Civil Court would determine the rights of the parties, but refused to make over the possession to the successful party when the District Court determined the rights of the contesting parties, on the ground that the losing party was going to appeal to the Chief Court :

Held, that the Sub-Divisional Magistrate's order was clearly without jurisdiction, as a Magistrate ceases to have authority to retain the property after a competent Civil Court determines the rights of the parties.

The Chief Court has power to annul such orders in revision under S. 435 (3), Crim. Pro. Code. *Maung Tha Zan v. Maung Ba Gale alias Maung Bu*, 15 Cr.L.J. 500=24 Ind. Cas. 588.

TWOMEY, J.

- (118) S. 147—*Right to enter temple and officiate at Kumbhabhishekam ceremony whether within the section—Magistrate whether should formally record proceeding that there is danger of breach of peace.*

A right to enter the temple and officiate at the Kumbhabhishekam ceremony whenever it is necessary to perform the same falls within the scope of S. 147 (a).

The order of a Magistrate under S. 147 is not bad on the ground that he has not formally recorded a proceeding that there is in his opinion danger of breach of the peace (b). *A. Chidambara Gurukkal v. Sengoda Gownden*, 16 M.L.T. 427=27 M.L.J. 587=15 Cr. L.J. 671=25 Ind. Cas. 999.

KUMARASWAMI SASTRI, J.

References:—(a) 11 M. 323; 29 M. 237, F.; 37 C. 578; 38 C. 387, *Not F.* (b) 2 C.W.N. 670, R.

- (119) S. 147. See No. 108, *supra*.

- (120) Ss. 147, 144, 133, 435, 439—*Obstruction to pathway—Prior order under S. 144—By a second class Magistrate—Commencement of proceedings under S. 147 within a week from date of prior order—Order under S. 147—Competency to pass—Revision—When open to—Actual obstruction—Direction to remove in proceedings under S. 147—Legality—S. 133 no bar—Order of single Judge of High Court to interfere under S. 435, 439—Letters Patent appeal—Interference.*

If a Sub-Divisional Magistrate really thought that, notwithstanding the order under S. 144, Crim. Pro. Code, passed within a week before his taking steps under S. 147, the likelihood of a breach of the peace still existed, it cannot be stated that the Sub-Divisional Magistrate was legally incompetent to take action under S. 147.

The High Court might interfere if it considered that the Sub-Divisional Magistrate's apprehension was quite unreasonable. Even where a person had obstructed a pathway by a fence, a Magistrate has jurisdiction under

Crim. Pro. Code—(Continued).

S. 147, Crim. Pro. Code, to direct such person not to obstruct the pathway.

The fact that S. 133, Crim. Pro. Code, expressly provides for an order by the Magistrate directing the removal of obstruction to pathways, does not necessarily imply that a similar order cannot be passed in proceedings taken under S. 147 (a).

S. 147 can be applied when the right of way claimed is a right to public path and not a private path. The terms of the section are wide enough to cover both cases.

Revision under Ss. 435 and 439, Crim. Pro. Code, is a matter of discretion and it would require a very strong case for a Letters Patent appeal to succeed against the decision of a single Judge of the High Court refusing to interfere in revision. *Karuppanna Koundan v. Kandaswami Koundan*, 15 M.L.T. 230=26 M.L.J. 238=(1914) M.W.N. 394=15 Cr. L.J. 362=23 Ind. Cas. 730.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 4 M. 121 and 1 Weir 143, 144, *Not Fol.*

- (121) S. 148. See No. 109, *supra*.

- (122) Ss. 154, 157—*Meaning of information—Procedure where offence committed beyond local limits—Penal Code, S. 211—False charge.*

Information received under S. 157 of the Crim. Pro. Code undoubtedly refers to information furnished and recorded under S. 154, Crim. Pro. Code. Every enquiry which a police officer makes is not necessarily an investigation under S. 157.

The Crim. Pro. Code is silent as to the correct procedure to be adopted by a station house officer who receives information of the commission of a cognisable offence outside his station limits.

There is nothing in S. 154 to prevent his receiving and recording the information though he has no power under S. 157 to conduct an investigation.

Where the accused sent a telegram in general of the occurrence of a dacoity and later on gave a statement implicating a number of persons in the dacoity, and the police took action on the latter and found the charges false, *held* that the person can be convicted under S. 211, I.P.C., for bringing a false charge. *Nandamuri Anandayya v. Emperor*, (1914) M.W.N. 382=15 Cr. L.J. 622=25 Ind. Cas. 630.

SANKARAN NAIR and AYLING, JJ.

- (123) Ss. 154, 374—*First information, if substantive evidence—Capital sentence—Circumstances to be considered by the High Court in confirming sentence of death—Delay between passing of sentence in the Sessions Court and final orders in the High Court, if sufficient ground for not confirming sentence of death.* *Kutub Singh v. Emperor*, 17 C.W.N. 1213=14 Cr. L.J. 642=21 Ind. Cas. 584. See Final Part, 1913, Col. 45.

Crim. Pro. Code—(Continued).

- (124) Ss. 155, 190 (1) (b)—*Police report submitted in non-cognizable case—Examination of police officer as if he was a complainant—Legality—Magistrate doubting correctness of report—Proper procedure.*

A police report in a non-cognizable case is a police report within the meaning of S. 190 (1) (b), Crim. Pro. Code, and there is no authority in the Code for examining a police officer submitting a police report under S. 190 (1) (b) as if he was a complainant.

It is open to the Magistrate to order an investigation under S. 155, when he receives a police report in a non-cognizable case and has reason for doubting its correctness. **Nga Saw Ke v. King-Emperor**, U.B.R. (1914), 2nd Cr., 19 (Cr.).

W. SHAW, J.C.

Reference :—U.B.R. (1904—1906), I, Crim. Prq., p. 25, R.

- (125) S. 157. See No. 122, *supra*.

(126) Ss. 161, 162—*False information to police officer—Statements made by persons to corroborate the informant during investigation—Evidentiary value. See PENAL CODE, No. 48, 35 P.W.R. 1914 (Cr.).*

- (127) S. 162—*Indian Evidence Act, S. 157—Statements made to police when reduced to writing are not admissible—Police officer can depose to the statements.*

In the course of a police investigation a witness made a statement to the police that she saw a boy near the scene of murder immediately after the offence was committed. She denied the presence of the boy when she was examined before the committing Magistrate. At the trial she admitted that she had seen the boy at the scene of the offence. The statement she had made to the Police officer was sought to be proved by the sworn testimony of the Police officer that she had made it to him. This testimony was objected to on the ground that it offended against S. 162 of the Crim. Pro. Code.

Held, that the Police officer could, under S. 162 of the Crim. Pro. Code, be allowed to depose to what the witness had said to him for the purpose of corroborating what she said before the Sessions Judge.

Per Shah, J.—Looking to the plain language of S. 162 of the Crim. Pro. Code, the *writing* only is excluded from evidence, but the right to prove any *statement* to the police by oral evidence to corroborate the testimony of any witness is not taken away by the section. **Emperor v. Hanmaraddi Ramaraddi**, 16 Bom. L.R. 603=2 Bom. Cr. Cas. 234=15 Cr. L.J. 690=26 Ind. Cas. 138.

HEATON and SHAH, JJ.

- (128) S. 163—*Right of accused to get copies of statements made to Police.*

The accused is not entitled, as of right, to be furnished with any copies of statements made to the Police, and it is only if the Magistrate

***Crim. Pro. Code—(Continued).**

considers it expedient in the interests of justice to grant such copies that the accused can obtain or use such copies. The argument that, unless the Magistrate says that it is *not expedient* in the interests of justice to grant copies to the accused, the accused is entitled to get such copies or use them as evidence, cannot be accepted. *In re Thiruvengada Mudali*, 25 M.L.J. 182=15 Cr. L.J. 289=23 Ind. Cas. 497=(1914) M.W.N. 484.

SADASIVA IYER, J.

References :—33 C. 1029; 36 C. 560, R.

- (129) S. 162—*Dying declaration—Not signed by deponent—Mode of proof. See DYING DECLARATION, No. 1, 10 N.L.R. 19.*

- (130) S. 162. See No. 126, *supra*.

- (131) Ss. 162, 172—*Police diaries, use of, as evidence under Ss. 162 and 172.*

Held, that police diaries are to be used not as evidence but "to aid the Court in an enquiry or a trial." The meaning of this phrase in S. 172, Crim. Pro. Code, is that the Court may see from the police diaries what is the general trend of evidence to be given and what witnesses are important and what not, and whether witnesses produced give evidence as to all the facts which they formerly professed to know.

Held also, that it is contrary to the intention of the Legislature that conclusions should be drawn from statements recorded in police diaries but not recorded in Court. Statements made to police officers should not be used as evidence except at the request of the accused to impeach the credit of the prosecution witnesses. **Aslam v. The King-Emperor**, 1 P.W.R. 1914 (N.W.F.P.) (Cr.).

DOBBS, J.C.

- (132) S. 164—*Confession—Care necessary in recording confessions—Questions as to ill-treatment—Magistrate's satisfaction as to voluntariness of confession—Statements in confession inconsistent with medical evidence.*

Great care and circumspection are necessary in recording a confession under S. 164, Crim. Pro. Code. It is necessary to record the questions put to the accused to ascertain whether the confession was voluntary, to tell him that after his confession he will not have to go back to Police custody, to warn him of the consequence which will ensue if he falsely implicates himself in the hope of release and to ask him whether the Police or any other person has subjected him to any ill-treatment.

No hard and fast rule can or should be laid down as to the procedure which should be adopted when an accused person is placed before a Magistrate for the recording of a confession under S. 164, Crim. Pro. Code, but it is not sufficient to put one comprehensive question as to the nature of the confession or to make a note at the commencement of the record of the confession that the accused has been warned.

Crim. Pro. Code—(Continued).

not to confess through any fear or inducement and that the Police of the *thana* have been removed from the Court room.

A Magistrate ought, by putting questions which occur to him, to make himself conscientiously satisfied that the man is a free agent and the confession is voluntary and has not been procured by threats or inducements.

Where in a murder case this was not done by the Magistrate recording confessions and they were retracted on trial and the statements in the confessions as to the manner in which the murder was committed were inconsistent with medical evidence, the accused were acquitted. *Kandhal v. Emperor*, 15 Cr. L.J. 633 = 25 Ind. Cas. 838.

KANHAIYA LAL and KENDALL, A.J.CS.

(133) Ss. 164, 191 (c), 202—*Magistrate exceeding jurisdiction in recording statements on oath—Deponent occupying the position of an accused—Contradictory statement—Sanction to prosecute for perjury—Legality. Emperor v. Shoukatmal*, 7 S.L.R. 75 = 21 Ind. Cas. 472 = 14 Cr. L.J. 600. See Final Part, 1913, Col. 76.

(134) S. 166. See No. 16, *supra*.

(135) S. 167. See No. 22, *supra*.

(136) S. 172—*Diary not used to refresh memory, whether evidence—Improper admission of such diary, whether sufficient ground for interference.*

A Magistrate should not refer to such an entry in a diary, not used by a prosecution witness to refresh his memory, as corroborative of his evidence, but an error of the kind is not sufficient ground for interference, when the Magistrate has found the accused guilty after considering the other evidence in the case. *In re Kuttialikutti Marakar*, 15 Cr. L. J. 256 = 28 Ind. Cas. 408.

SADASIVA IYER, J.

(137) S. 172. See No. 131, *supra*.

(138) S. 179—Criminal breach of trust—Offence, essentials of—Jurisdiction. See PENAL CODE, No. 128, (1914) M.W.N. 894.

(139) Ss. 179 to 184 and 188—*Jurisdiction—Criminal Courts—Entrustment of jewel in British India—Pledge outside British India—Conversion—Offence committed—Accused committed to Sessions in British India—No certificate under S. 183—Competency of Sessions Court to try.*

The complainant entrusted, at V, in British India, certain jewels to the accused R, a Native Indian subject of His Majesty, for sale on commission. R pledged the jewels at B, in a Native State, and converted the jewels for his own use. It was also part of the arrangement between the complainant and R that R should account for the jewels to the complainant at V or return them or their price at V. The accused was charged with the offence of criminal misappropriation and committed for trial to the Court of Session in British India.

Crim. Pro. Code—(Continued).

Held, that the commitment was not illegal for want of a certificate under S. 188, Crim. Pro. Code.

The loss of the jewels, which was the consequence, occurred at V, in British India, and this is sufficient under S. 179, Crim. Pro. Code, to give jurisdiction to the Magistrate to commit the case to the Sessions. S. 179, Crim. Pro. Code, is not subject to S. 188, Crim. Pro. Code. (*Per Spencer, J.*)

None of the Ss. 179 to 184 is subject to S. 188. (*Per Sadasiva Iyer, J.*) The Assistant Sessions Judge of North Arcot v. Ramaswami Asari, 26 M. L.J. 235 = (1914) M.W.N. 824 = 15 Cr. L.J. 207 = 22 Ind. Cas. 991.

SADASIVA IYER and SPENCER, JJ.

References :— (1910) M.W.N. 143; 13 Cr. L.J. 530, *Diss.*; 19 A. 111; 35 A. 29; 8 Bom. L. R. 513; 1 M. 171; 5 B. 388; 28 A. 372; 13 M. 423; 24 A. 256, R.

(140) S. 180—*Penal Code. S. 411—Theft within British territory—Retention of stolen articles outside British territory—British Courts if have jurisdiction to try accused for such retention of stolen articles.*

The accused was found in possession of stolen articles at a place outside British territory. The theft of the articles took place within British territory. The accused was placed on his trial before the Court in British territory having jurisdiction over the place where the theft took place :

Held—That the British Courts had no jurisdiction to try the accused for an offence under S. 411, I. P. C., committed at a place beyond British territory with regard to the stolen properties. *Moheshwari Preshad Singh v. The King-Emperor*, 18 C.W.N. 1179 = 15 Cr. L.J. 537 = 24 Ind. Cas. 945.

SHARFUDDIN and TEUNON, JJ.

(141) S. 180. See No. 139, *supra*.

(142) S. 181. See No. 139, *supra*.

(143) S. 182. See No. 139, *supra*.

(144) S. 183. See No. 139, *supra*.

(145) S. 184. See No. 139, *supra*.

(146) S. 185.—*High Court if can interfere merely on the ground of convenience. Rajani Bhoode Chuckerbutty v. The All India Banking and Insurance Co., Ltd., Lahore*, 17 C.W. N. 1207 = 22 Ind. Cas. 192 = 15 Cr. L.J. 48 = 41 C. 305. See Final Part, 1913, Col. 78.

(147) S. 185. See No. 110, *supra*.

(148) S. 190. See Nos. 2, 5 and 124, *supra*, and No. 153, *infra*.

(149) S. 190 (1) (a), (b), (c), and S. 4 (h)—*Complaint—Person filing need not have personal knowledge of facts—Difference between cl. (a) and (b) of S. 190 (1) and cl. (c).*

The person making a complaint need not himself be a witness nor have personal knowledge of the facts constituting the offence (a).

Crim. Pro. Code—(Continued).

The real distinction between sub-cl. (c) and sub-cl. (a) and (b) of S. 190 (1) is that, in the two latter cases, an application is made to the Magistrate to take cognizance of the offence either by a complainant or by the Police, while in the former case the Magistrate takes cognizance *suo motu* either on his own knowledge, or suspicion, or on information received from some person who will not take the responsibility of setting the law in motion. In this case the law, partly out of regard for the susceptibilities of the accused and partly to inspire confidence in the administration of justice, allows the accused the right to claim to be tried before another Magistrate. *Imperator v. Shewak Ram*. 7 S.L.R. 77 = 15 Cr. L.J. 369 = 23 Ind. Cas. 737.

PRATT, J.C.

References :—(a) 13 B. 600; 22 B. 112; 14 C. 707, R.

(150) Ss. 190, (c) and 191—*Report by the Cantonment Magistrate to the Assistant Commissioner, Murree.*

Held, that where a Magistrate received information from another Magistrate that A appears to have committed a crime and after some inquiry the former thinks that B has committed it and prosecutes him for the same, he takes cognizance of the case under S. 190 (c) of the Crim. Pro. Code. Consequently the accused is entitled to have the case transferred to another Magistrate. *Makhan Singh v. Gunner Jepson*, 10 P.W.R. 1914 (Cr.) = 65 P.L.R. 1914 = 15 Cr.L.J. 261 = 23 Ind. Cas. 469.

BEADON, J.

(151) S. 191. See Nos. 133 and 150, *supra*.

(152) S. 192—*Case transferred to the Court of a Sub-Divisional Magistrate—Latter's power of transfer.*

When a District Magistrate has referred a case for trial to a Sub-Divisional Magistrate, the latter has no power to transfer it to any other Magistrate subordinate to him and any order to this effect will be *ultra vires*. *Bashir Husain v. Ali Husain*, 12 A.L.J. 225 = 36 A. 166 = 15 Cr.L.J. 406 = 23 Ind. Cas. 1006.

KNOX and TUDBALL, JJ.

(153) Ss. 192, 190—*Transfer of cases—Application of.*

S. 192, Crim. Pro. Code, refers only to cases of which the transferring Magistrate has taken cognizance, i.e., acted under S. 190 of the same Code. It has no reference to cases which have been transferred to that Court. *Darra v. Mukat*, 12 A.L.J. 277 = 15 Cr.L.J. 357 = 23 Ind. Cas. 725.

KNOX, J.

(154) Ss. 192, 200, 503—*Pardanashin lady, complaint by—Examination of complainant—Issue of process—If complainant is pardanashin lady, whether she may be examined by Commission—Complainant, whether witness.*

6 Cr.

Crim. Pro. Code—(Continued).

If a *pardanashin* lady makes a complaint to a Magistrate he is entitled to take cognizance of it. But before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate, if really it is her own complaint.

The words "at once" in S. 200 of the Crim. Pro. Code clearly indicate that ordinarily a complaint must be presented in person. A complaint should never be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint.

Process cannot be issued against an accused person, either by the Magistrate first taking cognizance of an offence, or by the Magistrate to whom the case is transferred under the proviso to S. 200, Crim. Pro. Code unless and until the Magistrate issuing process has first examined the complainant. And this is perhaps more necessary in the case of a *pardanashin* lady than in other cases, to enable the Magistrate to satisfy himself that the complaint is really her own action.

A *pardanashin* complainant may be examined by Commission under S. 503, Crim. Pro. Code. The terms of that section are very wide. They refer not only to an enquiry and a trial, but to any other proceeding. The section authorizes the examination of any witness, and a complainant is certainly a witness. *Abhoyeswari v. Kishori Mohan Banerjee*, 15 Cr. L. J. 348 = 23 Ind. Cas. 700 = 18 C. W. N. 1020.

SHARFUDDIN and COXE, JJ.

(155) S. 195—*Sanction to prosecute—Letters Patent, cl. 10, proceeding under—Attorney proceeded against making affidavit—Alleged false statements—Public Prosecutor applying for sanction—What Bench to give sanction—Discretion to be free and untrammelled—Court to see that no abuse of criminal justice takes place—Attorneys, if can make affidavit in answer to rule against him under Court's disciplinary powers—Liability for false statement in affidavit.*

A proceeding under cl. 10 of the Letters Patent against the opposite party was heard by the present Bench. The application failed, but the Court thought that there were matters in the case which called for further inquiry with a view to possible Criminal Proceedings. The papers were placed before the Public Prosecutor who applied under S. 195 of the Crim. Pro. Code for sanction to prosecute the opposite party for offences alleged to have been committed by him under Ss. 198 and 195 of the Penal Code, in or in relation to the proceeding under cl. 10 of the Letters Patent.

Held, that the Bench was neither prosecuting nor trying an accused, that it was merely considering whether the bar to the cognizance of the alleged offences, should be removed by according the required sanction, and that under S. 195

Crim. Pro. Code—(Continued).

of the Crim. Pro. Code, it was this Bench alone that could give the required sanction.

S. 195 is expressed in the widest terms and vests in the Court an absolute and unqualified discretion. Not one jot or one tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court, nor can this discretion vested by the section in the Court be crystallised or restricted by any series of cases, and it remains free and untrammelled to be fairly exercised according to the exigencies of each case.

An application for sanction is not to be conducted on the same lines as the criminal trial which may be its sequel.

When a Tribunal is invested by an Act or by rules with a discretion, without any indication in the Act or the rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicate the particular groves in which the discretion should run (a).

When exercising discretion, the Court will be astute to see that there should be no abuse of the administration of criminal justice. Therefore, no one should be permitted to use a penal law merely to satisfy his own private ends or personal spite.

An Attorney can make an affidavit by way of answer to a rule issued against him under the Court's disciplinary jurisdiction, and for a false statement in the affidavit, he is criminally liable. **Mr. Hume, Public Prosecutor v. Poresh Chander Ghose**, 15 Cr. L.J. 49=22 Ind. Cas. 321=41 C. 446 (S.B.)

JENKINS, C.J., STEPHEN and CHAUDHURI, JJ.

References:—(a) 29 Ch. D. 50 (58); 54 L.J. Ch. 762; 52 L.T. 395; 33 W.R. 470; (1897) P. 89 at p. 25; 66 L.J. P. 57; 76 L.T. 330; 45 W.R. 583, *Rel.*

(156) S. 195—*Offences under Ss. 193, 471, Penal Code—Committed in proceedings before arbitrator—Sanction to prosecute whether necessary.*

A civil suit was decided between M and C after reference to arbitration. C then lodged a complaint charging M with offences under Ss. 193 and 471, Indian Penal Code, alleged to have been committed in the proceedings before the arbitrator. *Held* that sanction under S. 195, Crim. Pro. Code, was required before a Court could take cognizance of such a complaint. **Mula Mal v. Churanj Lal**, 8 P.R. 1914 (Cr.) =186 P.L.R. 1914=15 Cr.L.J. 358=23 Ind. Cas. 726.

RATTIGAN and CHEVIS, JJ.

References:—17 M.L.J. 420, F.; 6 Cr.L.J. 180, R.

(157) S. 195—*Civ. Pro. Code, 1908. S. 115—Interference when its effect will be to perpetuate wrong order—Dismissal in default.*

Crim. Pro. Code—(Continued).

A Court has no power to dismiss for default and non-payment of process fees, an application made under S. 195 of the Code of Criminal Procedure (a).

Where a Court restores to its file an application so dismissed, the High Court will not interfere, for the order of restoration is the order required to set right what was done without jurisdiction. **Marudappa Gounden v. Bommanna Gounden**, 15 Cr. L.J. 71=22 Ind. Cas. 423.

MILLER, J.

References:—(a) 32 B. 203 (204)=10 Bom. L.R. 95=3 M.L.T. 170=7 Cr. L.J. 120, F.

(158) S. 195—*Forged document—Production in a proceeding—Person not party to such proceeding—Prosecution of such person—No sanction necessary.*

Where a person was not a party to the proceedings in the Court in the case in which an alleged forged document was produced, no sanction for his prosecution is required. **The Sessions Judge of Cuddapah v. Kondeti Obalesu**, 26 M.L.J. 220=23 Ind. Cas. 194=15 Cr. L.J. 212.

SADASIVA IYER, J.

References:—25 M. 671, F.; 15 C.W.N. 565, R.; 6 Ind. Cas. 529, *Not F.*

(159) S. 195—*Oaths Act (X of 1873), S. 13—Omission to record deposition as on solemn oath or affirmation—Presidency Court of Small Causes, enquiry by Registrar, as to proper service of summons, if judicial proceedings—Sanction to prosecute for false personation in service of summons.*

Before the Registrar of the Presidency Court of Small Causes at Calcutta, whose duty is to enquire into the proper service of summons and to take evidence in this behalf, it transpired that the petitioner in this case by false representation had returned the summons as properly served, and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the petitioner under S. 205, Penal Code, which was granted by the said Registrar under S. 195 of the Crim. Pro. Code, and upon a rule being obtained to question the propriety of the sanction.

Held, that the proceedings before the Registrar were judicial proceedings and he was a judicial officer, that the sanction given by him to prosecute was properly given, and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by S. 12 of the Oaths Act. **Balchand v. Tarak Nath Sadhu**, 18 C.W.N. 1828.

CHAUDHURI, J.

References:—14 B.L.R. 294 (F.B.); 16 B. 369, R.

(160) S. 195—*Sanction to prosecute—Police officer or Sub Magistrate no subordinate of Sessions Judge—Essentials to grant sanction for contradictory statements.*

Crim. Pro. Code.—(Continued).

To grant sanction for prosecution under S. 192, I.P.C., neither the Police Officer nor the Sub-Magistrate to whom the reports were sent is a Subordinate of the Sessions Judge within the meaning of S. 195, cl. (7), Crim. Pro. Code. .

To sanction a prosecution for an offence under S. 193, I.P.C., it is necessary that a Court should be empowered to sanction prosecution in respect of each of the statements said to be contradictory of each other. **Reddi Rama Reddi v. Public Prosecutor of Kuraool**, (1914) M.W.N. 798=27 M.L.J. 586=15 Cr. L. J. 612=25 Ind. Cas. 524

AYLING and HANNAY, JJ.

(161) S. 195—Sanction to prosecute—Delay in applying for sanction, effect of—Discretion of Court.

Where an application for sanction to prosecute is made after great delay, the Court may well exercise its discretion in refusing the application. **Ram Bakhsh v. Chhote**, 15 Cr. L.J. 577=25 Ind. Cas. 329.

LINDSAY, J.C.

References :—5 Ind. Cas. 469=7 A.L.J. 50=11 Cr. L.J. 140; 18 A. 303=A.W.N. (1896) 31, B.

(162) S. 195—Sanction to prosecute—Grant of—Absence of application.

The grant of a sanction, under S. 195 of the Crim. Pro. Code, does not presuppose application made to the Court to give the sanction. *In re Sangappa Gadigeppa*, 16 Bom. L. R. 947=2 Bom. Ori. Cases, 265.

HEATON and SHAH, JJ.

(163) S. 195—Insolvency proceeding—Official Assignee—Using forged document in—Sanction of Insolvency Commissioner—Necessity—Adjudication order—Effect—Official Assignee not a Court. **Messrs. W. A. Beardsell & Co. v. Nilgiri Abdul Gunni Saheb**, 11 M.L.T. 391=14 Ind. Cas. 593=13 Cr. L.J. 241=(1912) M. W.N. 536=87 M. 107. See Final Part, 1912, Col. 61.

(164) S. 195—Sanction to prosecute for perjury—Conditional sanction—Legality—Duty of Magistrate. **Re P. Muneyya**, 86 M. 471=22 Ind. Cas. 187=15 Cr. L.J. 43 See Final Part, 1913, Col. 82.

(165) S. 195—Sanction to prosecute—Failure to specify offence—Appellate Court directing subordinate Court to rectify mistake in form of sanction—Jurisdiction. **Chandra Kumar Manna v. Jugal Charan Mondal**, 14 Cr. L.J. 665=21 Ind. Cas. 895. See Final Part, 1913, Col. 83.

(166) S. 195—Sanction to prosecute—Application made after four months—Delay, whether excusable.

An application for sanction to prosecute ought to be made promptly. A delay of four months is too long. **Sagarman v. Emperor**, 15 Cr. L. J. 898=26 Ind. Cas. 146.

TURBALL, J.

Crim. Pro. Code.—(Continued).

(167) S. 195—Order of High Court—Disciplinary jurisdiction—High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of the Letters Patent—Order granting leave to appeal whether may be reviewed at instance of Public Prosecutor. See **LETTERS PATENT (CALCUTTA)**, No. 2, 15 Cr. L.J. 52.

(168) S. 195. See No. 3, *supra* and Nos. 354, 415, 424, *infra*.

(169) Ss. 195 (1)(a), 144—Sanction—Disobedience of the order of a public servant—Application for sanction, if necessary—Police report. **Panchu Mondal v. The King-Emperor**, 17 C. W.N. 976=19 Ind. Cas. 948=14 Cr. L.J. 292=41 C. 14. See Final Part, 1913, Col. 85.

(170) S. 195 (1) (c)—Mamlatdar holding inquiry into record of right—Land Revenue Code (Bom. Act V of 1879), Ss. 189, 197—Mamlatdar—Revenue Court—Sanction.

A Mamlatdar holding an enquiry relating to record of rights, under Chap. XII of the Land Revenue Code (Bombay Act V of 1879), is a Revenue Court within the meaning of S. 195 (1) (c) of the Crim. Pro. Code. **Emperor v. Narayan Ganpaya Haynik**, 16 Bom. L.R. 678=2 Bom. Ori. Cas. 248.

HEATON and SHAH, JJ.

(171) S. 195 (6)—Sanction to prosecute—Sanction in appeal—Further appeal to third Court not allowed.

It is not intended that the question of granting or withholding sanction to prosecute should, after its decision by two Courts, be carried to a third Court. Where a Munsif refused sanction to prosecute and the District Judge before whom the matter was taken up under S. 195 (6), Crim. Pro. Code, granted the sanction, *held*, the High Court should not interfere. **Baran Barai v. Mata Prasad**, 12 A.L. J. 821=36 A. 469=15 Cr. L.J. 616=25 Ind. Cas. 528.

RAFIQ and PIGGOT, JJ.

References :—6 A.L.J.R. 1, F.; 30 M. 382, Not F.

(172) S. 195 (6)—Application presented after a year's delay—Whether can be granted—Existence of special circumstances—Limitation Act not applicable to applications under S. 195 (6).

One year is an unreasonably long time after which to present an application under S. 195 (6), Crim. Pro. Code. When so presented, it should be entertained only under special circumstances. Had it been clear that a serious criminal offence had been committed such as in the opinion of the Court, should not in the public interests, be permitted to go unpunished, the Courts might condone this delay. But, in the present case, the application was disallowed because such special circumstances were not proved. Applications under S. 195 (6) are not governed by the Limitation Act, but they

Crim. Pro. Code—(Continued).

should be made without delay. *Jiwatram Jhamandas v. The Crown*, 8 S.L.R. 49=15 Cr. L.J. 654=25 Ind. Cas. 989.

CROUCH and BOYD, A.J. OS.

References:—5 S.L.R. 265; 27 M. 223; 32 M. 49; 22 A. 244, R.

(172) S. 195 (6)—*Sanction—Application for revocation thereof—Is notice to other party necessary?*

An application for the revocation of a sanction granted by the lower Court should not be disposed of *ex parte* without giving notice to the person obtaining sanction or to the District Magistrate.

The Sessions Judge's *ex parte* order setting aside the sanction was set aside and he was asked to dispose of the application after giving notice to the other party. *Katan v. Nga Tin*, 7 Bur. L.T. 205=15 Cr. L.J. 571=25 Ind. Cas. 823.

SHAW, J.O.

(174) S. 195, cl. (6)—*Sanction granted to prosecute—Extension of time for instituting complaint—Power of the High Court—S. 148, Civ. Pro. Code.*

The High Court has power to extend the time for the institution of a complaint on sanction, even if the six months mentioned in S. 195, cl. (6), have expired. The Secretary of State for India in Council through the Collector of Tinnevely v. Sankarapandian Pillai, (1914) M.W.N. 347=15 Cr. L.J. 359=23 Ind. Cas. 727.

SADASIVA IYER and TYABJI, JJ.

References:—26 M. 190; 26 M. 480, F.; 12 C.L.J. 382, Not F.

(175) S. 195, cls. (b) & (c)—*Court—Income-tax Collector, whether a Court—Sanction to prosecute—Perjury and forgery committed before Income-tax Collector—Penal Code. Ss. 198, 196, 199, 471.*

An Income-tax Collector is a Revenue Court within the meaning of that word as used in cls. (b) and (c) of S. 195 of the Crim. Pro. Code. *In re Punamchand Maneklal*, 16 Bom. L.R. 446=2 Bom. Cr. C. 199=38 B. 642=15 Cr. L.J. 581=25 Ind. Cas. 333 (F.B.).

SCOTT, C.J., BATCHELOR and BEAMAN, JJ.

(176) Ss. 195 (b) and 437—*Sanction to prosecute—Lower Court's order upheld by Sessions Judge—No revision against Sessions Judge's order—Revisional powers of the High Court—How to be exercised—Appeal.*

Nothing in S. 195 of the Code of Criminal Procedure justifies the High Court in reconsidering the order of the Sessions Judge, refusing under cl. 6 of S. 195, to grant sanction to prosecute which was refused by the Magistrate.

The revisional jurisdiction of the High Court under S. 437, Crim. Pro. Code, can always be exercised in order to prevent gross and palpable

Crim. Pro. Code—(Continued).

failure of justice, but it should not be exercised in such a way that a right of appeal may practically be given in cases where such right is definitely excluded by the Code. *Ahsan Ullah Khan v. Mansukh Ram*, 12 A.L.J. 511=36 A. 408=15 Cr. L.J. 598=25 Ind. Cas. 850.

PIGGOTT, J.

(177) Ss. 195 (b), 537 (b)—*Sanction for prosecution—Confirmation by Appellate Court—Six months, time how to be calculated—Sanction by District Magistrate—Appeal to High Court instead of to the Sessions Court—High Court confirming the sanction—Legality.*

In this case the Sessions Court set aside the conviction of the accused on the ground that the complaint was not filed within six months from the grant of sanction in the first instance. The complaint was actually filed within six months of the order of the High Court confirming the sanction for prosecution.

Held, that the confirmation of a sanction by the appellate authority is a fresh 'giving' of sanction within the meaning of sub-S. (b) of S. 195; and as such the six months allowed under the section for filing the complaint must be calculated from the date of the order of the Appellate Court, and not from the date of the grant of sanction in the first instance; so, the Sessions Judge's order acquitting the accused on the ground that the sanction 'given' had expired must be set aside, as there was a sanction 'given' in this case by the High Court within six months before the charge (a).

Held, also that, though the confirmation should have been made by the Sessions Judge as the authority to whom the District Magistrate was Subordinate, and not by the High Court, yet the High Court's decision is final between the parties and its legality cannot be questioned.

The decision in *Chinnakaruppa Goundan v. Muthu Goundan* (b) which seems to be against the express provision of S. 537 (b) requires reconsideration. (Per Sadasiva Iyer, J.) *The Public Prosecutor v. Raver Unithri Marvathar Yittil*, 26 M.L.J. 511=15 M.L.T. 403=15 Cr.L.J. 409=24 Ind. Cas. 145.

WALLIS, SADASIVA IYER and SPENCER, JJ.

References:—(a) 2 Weir 202; 80 M. 382; 22 M.L.J. 419=11 M.L.T. 361=(1912) M.W.N. 499 (F.B.), R. (b) 2 Weir 202, R.

(178) Ss. 195, 476—*Sanction to prosecute—Grant of—Police report—Findings in previous case—No preliminary enquiry—Legality of sanction—Interference by High Court with orders granting sanction—When to be made—Discretion of Subordinate Courts—Not to be interfered with—Interference by way of third appeal—When to be exercised.*

Where a Sub-Magistrate, doubting the truth of the complaint presented by the petitioner

Crim. Pro. Code—(Continued).

which was put in at a late stage and appeared to be intended as a counter-charge to the charge of stabbing which was then pending against the petitioner, referred the complaint to the Police for investigation who, after waiting till the petitioner was convicted on the stabbing charge, referred the complaint as false, and where another Sub-Magistrate, who was the successor in office, thereupon dismissed the complaint under S. 203, Crim. Pro. Code, and granted, without holding a fresh inquiry but after making reference to the order dismissing the complaint, sanction under S. 195, Crim. Pro. Code, to prosecute the petitioner for preferring a false complaint, on the ground that the charge was a mere concoction to meet the charge of stabbing of which he was convicted. *Held* that the Magistrate was right in granting the sanction (a).

S. 195 (b), Crim. Pro. Code, which relates to sanction for certain offences "committed in or in relation to any proceedings in any Court" does not say by which considerations the Court is to be guided, nor does it prescribe as indispensable that the Court should hold a fresh inquiry and take evidence for the complainant before granting sanction, a proceeding which would be quite unnecessary in cases where the Court has a knowledge of the facts in the course of the proceeding in or in relation to which the offence is alleged to have been committed. (Per *Wallis, J.*).

A preliminary inquiry is not essential in all cases where the Court grants sanction under S. 476, Crim. Pro. Code.

Under S. 195, Crim. Pro. Code, in which there is no reference to 'a preliminary inquiry' such an inquiry is unnecessary (b). (Per *Sadasiva Iyer, J.*).

The High Court ought not to interfere with the discretion of the subordinate Courts in the matter of the grant of sanction, unless there is some *prima facie* strong ground for holding that there is, no reasonable probability of having a conviction on the sanction, or that it is otherwise inexpedient to award the sanction on the facts of the particular case, or that the party against whom the sanction was given was probably innocent (c). (Per *Sadasiva Iyer, J.*).

Though, in sanction matters, a party has a right to come up on a sort of third appeal to the High Court, such petitions by way of third appeal should, as a matter of course, be rejected unless the records show not merely a technical illegality or irregularity but that a palpably innocent man is sought to be prosecuted out of private grudge by his enemies. (Per *Sadasiva Iyer, J.*).

When the Crim. Pro. Code says in S. 195, cl. 6, that a sanction given may be revoked by the appellate authority, it cannot be said that it was intended that the higher authority was bound to revoke the sanction whenever some irregularity or, even illegality is shown in the

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proceedings of the lower authority giving sanction. *In re Narayana Nadar*, 26 M.L.J. 486—23 Ind. Cas. 479—15 Cr. L.J. 271.

WALLIS and SADASIVA IYER, JJ.

References :—(a) 10 M. 232 (F.B., Expl. (b) and (c) 84 A. 267; 26 M. 592; 22 M.L.J. 419, R.

(179) Ss. 195, 476—Offence under Ss. 471 and 474, I.P.O., committed in course of proceedings in rent suit—Sanction whether necessary. See PENAL CODE, No. 153, 19 O.W.N. 125.

(180) Ss. 195, 476, 202, 439—*Complaint before District Magistrate—Transfer for inquiry without examining complainant—Irregularity—No application for sanction—Order purporting to be made under S. 195—Irregularity—Proper course—S. 476, Crim. Pro. Code—Prejudice—Right to object by way of appeal—No revision.*

The sending by a District Magistrate of a complaint for inquiry to a Sub-Divisional Magistrate without examining the complainant is an irregularity contrary to the provisions of S. 202, Crim. Pro. Code.

Where the complaint was, on consideration of the proceedings of the Sub-Divisional Magistrate, found to be false by the District Magistrate, it was open to him to proceed thereupon on application under S. 195, Crim. Pro. Code. In the absence of such an application, his order purporting to have been made under S. 195 could not be upheld. The proper course for him would have been to have proceeded under S. 476, Crim. Pro. Code.

Where the applicant did not appeal against the order purporting to have been made under S. 195 and the trial appears to have advanced to a late stage, it may be open to the applicant to raise the question of prejudice by way of appeal in case of conviction, but it cannot be interfered with by way of revision under S. 439, Crim. Pro. Code. *Crown v. Nathu wd. Mahar*, 8 S.L.R. 21=15 Cr. L.J. 662=25 Ind. Cas. 990.

HAYWARD and BOYD, A.J. OS.

(181) Ss. 195, 537—Conviction for offence for which no sanction necessary—Whether can be converted in revision to conviction for offence for which sanction is necessary. See PENAL CODE, No. 47, 15 Cr. L.J. 603.

(182) S. 200. See No. 154, *supra*.

(183) S. 202. See Nos. 133 and 180, *supra*.

(184) Ss. 202, 203, 476—*Order of Magistrate taking cognizance making over case to another Magistrate for disposal after a local enquiry, if legal—Dismissal of complaint—Order for prosecution. Mahomed Imamuddin v. Debendra Nath*, 18 C.W.N. 95=22 Ind. Cas. 422=15 Cr. L.J. 70. See Final Part, 1913, Col. 87.

(185) Ss. 202 and 204—*Strict procedure to be followed by Magistrate—Evidence—Papers in a previous complaint. Baqar v. Banal*, 11 A.L.J. 921=22 Ind. Cas. 165=15 Cr. L.J. 21. See Final Part, 1913, Col. 88.

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- (186) Ss. 202, 522—*Local enquiry by pleader—Dispossession of immovable property—Consideration of new ground at hearing of Rule.*

A Magistrate has no jurisdiction to order a local enquiry by a pleader in the nature of a commission in a civil case.

An order under S. 522, Crim. Pro. Code, is not sustainable where there is no finding that the complainant has been dispossessed of any immovable property.

Case in which the High Court considered a ground other than those on which the Rule was issued. *Mohar Khan v. Gayzuddin Sheikh*, 18 C.W.N. 399 = 15 Cr. L.J. 302 = 28 Ind. Cas. 510.

COXE and MULLICK, JJ.

- (187) S. 203—*Complaint—No finding as to its falsity or unsustainability—Dismissal under S. 203—Illegality—Discretion—Judicial considerations—Basis of order—High Court—Power to interfere—Charter Act, S. 15.* *Gangu Reddy v. C. Samaraspathi Mudali*, 25 M.L.J. 510 = 14 Cr. L.J. 633 = 21 Ind. Cas. 681. See Final Part, 1913, Cpl. 88.

- (188) S. 203. See No. 184, *supra*, and Nos. 226, 324, 325, *infra*.

- (189) S. 204. See No. 185, *supra*.

- (190) Ss. 204, 205—*Power to substitute summons for warrant.* *Crown v. Mussamat Zallikhan*, 7 S.L.R. 40 = 21 Ind. Cas. 476 = 14 Cr. L.J. 604. See Final Part, 1913, Col. 90.

- (191) S. 205—*Women charged with abetment of bigamy—Vague complaint—No allegation of specific acts—Exemption from personal attendance—Right to be allowed.*

Where three women were charged with having abetted a bigamous marriage, and the complaint against them was couched in the vaguest language, and it was not alleged that they committed any specific acts, and where the prosecution witnesses would have no difficulty in describing them in spite of their absence from Court.

Held, that the Magistrate should have exempted them, at any rate until a *prima facie* case is made out against them, from personal attendance under S. 205, Crim. Pro. Code. *The Crown v. Mussamat Bachal*, 7 S.L.R. 161 = 15 Cr. L.J. 589 = 24 Ind. Cas. 947.

PRATT, J.C. and KEMP, A.J.C.

Reference :—3 S.L.R. 167, *Foll*.

- (192) S. 205. See No. 190, *supra*.

- (193) Ss. 205, 529—*Penal Code, S. 826—Purdanashin lady, dispensing with personal attendance in Court—Transfer.* *Raj Rajeshwari Debi v. The King-Emperor*, 17 C.W.N. 1248 = 25 Ind. Cas. 489 = 15 Cr. L.J. 281. See Final Part, 1913, Col. 90.

- (194) S. 206—*Magistrate—Committal of case—Connection with another case, no ground for*

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- committal.* *Emperor v. Acha Shathi*, 15 Bom. L. R. 998 = 2 Bom. Cr. O. 165 = 14 Cr. L.J. 657 = 21 Ind. Cas. 897. See Final Part, 1913, Col. 90.

- (195) Ss. 207, 254—*Magistrate competent to try and adequately punish an offence—Commitment to Sessions—Whether proper—Reasons for committal—Criminal Circular (Sind), r. 25, Ch. VI.*

If a case be one which a Magistrate is both competent to try and can adequately punish, he has no discretion to commit it to the Court of Sessions (a).

S. 254, Crim. Pro. Code, in mandatory terms imposes on the Magistrate the duty of trying any warrant case which he is competent to try and which in his opinion can be adequately punished by him. He is given a discretion to commit to a Court of Sessions only such of those cases which he is competent to try as, in his opinion, ought to be tried by such Court because the offence cannot be adequately punished by him (*vide* Ss. 207 and 254, Crim. Pro. Code). He must comply with the provisions of r. 26, Ch. VI of Criminal Court Circulars and state why the case was not disposed of by himself. *Diwanichand v. The Crown*, 8 S.L.R. 28 = 15 Cr. L.J. 664 = 25 Ind. Cas. 992.

CROUCH, A.J.C.

References :—(a) 24 O. 429 ; 3 Cr. L.J. 94, R.

- (196) Ss. 208, 209, 210, 435, 439—*Case triable exclusively by a Court of Sessions—Duty of committing Magistrate—Order of discharge passed by a Presidency Magistrate—High Court's powers in revision.* *The National Bank of India Ltd. v. G. V. Kothandarama Chetti*, 14 M.L.T. 200 = 21 Ind. Cas. 129 = 14 Cr. L.J. 529 = (1913) M.W.N. 723. See Final Part, 1913, Col. 92.

- (197) S. 208, sub-S. (2)—*Right to reserve cross-examination of prosecution witnesses—Refusal to grant leave to reserve—Revision—Discretion of Magistrate.* *In re Mohamed Kasim*, 14 M.L.T. 532 = 22 Ind. Cas. 173 = 15 Cr. L.J. 29. See Final Part, 1913, Col. 92.

- (198) S. 209. See No. 196, *supra*.

- (199) Ss. 209, 436, 437—*Case exclusively triable by Court of Session—Discharge by Magistrate—Commitment by District Magistrate—Revision—High Court, power of.*

It cannot be said that a Magistrate has no power whatever to pass an order of discharge in a case "exclusively triable by a Court of Session."

Where the entire prosecution evidence is quite unworthy of credit and bristles with improbabilities and where it is clear that the case is foredoomed to failure at the Sessions, it is the duty of the subordinate Magistrate to discharge the accused (a).

Where an order of discharge passed by a Magistrate under S. 209, Crim. Pro. Code, is

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revised by the District Magistrate and a commitment to the Sessions Court is directed, the High Court, acting under S. 487 of the Code of Criminal Procedure, can interfere and can even go into questions of fact to see if the order of the District Magistrate was correct and proper (b). *In re Damappa Palai*, 15 Cr. L.J. 373=23 Ind. Cas. 741.

SADASIVA IYER, J.

References.—(a) 21 Ind. Cas. 129=14 M.L.T. 200=14 Cr. L.J. 529=(1913) M.W.N. 728; 8 Ind. Cas. 681=12 Bom. L.R. 923=35 B. 163=11 Cr.L.J. 692, F. (b) 80 M. 224=16 M.L.J. 529=5 Cr. L.J. 100, F.

(200) S. 210. See No. 196, *supra*.

(201) Ss. 212, 347—Magistrate, power of, to commit to Sessions after summoning and examining defence witnesses.

The discretion given to a Magistrate to commit a case to the Sessions, under S. 347 of the Code of Criminal Procedure, is neither restricted nor taken away merely because he issues summons to the defence witnesses under S. 212 of the Code and examines them. *In re The Sessions Judge, Madura*, 15 Cr. L.J. 704=26 Ind. Cas. 152.

SPENCER, J.

References.—1 Ind. Cas. 469=12 C.W.N. 1014=8 Cr.L.J. 221=36 C. 48, F.; 20 A. 264=A.W.N.(1898) 52; 26 A. 177=1 Cr. L.J. 357, Diss.

(202) S. 213 — Magistrate — Committing a case—Reasons for committal—Registration Act, 1908, S. 83 (2). *Emperor v. Nanji Samal*, 15 Bom. L.R. 999=2 Bom. Cr. O. 166=14 Cr. L.J. 609=21 Ind. Cas. 657=38 B. 114. See Final Part, 1913, Col. 93.

(203) S. 215—No evidence to justify commitment—Accused entitled to acquittal—High Court will not quash such commitment.

When there is no evidence to justify a commitment, it is not open to the High Court to quash it (a).

The accused is entitled to be acquitted even if the case is one for further inquiry (b). *In re The Sessions Judge of Colmbatore*, 27 M.L.J. 593=25 Ind. Cas. 993=15 Cr. L.J. 665.

SANKARAN NAIR and TYABJI, JJ.

References.—(a) 6 A. 98, Not F.; 10 Ind. Cas. 802=12 Cr. L.J. 256=13 Bom. L.R. 201, F. (b) 2 C.L.J. 46=2 Cr. L.J. 383, R.

(204) Ss. 215, 436, Proviso (a)—Commitment without notice to accused—Revision. *Anokha Singh v. The Crown*, 28 P.W.R. 1913 (Cr.)=312 P.L.R. 1913=14 Cr. L.J. 605=21 Ind. Cas. 477. See Final Part, 1913, Col. 93.

(205) Ss. 215, 494, 537—Commitment order—Quashing of.

A commitment order can be quashed only on a point of law under S. 215 of the Code, such as want of territorial jurisdiction in the committing Magistrate. But the commitment

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would be valid unless a failure of justice had been in fact caused by such commitment (S. 537). A commitment order cannot be quashed merely on the ground that the evidence was doubtful. The proper course would be for the District Magistrate in such a case to instruct the Public Prosecutor to withdraw under S. 494, Crim. Pro. Code. *King-Emperor v. Nga Taung Thu*, 7 Bur. L.T. 26=23 Ind. Cas. 478=15 Cr. L.J. 270.

TWOMEY, J.

(206) Ss. 222, sub-S. (2), 233—Penal Code, Ss. 409, 477-A—Charge—Joinder of charges—Criminal misappropriation—Three different defalcations—Falsification of accounts, different.

S. 222 of the Crim. Pro. Code does not cover two sets of offences, any number of which may be tried together.

Sub-S. (2) of the section cannot be applied to S. 477-A of the Penal Code.

S. 233 of the Crim. Pro. Code must be strictly followed, save and except where the law itself provides an exception. A joinder of three charges under S. 409, Penal Code, and three charges under S. 477-A, is not covered by any of the exceptions provided in the subsequent sections of the Code (a).

A series of alterations in accounts made to cover a defalcation might all be charged in one charge under the provisions of S. 477-A. It cannot be said that there are three distinct offences committed by an accused person merely by reason of the fact that he makes more than one false entry to cover one defalcation. But a series of false entries referring to three different defalcations cannot be taken in the same trial, although three defalcations or a whole series of falsified accounts may be tried in one charge.

Therefore a joinder of three charges under S. 409, Penal Code, and three charges under S. 477-A, is bad and fatal to the trial (b).

Where an accused, in making entries which are charged against him, was in reality furthering a fraud that had already been committed, the case falls within the purview of S. 477-A. But it is safer to set out the separate items of falsification in separate charges (c). *Raman Behary Das v. Emperor*, 15 Cr. L.J. 153=22 Ind. Cas. 729=18 C.W.N. 1152=41 C. 722.

HOLMWOOD and SHARFUDDIN, JJ.

References.—(a) 26 C. 560=3 C.W.N. 412; 30 M. 328=5 Cr. L.J. 341=2 M.L.T. 177=17 M.L.J. 171, Rel. (b) 25 M. 61=28 I.A. 257=5 C.W.N. 866=3 Bom. L.R. 540=11 M.L.J. 233=2 Weir 271, F. (c) 35 C. 450=12 C.W.N. 531=7 Cr. L.J. 378, F.

(207) S. 227. See No. 279, *infra*.

(208) S. 233—Two accused tried jointly for one offence—Power of Appellate Court to convict one of them of different offence.

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Where two persons are tried together and convicted of a certain offence, the Appellate Court can acquit one of them of the offence of which he was found guilty by the trial Court and convict him of a different offence found proved against him on the facts. *In re D. Suryanarayana Row*, 15 Cr. L.J. 680=25 Ind. Cas. 1008.

SADASIVA AIYAR, J.

References:—38 P.R. 1905 (Cr.)=115 P.L.R. 1905=2 Cr. L.J. 694, *Not F.*

S. 233. See No. 206, *supra*.

(210) Ss. 233, 234, 535 (1), 537 (a)—*Three separate complaints of offences of the same kind—Framing of a single charge setting out one offence in respect of three complaints—Irregularity if vitates trial. Musai Singh v. The King Emperor*, 18 C.W.N. 183=41 C. 66=42 Ind. Cas. 1008=15 Cr.L.J. 224. See Final Part, 1913, Col. 95.

(211) Ss. 233, 239—*Joint trial—Meaning of "same offence"—S. 239 not applicable where charge against each accused is mutually exclusive. Azim ud-din v. Emperor*, 14 Cr.L.J. 569=21 Ind. Cas. 163=7 L.B.R. 68=6 Bur. L.T. 191. See Final Part, 1913, Col. 96.

(212) Ss. 233, 410—*Misjoinder of charges—Summons case. See ACT V OF 1909 (BENGAL EXCISE)*, No. 1, 19 C.L.J. 53.

(213) S. 234. See No. 210, *supra*.

(214) Ss. 235, 239, Ill. (b)—*Joinder of charges—Trial for more than one offence—Same transaction—Separate offences committed on a different day being part of the same transaction.*

The case for the prosecution was that on a certain day the accused wrongfully confined some persons fined them and realized a portion of the fine, and on their promise to pay the balance three days later, they were released, but on their failure to make the payment on the appointed day, they were again wrongfully confined for realizing the balance of the fine and were beaten and otherwise maltreated. The Deputy Magistrate framed separate charges under S. 347, I.P.C., against the accused for each day's offence; he also framed a separate charge against the accused under S. 352 and S. 352, read with S. 114, I.P.C., as having been committed by the accused persons on the last day. All the charges were tried together.

Held, that the transaction of the last day was in continuation of what took place on the first day and the beating and other maltreatment alleged to have taken place on the last day were the concluding portion of the same transaction and the charges were rightly tried together. *Dy. Supdt. and Remembrance of Legal Affairs, Bengal v. Kallash Chandra Ghosh*, 19 C.W.N. 181.

SHARFUDDIN and TEUNON, JJ.

References:—30 B. 49; 27 B. 185, R.; 33 C. 292; 10 C.W.N. 58, D.

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(215) Ss. 236, 237—*Offence committed. Akram Ali v. Emperor*, 18 C.L.J. 574=15 Cr. L.J. 41=21 Ind. Cas. 185. See Final Part, 1913, Col. 96.

(216) Ss. 236, 237—*Applicability. See PENAL CODE*, Nos. 36 and 37, 18 C.W.N. 1276 and 1274.

(217) S. 237—*Different offences—Different accused—Joint trial—Legality. See PENAL CODE*, No. 115, (1914) M.W.N. 852.

(218) S. 237. See Nos. 215 and 216, *supra*.

(219) S. 238(2)—*Charge—Rioting—Common object not trespass—Conviction of trespass whether legal. See PENAL CODE*, No. 41, 15 Cr.L.J. 188.

(220) S. 239—*Joint trial of principal and abettor—Prejudice—Re-trial by another Judge.*

Where there were three charges under Ss. 408 and 408/109, I.P.C., against two accused persons in respect of three sums said to have been defalcated on three different dates, and the Sessions Judge tried the two accused jointly in spite of objection taken by them:

Held, that, under S. 239, Crim. Pro. Code, judicial discretion was given to the Court to try the principal offender and the abettor either jointly or separately, and the manner in which this discretion should be exercised must depend on the facts of each case.

The High Court, on a consideration of the circumstances of the case, *held* that the accused should not have been tried on the charges jointly, and set aside the convictions and sentences, and directed that the re-trial, if any, should take place before another Sessions Judge. *Dwarka Singh v. King-Emperor*, 19 C.W.N. 121.

SHARFUDDIN and TEUNON, JJ.

(221) S. 239—"Same transaction," meaning of—*Trespass and on ejection assembling men to force entry, whether part of same transaction—Joint trial, whether legal.*

The act of a trespasser in entering into a factory, and, subsequent to his ejection therefrom, his act in assembling men to force an entry into it, are acts unconnected with each other and do not form part of the same transaction, within the meaning of S. 239 of the Crim. Pro. Code, and a joint trial for such offences is illegal. *In re Anantha Padiyara*, 15 Cr.L.J. 695=26 Ind. Cas. 143.

AYLING, J.

References:—6 Ind. Cas. 242=7 M.L.T. 867=11 Cr. L.J. 293=(1910) M.W.N. 541; 29 C. 385=6 C.W.N. 485; 25 M. 61=11 M. L.J. 253=3 Bom. L.R. 540=5 C.W.N. 866=28 I.A. 257 (P.C.)=2 Weir. 271, B.

(222) S. 239 *Offences under Ss. 3 and 4 of the Gambling Act—Joint trial—Legality.*

In this case 19 persons were convicted under the Gambling Act—one under S. 3 for keeping a gambling den and the rest, under S. 4 for

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frequenting it and gambling there. *Held*, that the joint trial of all the 19 persons was illegal and the convictions should be set aside (a).

Persons can only be jointly tried, apart from cases of offenders and their abettors, if they are accused of the same offence or of different offences committed in the same transaction. The keeping of a gaming house and the being present in it at the time of a police raid cannot be said to be part of the 'same transaction.' *Crown v. Fazal Din*, 35 P.R. 1914 (Cr.).

JOHNSTONE, J.

References:—5 P.W.R. 1910 (Cr.); 25 M. 61 (P.C.), R.

(223) S. 239—Joint trial of persons separately accused of offences under the Excise Act—Accused raising no objection to joint trial—Effect—Conviction whether may be set aside. See ACT XII OF 1896 (EXCISE), No. 5, 97 P.L.R. 1914.

(224) S. 239—Offences under Ss. 215, 379, 411, Indian Penal Code—One trial—Whether misjoinder. See PENAL CODE, No. 65, 26 M.L.J. 598.

(225) S. 239. See Nos. 211 and 214, *supra*.

(226) Ss. 239, 537—Illicit possession and transport of opium—Joint trial—Misjoinder of parties—Effect. See ACT I OF 1878 (OPIUM), No. 1, 15 Cr. L.J. 420.

(227) S. 247—Order of acquittal on account of complainant's absence, passed on a date not fixed for hearing of case, effect of.

A case was called on by mistake on a date not fixed for hearing and the Magistrate recorded an order of acquittal under S. 247, Crim. Pro. Code, on account of the absence of the complainant. On the date fixed for hearing the mistake was discovered and the Magistrate ignored the order previously passed by him under S. 247, Crim. Pro. Code, and went on with the case which ended in a conviction:

Held—that an order passed on a date which was not fixed for the hearing of the case and on which date the complainant was necessarily absent is no order at all, and the trying Magistrate had jurisdiction to ignore it and go on with the case and come to the finding which he did. *Achambit Mondal v. Mohatab Singh*, 18 C.W.N. 1180.

SHARFUDDIN and TEUNON, JJ.

References:—2 Weir's Rep. 307, F.; 2 C.L.J. 622, D.

(228) Ss. 247, 203—Complaint by servant on behalf of master—Acquittal under S. 247 on death of such complainant—Complaint of same offence by another servant—Previous acquittal if bar to Magistrate's taking cognizance of second complaint—Penal Code, S. 426—Maiming an animal.

A servant on behalf of his master filed a complaint that an elephant belonging to his master had been maimed by the accused. The

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Magistrate receiving the complaint issued process under S. 426, I.P.C. On the date fixed for the disposal of the case, finding that the complainant was dead, the Magistrate acquitted the accused under S. 247, Crim. Pro. Code. Thereupon another servant (the petitioner) complained to the Sub-Divisional Magistrate of the same offence of maiming his master's elephant, but the Sub-Divisional Magistrate dismissed the complaint under S. 203, Crim. Pro. Code, on the ground that the previous acquittal was a bar to his taking cognizance of it:

Held—that the previous acquittal was wholly without jurisdiction and was no bar to the Magistrate's taking cognizance of the second complaint. *Madho Chowdhury v. Turab Mian*, 18 C.W.N. 1211=15 Cr. L.J. 736=26 Ind. Cas. 174.

HOLMWOOD and SHARFUDDIN, JJ.

(229) Ss. 247, 403, 417, 435, 439—Acquittal of accused under S. 247 procured by his own trick—Whether a revision or appeal lies against the acquittal—Admission of additional evidence in appeals—Powers of Court—Grounds for setting aside order of acquittal—English and Indian Law.

In this case the complainant preferred a complaint of mischief against two individuals. Process was issued against them and the complainant was informed of the date of the hearing in person. On the date fixed for the trial, the Magistrate acquitted the accused under S. 247, Crim. Pro. Code, owing to the complainant not being present in Court when the case was called on. It subsequently transpired that the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge of committing nuisance after he had come to the place where the Magistrate's Court was situated. The District Magistrate referred the case to the High Court under S. 439, for setting aside the order of acquittal and directing a new trial.

Held, that the High Court would be prepared to set aside the order of acquittal in this case and order a new trial if the matter had come before it by way of appeal presented by the Local Government under S. 417; but in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law or on the face of the record, and not to interfere in cases of acquittal in which Government might have appealed under S. 417, but has not done so (a).

Per Spencer, J.—There is nothing in the language of S. 417, Crim. Pro. Code, to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misappreciation of evidence, come to a wrong decision on the evidence before them.

There is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being

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governed by the same rules and being subject to the same limitations (b).

S. 241, Crim. Pro. Code, allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions, although cases in which this power is exercised will naturally be rare.

Per Miller, J.—Quære.—Whether the Legislature intended to permit the High Court in appeal or in revision to set aside an acquittal on the ground that fresh evidence is available which could not be produced at the trial, or on the ground that a complainant has shown sufficient reason for the failure to appear and prosecute his complainant before the lower Court. *In re Sinnu Gowndan*, 26 M.L.J. 160 = (1914) M.W.N. 273 = 15 Cr. L.J. 286 = 23 Ind. Cas. 188.

MILLER and SPENCER, JJ.

References:—(a) 4 B.L.R. 686; 22 C. 998; 7 M. 218; 2 Weir 457; 2 Weir 308; 2 M. 38; 14 M. 363; 25 A. 129; 11 A.W.N. 120; 3 B. 150, R. (b) 17 C. 485; 20 A. 459; (1914) P.R. p. 15; 2 C. 273, R.

(280) S. 247 and Ch. XX—*Summons case, hearing of, when concludes—Non-appearance of complainant on date fixed for argument and consequent acquittal of accused, if proper.*

Where, in a summons case, after the examination of the witnesses for the prosecution and the defence, the Magistrate adjourned the case for argument for the purpose of the documentary and oral evidence being explained to him, and on that adjourned date the complainant did not appear and the accused was acquitted under S. 247, Crim. Pro. Code.

Held that, although the Code of Criminal Procedure makes no provision for argument in a case governed by Ch. XX of the Code, the hearing of the case did not end with the examination of the witnesses for the parties, and S. 247 had application to the circumstances of the case. *Ramjiwan Rai v. Abilakh Barari*, 18 C.W.N. 584 = 15 Cr. L.J. 163 = 22 Ind. Cas. 799.

IMAM and CHAPMAN, JJ.

(231) S. 248—*Complaint by Municipal Secretary—Withdrawal by Municipal Council—Acquittal—Lexality.* See ACT IV OF 1884 (MADRAS DISTRICT MUNICIPALITIES), No. 1, 15 Cr. L.J. 299.

(232) S. 250—*Compensation to accused—Final order if should be contained in order of discharge or acquittal—Proviso, meaning of—Imprisonment in default of payment of fine, when to be ordered.*

Where, in discharging the accused under S. 253, Crim. Pro. Code, the Magistrate in his order of discharge declared the case to be vexatious and directed the complainant under S. 250, Crim. Pro. Code, to pay compensation to the accused subject to any cause being shown by him, and no cause being shown by

Crim. Pro. Code—(Continued).

the complainant, the Magistrate the day after made his previous order absolute and further directed the complainant to suffer simple imprisonment for 30 days in default of payment of the compensation:

Held, that the Magistrate's order directing the payment of compensation was in strict compliance with S. 250, Crim. Pro. Code.

It is sufficient that the Magistrate fixed the compensation in his order of discharge. The proviso to S. 250 clearly contemplates that the direction in the first paragraph of the section shall be considered as in the nature of a rule and that that rule shall not be made absolute until the complainant has shown cause (a).

So far as the sentence of imprisonment in default of payment was concerned, the High Court held that there was obvious error and ordered it to be amended in terms that the compensation shall be recovered as if it were a fine, and in the event of its not being so recovered there shall be simple imprisonment. *Lalit Mohan Singha v. Kunja Bahary Ghose*, 18 C. W.N. 702 = 15 Cr. L.J. 150 = 22 Ind. Cas. 726.

HOLMWOOD and SHARFUDDIN, JJ.

Reference:—(a) 38 C. 302, D.

(233) S. 250—*Compensation for vexatious complaint—Order for compensation passed on date subsequent to that of order of acquittal—When valid—Continuation of same proceedings.*

Where a Magistrate, who acquitted the accused, was of opinion that the cases were frivolous and vexatious, and ordered, on the day when he passed the order of acquittal, notice to issue to the complainant who was absent on that day to show cause on a subsequent date why he should not be directed to pay compensation, and where, on the date fixed by the notice, after recording and considering objections, the Magistrate directed payment of compensation to the accused.

Held, that the final order was not invalid merely because it was not pronounced in the same breath as the order of acquittal, and that it was substantially a continuation of the order of acquittal and part of the same proceeding and valid in law. *Ghanumal Nawalmal v. The Crown*, 7 S.L.R. 128 = 15 Cr. L.J. 504 = 24 Ind. Cas. 592.

HAYWARD and BOYD, A.J. CS.

References:—(a) 25 A. 315; 34 A. 354; 38 C. 302, R.

(234) S. 250—*Compensation, order for payment of, by complainant—Opportunity to show cause.*

The Magistrate after acquitting the accused made the following order—"Accused acquitted, complainant to pay compensation to each of the accused under S. 250, Crim. Pro. Code, and show cause why he should not pay. Complainant is absent. His brother verbally shows cause which is insufficient; order made absolute."

Crim. Pro. Code—(Continued).

Held, that the complainant was in fact given no opportunity of showing cause and the order should be set aside. **Subans Singh v. Mohabir Prashed Singh**, 18 C.W.N. 1277=15 Cr.L.J. 707=26 Ind. Cas. 155.

SHARFUDDIN and TEUNON, JJ.

(235) S. 250. See Nos. 13 and 36, *supra*.

(236) Ss. 250, 268 (g)—*Summary trial—Award of compensation—Failure to record complainant's objections—Effect—Technical mistake—High Court's powers of revision—No presumption of injustice.*

Reading S. 250, Crim. Pro. Code, along with S. 268 (g), it is imperative on a Magistrate to record and consider the objections of the complainant before imposing a fine upon him (a).

Per Hayward, J. C.—Where a Magistrate omitted to record the complainant's objections before fining him, his order ought to be set aside (a).

Per Boyd, A.J.C.—Mere omission to record what the complainant said is only a small irregularity. From such an omission the Court would not infer the further mistake that he omitted to ask the complainant to show cause and to consider the reply given by him.

The High Court ought not to interfere unless some one has been prejudiced, i.e., unless there is some reasonable chance of there having been a failure of justice. An order should not be upset because of a technical mistake of adjective law, if it is a purely technical mistake. There is no presumption that a technical mistake causes injustice. **Minhomal Lillaram v. The Crown**, 8 S.L.R. 35=15 Cr. L. J. 666=25 Ind. Cas. 994.

HAYWARD, J. C. and BOYD, A.J.C.

References:—(a) 2 S.L.R. 4; 2 S.L.R. 14; 25 M. 261; 28 B. 538 (566), R.

(237) Ss. 250, 422—*Criminal Rules of Practice, r. 60—Order setting aside grant of compensation—Omission of notice to District Magistrate, whether ground for interference by High Court.*

In an appeal against an order granting compensation under S. 250, Crim. Pro. Code, the District Magistrate ought to be served with a notice, but an omission to send him a notice and his consequent non-appearance would not justify the High Court's interference in revision with the Appellate Court's order. **Guruswami Naiken v. Tirumurthi Chetti**, 16 M.L.T. 426=25 Ind. Cas. 848=27 M.L.J. 629=15 Cr.L.J. 648.

AYLING and HANNAY, JJ.

References:—29 M. 187=8 Cr. L.J. 452; 1 Ind. Cas. 79=5 M.L.T. 268=9 Cr. L.J. 150=19 M.L.J. 120=33 M. 89, D.

(238) Ss. 250, 537—*Order for payment of compensation—When valid—Failure to follow the provisions of law—Irregularity.*

Crim. Pro. Code—(Continued).

A Magistrate dismissed a complaint as frivolous and vexatious and ordered the complainant to show cause why an order or payment of compensation should not be made against him. Four days later he ordered the complainant to pay compensation to the accused. *Held*, that an order for paying compensation must form part of the order of acquittal or discharge, and where a Magistrate proposes to pass such an order he should give the complainant an opportunity to show cause and hear and record his representations before finally making the order.

In the case in question, it was held that the proceedings were merely irregular as the order of discharge showed that the Magistrate did not conceive himself to have finally disposed of the case. The order of acquittal was only an order permitting the accused to leave the Court. **Ghurbin Koeri v. Khalil Khan**, 12 A.L.J. 143=36 A. 132=15 Cr. L.J. 193=22 Ind. Cas. 977.

RYVES and PIGGOTT, JJ.

References:—25 A.W.N. 214; 8 Bom. L.R. 847, F.; 25 A. 315, Not F.

(239) Ss. 250, 537—*Compensation to accused—Order for payment of—When to be made—Order passed after discharge—Illegality.*

Where the order for payment of compensation to an accused was not made by the order of discharge, but at a later stage when some other accused were discharged, *held* that the order of the Magistrate was without jurisdiction and was not a mere irregularity covered by S. 537, Crim. Pro. Code.

Under the provisions of S. 250, Crim. Pro. Code, the order for compensation must be contained in the order for discharge and cannot be made subsequently. **Nanheyial v. Mt. Ranibahu**, 10 N.L.R. 8=15 Cr. L.J. 290=23 Ind. Cas. 498.

BATTEN, A.J.C.

(240) Ss. 252, 540—*Summoning of witnesses for prosecution—Magistrate to exercise discretion—Witnesses not to be harassed unnecessarily.* **Sitab Singh v. Dalganjan Singh**, 14 Cr. L.J. 682=21 Ind. Cas. 1002=12 A.L.J. 15. See Final Part, 1913, Col. 98.

(241) S. 253. See No. 33, *supra* and No. 287, *infra*.

(242) Ss. 253, 435, 437—*Accused discharged under S. 253—Order by District Magistrate directing further inquiry—No notice to accused—Irregularity.*

Where the accused were discharged under S. 253, Crim. Pro. Code, an order directing further inquiry, passed by a District Magistrate, without giving notice to the accused, is irregular. **Dasara Yenkata Reddi v. Sanjaevi Reddy**, 16 M.L.T. 285=15 Cr. L.J. 619=25 Ind. Cas. 627.

SADASIVA IYER, J.

Reference:—26 M. 418, R.

Crim. Pro. Code—(Continued).

(243) S. 254. See No. 195, *supra* and Nos. 279 and 287, *infra*.

(244) S. 255. See No. 279, *infra*.

(245) S. 256—*Right of accused to cross-examine prosecution witnesses after charge framed—Duty of Magistrates.*

The provisions of S. 256, Crim. Pro. Code, are imperative and it is an illegality to neglect them. The section says that, after the charge has been framed, the accused "shall be required to state whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken." It is not until a specific charge has been drawn up and explained to the accused that he is in a position fully to cross-examine the witnesses for the Crown, and it is for this reason that the Legislature enacted S. 256. The omission to follow S. 256 involves remand and retrial of the case from the point of the drawing up of the charge, and it is therefore of vital importance that the accused should, in all cases, be asked at the appropriate time if he wishes to recall witnesses for cross-examination. *Moola v. Crown*, 11 P.R. 1914 (Cr.).

JOHNSTONE, J.

References :—20 C. 469; 22 A.W.N. 5; 27 C. 870, R.

(246) Ss. 256, 258, 417—*Indian Penal Code, S. 406—Appeal by Local Government against acquittal—Powers and duties of the High Court—Order of acquittal passed after cross-examination of prosecution witnesses subsequent to framing of charge.*

The accused was placed on his trial for having committed criminal breach of trust in respect of some bales of jute. The accused admitted his liability. The trying Magistrate framed a charge under S. 406, I.P.C., and after cross-examination of the witnesses for the prosecution acquitted the accused under S. 258, Crim. Pro. Code, holding that the case was one of civil dispute.

Held (on an appeal by the Local Government under S. 417, Crim. Pro. Code).—That, in an appeal from an acquittal, the High Court could not interfere, unless the judgment of the Court below was wrong and perverse or without jurisdiction and based upon obvious errors in procedure, and there being nothing of the kind in the case, the High Court should uphold the decision of the Magistrate even though wrong, because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter going to the jurisdiction or the regularity of the trial.

That the order of acquittal having been passed subsequent to the framing of the charge and after the cross-examination of the witnesses for the prosecution was not irregular or without jurisdiction. *Deputy Legal Remembrancer of Bengal v. Amulya Dwan*, 18 C.W.N. 666 = 16 Cr. L.J. 180 = 22 Ind. Cas. 786.

HOLLIMWOOD and SHARFUDDIN, JJ.

Crim. Pro. Code—(Continued).

(247) S. 258. See No. 246, *supra*.

(248) Ss. 258, 417, 439—*Acquittal, setting aside of, by High Court in revision, on the application of the complainant.*

Held (by Jenkins, C.J., and Fletcher, J.).—That the High Court has jurisdiction under S. 439, Crim. Pro. Code, to interfere in revision with an acquittal, but it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.

The decisions of the different High Courts consistently support the view that, as a general rule, it is expedient not to interfere in revision at the instance of a private person with an acquittal after trial by the proper tribunal, and that applications for that purpose should be discouraged on public grounds.

Per Teunon, J.—That under S. 417, Crim. Pro. Code, the right to present an appeal against an acquittal is vested in the Local Government, but an alternative remedy against injustice done to injured complainants has been provided in S. 439, Crim. Pro. Code, and the High Court has ample jurisdiction to interfere and remedy the wrong, if wrong has been done. The section is expressed in the widest terms and vests in the Court an absolute and unqualified discretion to which the enactment has set up no bars or limits and which cannot be fettered by judicial decisions. *Faujdar Thakur v. Kasi Chudhuri*, 19 C.W.N. 184.

JENKINS, C.J., TEUNON and FLETCHER, JJ.

(249) Ss. 258, 439—*Order of acquittal set aside by High Court in revision on merits, on the application of the complainant.*

Where the trying Magistrate in his judgment by which he acquitted the accused, while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution, the High Court, on the application of the complainant, set aside the order of acquittal on the merits and directed a re-trial by a new Magistrate. *Shaikh Bagu v. Raika Singh*, 18 C.W.N. 1244 = 16 Cr. L.J. 722 = 26 Ind. Cas. 170.

SHARFUDDIN and TEUNON, JJ.

(250) S. 259—*Order saying that the case was "struck off," legality of—Order of discharge when legal—Sanction of Court, necessity of, in case of fresh complaint.*

Where on obtaining sanction to prosecute on a charge under S. 211, Penal Code, a complaint was filed in Court and on a subsequent date after proceedings had started the complainant was absent and the Magistrate passed an order saying that the case was "struck off," *held*, that there was no warrant for passing such an order under the Code of Criminal Procedure.

Crim. Pro. Code—(Continued).

Held, further, that the order striking off the case was not tantamount to an order of discharge which the Magistrate was competent to make only in such cases as can be lawfully compounded under S. 259, Crim. Pro. Code.

Where the complainant under the above circumstances instituted a fresh complaint and the Court below accepted it, *held*, that a second trial could not be held.

Held also, that in cases where sanction of the Court in which the false complaint was made is required, a fresh sanction would be necessary if a fresh petition is made. **Ramphal v. King-Emperor**, 17 O.C. 18=23 Ind. Cas. 182=15 Cr. L.J. 280.

LINDSAY, J.C.

(251) S. 263—*Summary trial—Conviction—Reasons*. **Jagan Nath v. Emperor**, 14 Cr. L. J. 594=21 Ind. Cas. 466=16 O.C. 357. See Final Part, 1918, Col. 100.

(252) S. 263. See No. 236, *supra*.

(253) Ss. 263, 342—*Warrant case—Examination of accused—Charge of house-breaking with intent to commit theft—Different object proved—Necessary that charge should be altered—Notice to accused*.

In all warrant-cases, there must be an examination of the accused as laid down in S. 342 of the Crim. Pro. Code. S. 263 does not give the Magistrate any discretion whether he will examine the accused or not. The words "if any" in S. 263, cl. (g), do not apply to warrant-cases.

Where a Magistrate finds that the charge of house-breaking with a view to commit theft has broken down, but also finds that there was another object, it is his duty to give the accused notice of that object by drawing up a charge clearly stating what it is that he is accused of doing. **Mahomed Hossein v. Emperor**, 15 Cr. L.J. 190=22 Ind. Cas. 766=18 O.W.N. 1247=41 O. 743.

HOLMWOOD and SHARFUDDIN, JJ.

(254) S. 271. See No. 302, *infra*.

(255) S. 272. See No. 302, *infra*.

(256) S. 282—*Juror discharged—New juror added—Fresh trial*.

One of the jurors was discharged after some of the prosecution witnesses were examined and another juror was added in his place. The Judge did not commence the trial afresh, but called the witnesses who had been examined, read out their statements to them and they admitted those statements. Other witnesses were then examined: *Held* that the trial was defective and it could not be validated by reading over the depositions of witnesses to them and getting their admissions. **King-Emperor v. Narain**, 12 A.L.J. 802=36 A. 491=15 Cr. L.J. 588=24 Ind. Cas. 946.

RAFIQ and PIGGOT, JJ.

Crim. Pro. Code—(Continued).

(257) S. 284—*Assessors to be chosen from those summoned for any particular session—Legality of trial*. **Man Singh v. King-Emperor**, 11 A.L.J. 930=14 Cr. L.J. 654=21 Ind. Cas. 894=35 A. 570. See Final Part, 1918, Col. 100.

(258) S. 292—*Defence, cross-examination of prosecution witnesses by—Letting in evidence during such cross-examination by accused—Prosecutor's right of reply—Absence of—Meaning of 'any' in S. 292—Scope of the section*.

The prosecutor cannot have the right of reply merely because, in the course of cross-examination of the prosecution witnesses, certain documents have been put in on behalf of the defence. The meaning of the word 'any' in S. 292, Crim. Pro. Code, and the scope of the section discussed. **The King-Emperor v. J. S. Berch**, 7 L.B.R. 84=23 Ind. Cas. 193=15 Cr. L.J. 241.

HARTNOLL, J.

References:—4 L.B.R. 5, doubted; 81 C. 1050; 30 B. 421; 11 Bom. L.R. 177; 10 O.W. N. cclxvii, R.

(259) S. 297—*Misdirection—Charge to jury—"Dishonestly."*

When the accused was tried for criminal breach of trust by a District Magistrate with the aid of a jury, and the District Magistrate in summing up did not expressly tell the jury that the test they were to apply was whether the circumstances relied upon by the accused showed an intention of causing 'wrongful gain' or 'wrongful loss' and where they were not told what those terms meant.

Held that there had not been sufficient compliance with S. 297 of the Crim. Pro. Code, and that the verdict could not stand. **C.H. Browne v. King Emperor**, 7 Bur. L.T. 20=23 Ind. Cas. 465=15 Cr. L.J. 257.

PARLETT, J.

(260) Ss. 297, 303, 304, 307—*Sessions trial—Meaning of 'verdict' of jury—Mode of taking verdict—Misdirection to jury—Charge to jury when to be made—Judge when may question jury as to their verdict*. **The Public Prosecutor v. Abdul Hameed**, 36 M. 585=15 Cr. L.J. 197=22 Ind. Cas. 981. See Final Part, 1918, Col. 101.

(260-a) Ss. 302, 303, 307—*Jury—Verdict by majority—Sessions Judge not to put questions under S. 303 after delivery of verdict—No power to direct reconsideration—Proper Court—Submission to High Court under S. 307, Crim. Pro. Code—S. 302, I.P.C.*

Where the jury by a majority returned a verdict of guilty against the accused under the first part of S. 304, I.P.C., a Sessions Judge cannot put questions under S. 303, Crim. Pro. Code, to the jury and ask them under S. 302, Crim. Pro. Code, to re-consider their verdict.

Crim. Pro. Code—(Continued).

If he disagreed with the verdict of majority, he should have proceeded under S. 307, Crim. Pro. Code, and should have submitted the proceedings to the High Court (a).

Under S. 302, Crim. Pro. Code, the Sessions Judge could have asked the jury to retire for re-consideration when he ascertained that they were not unanimous and before the delivery of their verdict, but could not do so after the actual delivery of the verdict. *Kya Nyun v. King-Emperor*, 7 L.B.R. 140=25 Ind. Cas. 1006=15 Cr. L.J. 678.

HARTNOLL, O. C. J. and TWOMEY, J.

Reference :—(a) 10 C. 140, F.

(261) S. 303. See No. 260, *supra*.

(262) S. 304. See No. 260, *supra*.

(263) S. 305. See No. 302, *infra*.

(264) Ss. 306, 439—Quashing of proceedings—Verdict of not guilty on charge of conspiracy in favour of co-accused at previous trial—Effect on accused in supplementary trial on charge under Ss. 34, 307, I.P.C.—Recalling of warrant after acquittal of co-accused—Jurisdiction to issue fresh warrant on same materials—Repugnancy in verdict of jury—Effect—Weight to be attached to opinion of Judge and Jury. See PENAL CODE, No. 10, 18 C.W.N. 580.

(265) S. 307—Unanimous verdict, due to misdirection, of acquittal on charge of rioting, agreed to by Judge—Verdict of guilty of grievous hurt not charged—High Court, power of, on reference, to reconsider charge of rioting—Distinction between civil and criminal trespass—Criminal trespass, essential element in—Cutting across another man's land to save oneself and family from flood, if criminal trespass.

Of five accused persons, the jury unanimously found one guilty under S. 304, I.P.C., and the Judge agreeing with that verdict sentenced him to transportation for life. The other four accused persons were charged under Ss. 148, 304/149, 326/149, I.P.C., there being no charge under S. 326, I.P.C. The jury unanimously acquitted them of the charge of rioting, and the Judge agreed with them but the jury found them guilty under S. 326, I.P.C. The Judge made a reference to the High Court under S. 307, Crim. Pro. Code, on the ground that the verdict under S. 326, I.P.C., was illegal and unwarranted by the evidence and should be altered to one under S. 326 read with S. 149, I.P.C.

Held—That, on the reference, the High Court could not consider the question of rioting in respect of which the Judge and the Jury were agreed; a *fortiori* it could not consider any charge made by implication under S. 149, although the verdict of the jury acquitting the accused of the charge of rioting was based on a misdirection, as the Judge did not explain to the Jury the distinction between civil and criminal trespass before telling them that the complainants had trespassed into the disputed land.

Crim. Pro. Code—(Continued).

That, there being no charge under S. 326, I.P.C., independently, there could be no verdict given upon it, and the verdict of the jury finding the accused guilty under S. 326, I.P.C., was illegal and void and must be set aside (a).

Criminal trespass depends on the intention of the offender and not upon the nature of the act, and when a man's intention is to save his family and property from imminent destruction it cannot be said that because he, with that object in view, commits civil trespass on his neighbour's land and cuts a portion of his neighbour's property (which he ordinarily would not be justified in doing), he is guilty of any criminal offence. *The King-Emperor v. Madan Mandal*, 18 C.W.N. 668=15 Cr. L.J. 155=22 Ind. Cas. 731=41 C. 662.

HOLMWOOD and SHARFUDDIN, JJ.

References :—(a) 16 C.W.N. 1077; 34 C. 698, R.

(266) S. 307—Evidence Act, S. 114—Disagreement between Judge and Jury—Duties of the High Court on reference—Murder—Circumstantial evidence—Possession of deceased's blood-stained ornaments and clothes—Presumption of being murderer—Verdict of Jury, value of, where presumption of law not explained. *The Emperor v. Sheikh Neamatulla*, 17 C.W.N. 1077=14 Cr. L.J. 556=21 Ind. Cas. 156. See Final Part, 1913, Col. 103.

(267) S. 307—Duty of High Court. See PENAL CODE, No. 73, 15 Cr. L.J. 513.

(268) S. 307. See No. 260, *supra*.

(269) S. 307 (c)—Reference, validity of—'Opinion of the jury.' *Emperor v. Tarapada Naskar*, 18 C.L.J. 522=15 Cr. L.J. 31=22 Ind. Cas. 175=18 C.W.N. 615. See Final Part, 1913, Col. 103.

(270) S. 308. See No. 302, *infra*.

(271) S. 337—Formal withdrawal and forfeiture of pardon if necessary before proceeding against approver for original offence.

Under the present Code of Criminal Procedure, no formal withdrawal of a pardon and no formal declaration that a pardon has been forfeited are required before proceeding against a person who accepted a conditional pardon but violated the condition thereof. *The Emperor v. Saber Akunji*, 19 C.W.N. 179.

SHARFUDDIN and TEUNON, JJ.

(272) S. 339 (3)—Trial for murder—Conditional pardon to an accomplice—King's witness—Contradictory statement before Magistrate—Sanction to prosecute. *King Emperor v. Bodha*, 11 A.L.J. 964=22 Ind. Cas. 428=15 Cr. L.J. 76. See Final Part, 1913, Col. 105.

(273) S. 342—Applicability to all sorts of proceedings in Magistrate's Courts—Statement of accused in answer to questions put by Magistrate—Admissibility in evidence against accused—Magistrate's power to put questions to accused—Questions of inquisitional nature not to be put. See EVIDENCE ACT, No. 18, 15 Cr. L.J. 474.

Crim. P. o. Code—(Continued).

(274) S. 342—Examination of accused before completion of prosecution evidences—Legality. See PENAL CODE, No. 23, 15 Cr. L.J. 436.

(275) S. 342. See Nos. 20 and 253, *supra*.

(276) S. 345—Revision, High Court's power in—Offence, compounding of—Penal Code, S. 345—Complainant and accused, willingness to compromise, effect of—Sufficient reason, what does not constitute.

Held, that a High Court in revision may grant permission to compound an offence and allow a case to be compromised (a).

Held further, that where in a case under S. 325, Penal Code, the complainant and the accused were willing to compromise, it was no sufficient reason to refuse composition on the ground that a third party, the master of the complainant, who had received no injury from the accused, had refused or was not willing to agree to the composition. *Lalla v. King-Emperor*, 17 O.C. 92=15 Cr. L. J. 567=24 Ind. Cas. 975.

LINDSAY, J.C.

Reference :—(a) 32 A. 152, F.

(277) S. 345—Compromise effected out of Court by parties, pending hearing of rule issued by High Court, if can be given effect to under S. 345, Crim. Pro. Code.

The petitioner was the complainant in a case and the accused in the counter-case. The petitioner's complaint was dismissed by the Magistrate and in the other case he was convicted under S. 352, I. P. O. He moved the High Court and obtained a rule in each case, in one for the further enquiry into his complaint and in the other for a reduction of the sentence passed on him. Pending the hearing of the rules both cases were compromised by the parties out of Court :

Held—that, at the hearing of the rules, the parties had no *locus standi* to ask the Court to treat the compromise as one coming under S. 345, Crim. Pro. Code. *Adhar Chandra Dey v. Subodh Chandra Ghosh*, 18 O.W.N. 1212=15 Cr. L.J. 728=26 Ind. Cas. 176.

HOLMWOOD and SHARFUDDIN, JJ.

(278) S. 345 -- Compounding of offences—Proof of compounding not necessary.

Where the parties to a compoundable offence compound it under S. 345 of the Crim. Pro. Code, and produce a writing signed by them before the Court, the Court is bound to act upon it, and is not at liberty to call upon the parties to prove that the case has been compounded. *Emperor v. Gana Krishna Walunj*, 16 Bom. L.R. 999=2 Bom. Cr. Cases, 257.

HEATON and SHAH, JJ.

(279) Ss. 345, 227, 254, 255, 357 (1), 403 (1) — Charge of compoundable offence drawn up — Presentation of petition of composition — Duty of Court — Charge whether can be altered.

Crim. Pro. Code—(Continued).

Where a Court has drawn up a charge of an offence compoundable without sanction of Court, and this charge, having been read and explained to the accused, has been pleaded to, the Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in S. 345, Crim. Pro. Code, at once accept the petition and acquit the accused, and has no power to alter the charge already drawn up. *Hasta v. Crown*, 29 P.R. 1914 (Cr.) (F.B.).

KENSINGTON, C.J., JOHNSTONE and RATTIGAN, JJ.

References :—3 O.W.N. 322 ; 3 O.W.N. 548 ; 29 C. 726 (F.B.), R. ; 4 Bom.L.R. 718 ; 11 P.R. 1907 (Cr.), D.

(280) Ss. 345 (2), 439 (5)—Accused charged under S. 325, I.P.C.—Fight in the course of which a person was killed—Compounding of the offence by relations of the deceased—Order of acquittal—Illegality—Re-trial—Report of the District Magistrate—Revision.

Where the relations of the deceased who was killed in the course of a fight about a field with the four accused put in a compromise, which was accepted by the trying Magistrate as a compromise of an offence under S. 325, I.P.C., and the accused were acquitted, the order of acquittal was *held*, on the report of the District Magistrate, to be illegal and a re-trial was ordered.

Held, also, that, on the report of the District Magistrate, the Judicial Commissioner had power to interfere in revision with the order complained against.

The party who could have appealed was not the District Magistrate but the Local Government within the meaning of cl. 5 of S. 439, Crim. Pro. Code. *The Crown v. Ramzan Bachal*, 7 S.L.R. 200=15 Cr. L. J. 553=24 Ind. Cas. 961.

HAYWARD, J.C., and BOYD, A.J.C.

(281) S. 346. See No. 332, *infra*.

(282) S. 347. See No. 201, *supra*.

(283) S. 347 and Ch. XVIII—Penal Code, Ss. 354, 376 and 511—Trial under S. 354, Penal Code — Prosecution and defence witnesses examined and cross-examined — Accused committed to Sessions — Commitment, whether illegal.

The special power to commit to a Sessions Court, conferred on a Magistrate by S. 347 of the Code of Criminal Procedure, cannot be interpreted as depriving the accused of the benefit of the procedure prescribed in Ch. XVIII of that Code ; but where the accused, when tried on a charge under S. 354, Penal Code, denies the charge *in toto* and enjoys the benefit of cross-examining the prosecution witnesses and of examining the witnesses for the defence, it cannot be said that he has been prejudiced, merely because the Magistrate, at the time of delivering his judgment, altered the charge into one under Ss. 376 and 511, Penal Code, and committed

Crim. Pro. Code—(Continued).

him to the Sessions, because he was not himself competent to try the accused on the altered charge.

A committal order passed under such circumstances is not illegal, and should not be set aside. *In re Chianavan*, 15 Cr. L.J. 368 = 28 Ind. Cas. 794.

WALLIS and AYLING, JJ.

References:—17 Ind. Cas. 813 = 5 Bur. L.T. 329 = 19 Cr. L.J. 877 = 6 L.B.R. 129 (F.B.), F.

(284) Ss. 348, 403—*Conviction—Subsequent commitment to Sessions.*

Where a Magistrate has to act under S. 348 of the Code of Criminal Procedure, he ought not to find the accused guilty before commitment, but should merely frame a charge and then commit, as otherwise a conviction would bar a fresh trial before the Sessions Court under S. 403 of the Code of Criminal Procedure. *In re Kora Sellandhi*, 15 Cr. L.J. 188 = 22 Ind. Cas. 764.

MILLER, J.

(285) S. 349—*Sub-Divisional Magistrate—Jurisdiction to deal with a case under the section—Sentence—Passing adequate sentence—Transfer.*

The accused was at first tried by a Second Class Magistrate for offences punishable under Ss. 335 and 452, Penal Code. The trying Magistrate was of opinion that he could not pass an adequate sentence against the accused. He, therefore, sent up the proceedings under S. 349 of the Crim. Pro. Code to the Sub-Divisional Magistrate. The latter transferred the case to a First Class Magistrate, who committed the accused to the Court of Session. A question having arisen if the commitment was illegal.

Held, quashing the commitment, that the jurisdiction to deal with proceedings under S. 349 of the Crim. Pro. Code was conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. *Emperor v. Vinayak Narayan Arts*, 16 Bom. L.R. 598 = 2 Bom. Cr. Cas. 229 = 38 B. 719.

HEATON and SHAH, JJ.

(286) S. 350—*Re-commencement of trial or enquiry—Discharge or acquittal.*

Where a trial is re-commenced under S. 350 of the Crim. Pro. Code, while a charge had been framed by the predecessor-in-office of the Magistrate, the charge is not cancelled and there can only be an acquittal. It is settled law that proceedings before a Magistrate in a warrant case under Chap. XXI of the Crim. Pro. Code are only an enquiry until the charge is framed and, on a charge being framed, become a trial. The Magistrate who re-commenced an enquiry or trial does not thereby modify its nature at the stage at which it has arrived. *Tunguturi Sreeramulu v. Nalam Krishna Row*, (1914) M.W.N. 646.

AYLING and TYABJI, JJ.

Crim. Pro. Code—(Continued).

(287) Ss. 350, 497, 254, 253 (2)—*Enquiry commenced by a Magistrate—Framing of charge under S. 254 by him—Re-commencement under S. 350 of trial by his successor—Discharge under S. 253 (2), of the accused by latter—Order by District Magistrate for further inquiry under S. 497—Illegality—Nature of proceedings under S. 350—Object of S. 350—Inquiry—Trial, meaning of the terms.*

Where the case against certain accused was first begun by a Sub-Divisional Magistrate who went so far as to frame a charge under S. 254, Crim. Pro. Code, to which the accused pleaded not guilty, and the successor-in-office of the Magistrate re-commenced the enquiry under S. 350, Crim. Pro. Code, examined the complainant and then passed an order of discharge under S. 253 (2), and the District Magistrate set aside the order of discharge and ordered a further inquiry under S. 497, Crim. Pro. Code.

Held, that the re-commencement of a 'trial' under S. 350, Crim. Pro. Code, does not imply a cancellation of the charge framed by the first Magistrate, that the charge remains in force and that the subsequent order must be treated as one of acquittal and not of discharge (a).

The only object of the substantive portion of cl. 1 of S. 350 seems to be to leave it to the discretion of the Magistrate to either act on evidence recorded by his predecessor or to hear it over again for himself.

It is settled law that the proceedings before a Magistrate in a warrant case under Chap. XXI, Crim. Pro. Code, are only an 'enquiry' until a charge is framed, and on a charge being framed become a 'trial' (b).

Where the proceedings recommenced under S. 350 are only an enquiry, they are re-commenced as an enquiry. Where they have developed into a trial stage, they are re-commenced as a trial, i.e., a proceeding in which a charge has been framed.

A Magistrate who re-commences an enquiry or trial does not thereby modify its nature or the stage at which it has arrived (c).

Held, also, that the District Magistrate had no power to order further inquiry. *Tunguturi Sreeramulu v. K. Veerasalingam*, 16 M.L.T. 308 = 27 M.L.J. 589 = (1914) M.W.N. 646 = 15 Cr. L.J. 673 = 25 Ind. Cas. 1001.

AYLING and TYABJI, JJ.

References:—(a) (1903) 36 Punj. Rec. (Cr.) 35, Appr. (b) 32 M. 218; 32 M. 200, R. (c) 9 M. 282, R.

(288) Ss. 350, 528—*Transfer of leases from one Court to another—Evidence recorded by the first Court—Action taken on that evidence by second Court—No prejudice to the accused, effect of.*

S. 350 of the Code of Criminal Procedure is not limited to cases in which one Magistrate succeeds another in office, but applies to all

Crim. Pro. Code—(Continued).

cases transferred under S. 598, Crim. Pro. Code, from the file of one Magistrate to that of another. An order of commitment for trial to the Court of Sessions passed by the Magistrate to whose Court the case has been transferred, on the evidence recorded by the Magistrate from whose Court it was so transferred, should not be interfered with, particularly where no possible question of prejudice to the accused person could arise. *King-Emperor v. Nanhua*, 12 A.L.J. 467 = 15 Cr. L.J. 354 = 23 Ind. Cas. 722 = 36 A. 815.

PIGGOT, J.

References:—14 A. 348, D.; (1889) A.W.N. 130, *Not F.*; 35 C. 457; 32 M. 218, *F.*

(289) Ss. 350, 544—*Transfer of Magistrate pending trial—Expenses of prosecution witnesses re-called, whether to be paid by accused.*

Where, on the transfer of the trying Magistrate, the accused claims under S. 350, Crim. Pro. Code, to have the witnesses re-examined by the succeeding Magistrate, the witnesses should be re-summoned without payment of any fees. *Elias v. Ezekiel*, 15 Cr. L.J. 687 = 26 Ind. Cas. 135.

FOX, C.J.

(290) S. 356. See No. 111, *supra*.

(291) S. 360, sub S. (1), S. 476—*Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and prosecution for perjury if can be made thereon—Examination of witnesses in enquiry under S. 476, Crim. Pro. Code—Duty of Magistrate to make a record of statements.*

An order under S. 476, Crim. Pro. Code, was made against the petitioner directing his prosecution under S. 193, I.P.O., with reference to a deposition given by him as a witness at a criminal trial. It appeared that, after the deposition had been recorded, the record was handed over to the petitioner who proceeded to read it over himself. The Magistrate held a preliminary enquiry under S. 476, Crim. Pro. Code, before making the order for prosecution, and examined witnesses in the course of that enquiry, but made no record of their statements:

Held—That the provisions of S. 360, sub-S. (1), Crim. Pro. Code, were not sufficiently complied with, inasmuch as that sub-section requires that the evidence should be read over in the presence, that is, in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it.

That the deposition was inadmissible and the order for prosecution must be set aside.

That the Code of Criminal Procedure does not contain any provision with regard to the manner in which the evidence in an enquiry under S. 476, Crim. Pro. Code, should be recorded; but for future reference the Magistrate should have made a summary of the statements

Crim. Pro. Code—(Continued).

of the witnesses examined. *King-Emperor v. Jogendra Nath Gosh*, 19 C.W.N. 1242 = 15 Cr. L.J. 483 = 24 Ind. Cas. 571.

SHARFUDDIN and TEUNQN, JJ.

(292) Ss. 363, 417—*Demeanour of witnesses noted by Court—Duty of Appellate Court.*

Where a Session Judge of experience stated in the most emphatic terms the demeanour of the eye-witnesses was evasive, that they inspired him with no confidence, and that no man could be convicted on their testimony.

Held, that, before the Court of Appeal could justifiably accept their evidence, it must be assured in the most positive and convincing manner that there was no ground for this criticism. The consideration that the Court of Appeal itself would have arrived at a different conclusion, had it tried the accused person as a Court of original jurisdiction, is immaterial.

Where the evidence is all oral and its credibility is a mere matter of opinion, the opinion of the Court, which heard the witnesses, must be treated as almost conclusive. In such a case, the Court of Appeal should not adopt the view adverse to the accused, and believe the evidence as to his guilt, which the lower Court has disbelieved and take upon itself to set aside the verdict of acquittal. The indications of mistake must be obvious or the evidence too strong to be ejected, before the Court should interfere. *Emperor v. Bishen Singh*, 125 P.L.R. 1914 = 15 Cr. L.J. 203 = 27 P.W.R. 1914 (Cr.) = 22 Ind. Cas. 987.

RATTIGAN and SCOTT SMITH, JJ.

References:—7 P.R. 1904 (Cr.) = 1 Cr. L.J. 781 = 97 P.L.R. 1904, *F.*

(293) S. 364—*Confession recorded by Magistrate—Defective statement how to be cured.* See EVIDENCE ACT, No. 9, 44 P.W.R. 1914 (Cr.).

(294) Ss. 366, 537—*Loss of material records—Loss of judgment—Conviction and sentence—Validity of—Inherent power of Courts to replace lost records.* *Kamakshamma v. Emperor*, 14 M.L.T. 317 = 25 M.L.J. 445 = (1913) M.W.N. 862 = 21 Ind. Cas. 467 = 14 Cr. L.J. 595. See Final Part, 1913, Col. 108.

(295) S. 367—*Judgment inoperative until pronounced.* *Ramdhun Rai v. King-Emperor*, 11 A.L.J. 745 = 21 Ind. Cas. 162 = 14 Cr. L.J. 562. See Final Part, 1913, Col. 108.

(296) S. 367. See No. 279, *supra*, and No. 314, *infra*.

(297) Ss. 367 and 421—*Appeal—Summary dismissal—Judgment.*

A Court is not bound, when dismissing an appeal summarily under S. 421, Crim. Pro. Code, to write a judgment as defined in S. 367 of the Code. It is, however, advisable that it should give reasons for rejecting the appeal, in

Crim. Pro. Code—(Continued).

view of the possibility of its order being challenged by an application for revision. *Kundan v. Emperor*, 19 A.L.J. 850=36 A. 496=15 Cr. L.J. 512=24 Ind. Cas. 600.

PIGGOT, J.

References:—20 B. 540, F.; 21 O. 92; 8 A. 514; 17 A. 241; 19 A. 506, R.

(198) S. 374. See No. 123, *supra*.

(199) Ss. 388, 541—*Meaning of 'jail' and 'prison'—Sentence of imprisonment—Accused whether can suffer imprisonment in police lock-up—S. 3, Prisons Act (1894). King Emperor v. Po. Thiu*, 7 L.B.R. 62=22 Ind. Cas. 154=15 Cr.L.J. 10. See Final Part, 1913, Col. 109.

(200) S. 397. See No. 71, *supra*.

(201) S. 403. See Nos. 229, 279 and 284, *supra*.

(202) Ss. 403, 305, 309, 271, 272—*Autrefois acquit*—"Any other offence with which he might have been charged," meaning and effect of—*Acquittal on charge of murder if bar to trial on charge of culpable homicide where culpable homicide was charged in the previous trial—Acquittal on charge under S. 302/34, I.P.C., if bar to trial on charge under S. 302/114, or 302/109, Penal Code—Discharge of jury under S. 305, Crim. Pro. Code, and trial before a fresh jury under direction of Court if a continuation of the first trial on the original plea—Plea of accused if necessary again in second trial—Pleading not guilty and autrefois acquit at one and the same time, if proper—English law of criminal pleading, bearing of, on Indian Criminal Procedure—Plea of not guilty not a plea recognised by the Indian Code of Criminal Procedure.*

The accused was indicted in the Calcutta Court of Criminal Sessions under five counts which were, firstly, the murder of one N under S. 302/34, I.P.C., secondly, murder of the same man under S. 302/114, I.P.C., thirdly, abetting the murder of the same man under S. 302/109, I.P.C., fourthly, the murder of one A, fifthly, culpable homicide of A. The accused pleaded not guilty to all the charges. The Jury unanimously acquitted the accused of the first and the fourth charges and differed as to the other counts, there being not as many as six who agreed in opinion. The Judge discharged the jury under S. 305, Crim. Pro. Code, and directed a re-trial. On the re-trial of the accused before a fresh jury on the remaining counts of the indictment, the accused pleaded not guilty as also *autrefois acquit* and it was urged in defence (1) that, as the accused had been acquitted of the charge of murder of A, he could not be tried again for committing culpable homicide on him; and (2) that, as he had been acquitted of an offence under S. 302/34, I.P.C., in relation to the murder of N, he could not be convicted of an offence in relation to the same man under S. 302/109 or 302/114, I.P.C.:

Held—that S. 403 protected the accused only against a trial for murder and any other offence

Crim. Pro. Code—(Continued).

for which a different charge from the one made against him "might have been made." But the offence of culpable homicide for which he was tried again was one of the charges actually made against him and on the terms of S. 403, Crim. Pro. Code, the first objection failed. If the accused had been charged with murder alone, a verdict of not guilty would have protected him from another trial for culpable homicide and were he acquitted of culpable homicide he would be protected from a trial for any offence involving hurt; but where a charge was made, the case fell outside the provisions of the law dealing with cases where it might have been made.

That, for the purposes of S. 403, the accused was not being tried again but was being tried on the original indictment, and on his first plea of not guilty. S. 308, Crim. Pro. Code, did not affect the construction of S. 403.

That S. 403 should not be construed with reference to the English law relating to criminal pleading. Ss. 271 and 272, Crim. Pro. Code, contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature.

That the plea of 'Not guilty' was one not recognised by the Code of Criminal Procedure, and it was not open to the accused to make any answer to an indictment except guilty or a claim to be tried.

S. 403 has nothing to do with pleading, but is in terms of a limitation on the jurisdiction of the Court. A defence under that section may be set up at any time before verdict in any form.

That even assuming the case to be governed by the English law of pleading, *autrefois acquit* was not properly pleaded.

That the accused had already pleaded 'Not guilty' in the first trial and that plea was still awaiting adjudication and the second plea was therefore unnecessary and of no effect.

That, even if the principles of English law were to be applied to the present case, the acquittal for murder was no bar to the re-trial for culpable homicide.

Where another person actually killed the deceased, the accused who was stated to have accompanied him and attempted to kill him could not be charged with murder under S. 34 of the Penal Code.

S. 34, Penal Code, is to be read according to the meaning of its terms, without reference to any doctrines derived from the English Common Law.

The construction put on the section in *R. v. Mahabit Tiwari and Gourdas Nomasudra v. The Emperor* (a) (which is summarised in para 243 of Mayne's Criminal Law) is wider than the terms of the section justify.

The finding of 'Not guilty' by the jury on the charge under S. 302/34, I.P.C., under the

Crim. Pro. Code—(Continued).

direction of the Judge for an acquittal on legal grounds did not decide any question of fact and could not be taken as negating the common intention of the accused and the man who in fact killed N.

That there is no reason for saying that a man must be absent in order to abet under S. 109, I.P.C.

That, by instigating the unknown murderer by accompanying him to the place and by aiding him in his flight afterwards, the accused would be abetting the murder under S. 109, I.P.C., even if he was not present at the murder; his presence there would make him liable for the murder under S. 114.

The effect of S. 109 and S. 114 of the Penal Code is to supersede all the English law relating to principals of the first and second degrees and accessories before the act. **Emperor v. Nirmal Kanta Roy**, 18 C.W.N. 723=15 Cr. L.J. 460=24 Ind. Cas. 840=41 C. 1072.

STEPHEN, J.

References:—(a) 21 A. 263; 13 C.W.N. 680, R.

(803) Ss. 403, 423 (b), 439 (4)—*Appeal against conviction—Acquittal—Re-trial—High Court's power to alter the finding and enhance sentence—Revision—Applicability of S. 439 (4)—Construction of statute.*

A High Court, when hearing an appeal against a conviction, may, as a Court of Appeal, under S. 423, cl. (b), Crim. Pro. Code, alter the finding, and then as a Court of Revision under S. 439, Crim. Pro. Code, enhance the sentence so as to make it appropriate to the altered finding.

In such cases the prohibition of re-trial contained in S. 403, does not apply, as an appeal to a High Court is not a second trial but a continuation of the trial in the Sessions Court and throws open the whole case to the interference of the High Court (a).

Sub-S. (4) of S. 439, refers to a case where the trial has ended in a complete acquittal, not to a case where the trial has ended in a conviction but the Court has wrongly applied the law or has wrongly found some fact not proved, and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable. The sub-section cannot be held to limit the powers of a Court of Appeal. It only limits the powers of a High Court when acting, not as a Court of Appeal, but as a Court of Revision.

The terms of a statute should not be so construed as to involve an inconsistency between its different parts. **Kambam Ball Reddy v. Emperor**, 37 M. 119=22 Ind. Cas. 756=15 Cr. L.J. 180.

BENSON and SUNDARA IYER, JJ.

References:—(a) 7 Ind. Cas. 861; 34 M. 545; 8 M.L.T. 313; 11 Cr. L.J. 538; 10 Ind. Cas. 872; 21 M.L.J. 805; 10 M.L.T. 66; (1911) 2 M.W.N. 106; 35 M. 243; 12 Cr. L.J.

Pro. Code—(Continued).

23 C. 975; 22 C. 377; 9 A. 144; R.; Crim. No. 600; Crim.E.C. No. 400 of 1903 and Appl. No. 143 (unreported), Rel.

4) Ss. 403, 413—*Several persons convicted at one trial—Different sentences—Right of appeal.*

413, Crim. Pro. Code, prohibits an appeal at a sentence of less than one month's sentence or a fine of less than Rs. 50 by a District Magistrate or a Court of Session, and the mere fact that such sentences passed on some of the accused while the sentences were passed on the rest would give to the former a right of appeal only as there is one consolidated appeal by all convicted persons. **Uruma Mudali, in re**, 15 J. 371=23 Ind. Cas. 739=16 M.L.T. 83.

VALLIS and SADASIVA IYER, JJ.

5) S. 410. See No. 212, *supra*.

3) S. 413. See No. 304, *supra*.

1) S. 421. See No. 297, *supra*.

3) S. 422—*Criminal appeal—Restrictive for admission, whether valid—Oaths Act 1873, S. 13—Evidence Act, S. 118—of tender years—Capacity to understand—of capacity by preliminary examination—Jury, function of.* **Nafar Sheikh v. Emperor**, 14 Cr. L.J. 485=20 Ind. Cas. 741=15 Cr. L.J. 582=18 C.W.N. 147=41 C. 406. See Part, 1913, Col. 113.

3) S. 422. See No. 237, *supra*.

3) S. 423—*Enhancement of sentence—sentence altered.*

A subordinate Magistrate sentenced an accused to one month's rigorous imprisonment and a fine of Rs. 5, and in case of default in payment of fine, to one week's further imprisonment.

The District Magistrate on appeal by the accused varied the sentence to one of 8 days' imprisonment and a fine of Rs. 100 and in default of payment of fine to a further imprisonment of one month. Held there was no enhancement of sentence and the order of the District Magistrate was quite legal. **Behar Singh v. King Emperor**, 12 A.L.J. 827=36 A. 15 Cr. L.J. 519=24 Ind. Cas. 807.

HOGGOT, J.

References:—23 B. 439; 30 M. 103, Doubled; 175, *Appr*.

1) Ss. 423, 438—*Reference to High Court.* When an Appellate Court does not dismiss an appeal summarily, it must dispose of it in the manner provided by S. 423, Crim. Pro. Code. It has no power to refer to the High Court for an opinion on a question of law arising in an appeal. **Emperor v. Sulaiman**, 7 L.B.R. 251=25 Ind. Cas. 195=15 Cr. L.J. 667.

WOMEY, J.

1) Ss. 423, cl. (d), 517, 520—*High Courts, power of interference with order for restoration of property by Court below—Acquittal of accused—Restoration of property to accused.*

Crim. Pro. Code—(Continued).

The High Court has jurisdiction, under S. 520 of the Crim. Pro. Code, to interfere with, or, under S. 428, cl. (d) to amend an order made by a lower Court under S. 517.

Certain properties were found in the house of the accused, which the complainant alleged had been stolen from his house. The accused was convicted and his conviction upheld on appeal. An order was passed by the first Court to the effect that the properties, which were then in the custody of the Court, should be made over to the complainant. The High Court in revision acquitted the accused who moved the High Court for the restoration of the properties to him:

Held, that, as the accused has been acquitted of the offence of theft, the proper order is to direct that the property found in the possession of the accused should be restored to him. **Hagu Biswas v. Manmatha Nath Mitra**, 15 Cr. L.J. 184=22 Ind. Cas. 760=18 C.W.N. 959.

SHARFUDDIN and CHAPMAN, JJ.

(313) S. 424—*Appellate Court whether entitled to alter conviction for principal offence into one of abetment—Abettor present at commission of offence, whether can be convicted of principal offence.*

An Appellate Court cannot alter a conviction of an accused into one of abetment.

If an accused who abetted an offence was present at the commission of it, he is rightly convicted of the principal offence. *In re Perumal Naidu*, 15 Cr.L.J. 694=26 Ind. Cas. 142.

SADASIVA AIYAR, J.

(314) Ss. 424, 367—*Appellate Court—Judgment of—What it should contain.* **Nga Po Han v. King-Emperor**, U.B.R. (1913) 2nd Qr., 169=21 Ind. Cas. 170=14 Cr.L.J. 570. See Final Part, 1913, Col. 114.

(315) S. 428—*Remand by Appellate Court for additional evidence and finding—Illegal.*

S. 428 of the Crim. Pro. Code does not empower an appellate Magistrate to call for a fresh finding from a Subordinate Magistrate. The Appellate Magistrate is not competent to act upon the finding by the Sub-Magistrate on the additional evidence. **Muthukarappan Surval v. Yellayya Kudumban**, (1914) M.W.N. 778.

SADASIVA AIYER, J.

(316) S. 435—See Nos. 13, 112, 113, 117, 120, 196, 229 and 242, *supra* and No. 855, *infra*.

(317) Ss. 435, 121—*Order declaring bond taken under Ss. 20, 21—Sind Frontier Regulation, forfeited—Revision.* See REGULATION III OF 1892 (SIND FRONTIER), No. 1, 7 S.L.R. 194.

(318) Ss. 435, 438—*Revision—Further evidence not to be taken under S. 438*

A District Magistrate, while exercising his revisional powers, has no power to take evidence under S. 438 of the Code. **Mahagnia v.**

Crim. Pro. Code—(Continued).

Ram Charan, 12 A.L.J. 461=15 Cr.L.J. 575=25 Ind. Cas. 327.

CHAMIER, J.

(319) Ss. 435, 476—*Income-Tax Act (II of 1886), S. 86—Collector deciding objections to assessment of income-tax as Revenue Court—Prosecution ordered for false statement in declaration.*

S. 435, Crim. Pro. Code, applies to proceedings before inferior Criminal Courts, and an order of a Collector under S. 86 of the Income-Tax Act, arising out of a proceeding pending before another officer, does not fall within the purview of that section (a).

A Collector deciding an objection to the assessment of income-tax may possibly be regarded as a Revenue Court (b). **Pandit Ganga Sahai v. Emperor**, 15 Cr.L.J. 2=22 Ind. Cas. 146.

KANHAIYA LAL, A.J.C.

References:—(a) 3 Ind. Cas. 886=10 Cr.L.J. 395=3 S.L.R. 66, F. (b) 44 P.R. 1905 (Cr.)=187 P.L.R. 1905=3 Cr. L.J. 128, R.

(320) S. 436—*Power to order commitment—District Magistrate—Offences under Ss. 408 and 477-A, I.P.C.*

A Magistrate of the First Class in an inquiry into offences of criminal breach of trust and falsification of accounts punishable under Ss. 408 and 477-A, Penal Code, declined to commit the accused to the Court of Session and discharged him. The District Magistrate, acting in revision, reversed the order of discharge and committed the accused to the Court of Session on charges under Ss. 408 and 477-A, Penal Code. The accused applied to the High Court contending that the order of committal was bad, as the case against him was primarily under S. 408 which was not triable exclusively by a Court of Session:

Held, (1) that the District Magistrate had the jurisdiction to make the order he did under S. 436 of the Crim. Pro. Code, because the falsification of accounts was not only a substantial part of the affair, but was so substantial and so necessary that the misappropriation could not have been effected in the way it was done without the falsification.

(2) That it was competent to the District Magistrate to add to a charge under S. 477-A the charge under S. 408, Penal Code. **Emperor v. Gendial Chimanbhat**, 16 Bom. L.R. 80=2 Bom. Cr. Cas. 179=15 Cr.L.J. 292=23 Ind. Cas. 500.

HEATON and SHAH, JJ.

(321) S. 436. See Nos. 199 and 204, *supra*.

(322) S. 437. See Nos. 68, 176, 199, 242 and 287, *supra*.

(323) Ss. 437, 110, 112, 119—*Application to proceedings under Ch. VIII—"Release" and "Discharge"—Power of the District Magistrate to direct further enquiry when accused released.*

Crim. Pro. Code—(Continued).

The accused was called upon to show cause why he should not give security for good behaviour. A Magistrate enquired into the matter and after recording the evidence released him. The District Magistrate examined the record and directed further enquiry under S. 437, Crim. Pro. Code. Another Magistrate then heard the case and after recording evidence, *held* that there was no necessity to bind over the man to be of good behaviour and released him. The District Magistrate without issuing notice to the accused again sent for the record and directed further enquiry under S. 437, Crim. Pro. Code. At the second of the two enquiries the Magistrate drew up a fresh formal order under S. 112 of the Code. *Held*, that S. 437, Crim. Pro. Code (which empowers the District Magistrate to direct further enquiry to be made into the case of an accused person who has been discharged) is wide enough to cover the case of a person who has been called upon to show cause, under S. 110, Crim. Pro. Code, why he should not give security for good behaviour, and in whose case an order of release or discharge (both of which are really to the same effect) has been passed under S. 119, Crim. Pro. Code.

Held, further that, although a District Magistrate can at any time and for good and sufficient reason institute fresh proceedings under Ch. VIII of the Code, there is no bar to the District Magistrate examining the record of any proceedings, under that chapter, had by a Subordinate Magistrate and ordering further enquiry to be made.

Held, further that, after the discharge of the accused by two Magistrates, an order directing further enquiry should not have been passed without giving him an opportunity of showing cause why such order should not be passed. *Kharg v. King-Emperor*, 12 A.L.J. 167 = 15 Cr. L.J. 39 = 22 Ind. Cas. 183 = 36 A. 147.

TUDBALL and PIGGOT, JJ.

References:—20 A.W.N. 206; 6 O.C. 262; 42 P.R. 1905 (Cr.); 33 M. 85; 27 C. 662; 33 C. 8; 36 C. 163; 24 A. 148; 21 A. 107; 19 A.W.N. 203, R.

(324) Ss. 437, 203—*Accused once tried and discharged — Fresh enquiry on the same charge on a second complaint—Magistrate's jurisdiction.*

A Magistrate who has tried and discharged the accused on a particular charge has jurisdiction to again enquire into the same charge on a second complaint. *Williams Cecil Keymer v. Emperor*, 12 A.L.J. 1 = 15 Cr. L.J. 1 = 22 Ind. Cas. 145 = 36 A. 53.

BANERJI and RYVES, JJ.

Reference:—A.W.N. (1895), 86.

(325) Ss. 437, 203—*Procedure—Complaint dismissed once—Subsequent complaint by another complainant on the same facts—Tribunal, the same—Incumbent, a different individual—Enquiry ordered by the High Court.*

Crim. Pro. Code—(Continued).

A particular Sub-Divisional Magistrate dismissed a complaint under S. 203, Crim. Pro. Code. A subsequent complaint arising out of the same matter was made before him and he ordered the papers of the first case to be put up with the present complaint on a particular date. The officer was in the meantime transferred and his successor took up the case and ordered process to issue.

Held, that the successor-in-office of a particular Magistrate, although a different individual, constituted the same tribunal as his predecessor-in-office, and had jurisdiction to entertain a second complaint in the same matter, although the first one had been dismissed by the latter.

In this case enquiry was ordered by High Court. *Ram Bharos v. Baban*, 12 A.L.J. 106 = 36 A. 129 = 15 Cr.L.J. 168 = 22 Ind. Cas. 734.

RYVES, J.

References:—22 A. 106; 25 A.W.N. 86, R.

(326) Ss. 437, 476—*Jurisdiction—Sessions Judge — Further inquiry — Discharge of accused by Magistrate and direction of complainant's prosecution—Sessions Judge to refer matter to High Court.*

A Sessions Judge has no jurisdiction to direct further inquiry in a case in which the Magistrate had not only discharged the accused but, under S. 476 of the Crim. Pro. Code, had directed the complainant's prosecution under S. 211, Penal Code. The Sessions Judge ought to have referred the case to the High Court. *Arjun Naik v. Bira Bhoi*, 15 Cr. L. J. 16 = 22 Ind. Cas. 169.

IMAM and CHAPMAN, JJ.

Reference:—22 Ind. Cas. 145 = 15 Cr.L.J. 1, F.

(327) Ss. 437, 476—*Further inquiry—Prosecution of complainant for subsisting offence—Notice.*

An order for further inquiry is bad during the continuance of an order made under S. 476, Crim. Pro. Code, for prosecution of the complainant for an offence under S. 211, I.P.C.

An order for further inquiry ought not to be made without notice to the accused. *Kanhu Naik v. Natabar Shaha*, 15 Cr.L.J. 1 = 22 Ind. Cas. 145.

HABINGTON and BRETT, JJ.

(328) Ss. 437, 517—*Discharge—Proper order to be passed—Stolen property—Its disposal—Confession in presence of the Police—Evidence Act, S. 25. Chanan v. The Crown*, 37 P.W.R. 1913 (Cr.) = 320 P.L.R. 1913 = 21 Ind. Cas. 468 = 14 Cr.L.J. 596. See Final Part, 1913, Col. 116.

(329) S. 438—*Sentence passed by Court of Sessions—District Magistrate's power to refer.*

Semle.—A District Magistrate is not entitled to refer a case to the High Court with a view to getting a sentence passed by a Court of Sessions

Crim. Pro. Code—(Continued).

enhanced. It is extremely inconvenient that the District Magistrate should criticise an order passed by a Court superior to him, and the High Court should not interfere, except for special reasons, with the sentence passed by a Court of Sessions, on a reference made to it by the District Magistrate. *King-Emperor v. Ganga*, 12 A.L.J. 519=15 Cr.L.J. 407=23 Ind. Cas. 1007=36 A. 378.

CHAMBER, J.

(330) S. 438—*Reference by District Magistrate on point of law in pending case, whether valid.*

A District Magistrate is not competent to refer to a High Court, under S. 438 of the Code of Criminal Procedure, a point of law actually arising in a case pending before him. *In re Palani Gownden*, 15 Cr. L.J. 472=24 Ind. Cas. 352.

SADASIVA AIYAR, J.

(331) S. 438. See Nos. 65, 311 and 318, *supra*.

(332) Ss. 438, 346—*Conviction for a minor offence—Facts disclosing a more serious offence which the original Court was not competent to try—Accused not prejudiced nor sentence inadequate—Whether convictions should be quashed.* *Mohideen Batcha Sahib, In re*, 25 M.L.J. 484=14 Cr. L.J. 640=21 Ind. Cas. 688=27 M.L. J. 594. See Final Part, 1913, Col. 116.

Ss. 438 and 439 (5)—*Order of acquittal—Reference by District Magistrate—Right of appeal against acquittal—Revision—Practice of the High Court.*

It is against the practice of the High Court to interfere in revision with orders of acquittal where reference has been made by the District Magistrate. Right of appeal against orders of acquittal is vested in the Local Government and not in the District Magistrate. It is only open to him to move the Local Government to file an appeal. *King-Emperor v. Gur Dayal*, 12 A.L.J. 255=15 Cr. L. J. 304=23 Ind. Cas. 512.

PIGGOT, J.

References:—24 A. 346; 25 A. 128, R.

(334) S. 439—*Revision of sentence on consideration of fresh facts—Penal Code, S. 147—Rioting over disputed possession of chur—Finding of Settlement Officer pronounced after issue of Rule considered by High Court in revising sentence.*

In a case of rioting arising out of a dispute relating to the possession of a chur between the zemindar and the talukdar in which both the lower Courts found in favour of the complainant on the question of possession, but the Assistant Settlement Officer, after the judgment of the Sessions Judge in appeal was pronounced and after a Rule was issued by the High Court, found in connection with the preparation of record of rights that the culturable area in the chur was in the possession of the zemindar

Crim. Pro. Code—(Continued).

whose men the petitioners were, the High Court for the purpose of revising the sentence, considered the judgment of the Assistant Settlement Officer and reduced the sentence. *Araj Sarkar v. Emperor*, 13 C.W.N. 646=15 Cr. L.J. 478=24 Ind. Cas. 561.

IMAM and CHAPMAN, JJ.

(335) S. 439—*Revision—Concurrent finding of two Courts—Evidence not convincing—Criminating statement before a constable—Criminal misappropriation—Penal Code, S. 403.*

Held, that, when complainant is an enemy of the accused and other circumstances of the case make the case against him doubtful, he is entitled to be acquitted even in revision. *Rattu Ram v. The Crown*, 28 P.W.R. 1914 (Cr.)=168 P.L.R. 1914=15 Cr. L.J. 591=25 Ind. Cas. 343.

SHADI LAL, J.

(336) S. 439—*Misappreciation of evidence—Revision.*

Miller and Ayling, JJ.—In revision, it is in the discretion of a High Court to exercise its power of going into the question of appreciation of evidence (a).

Sankaran Nair, J. (dissenting).—Where there has been misappreciation of evidence, and a convicted person claims to be heard to shew that the lower Courts have misappreciated that evidence, and that he has been unjustly convicted, it is not open to a Judge to say that it is within his discretion to permit or refuse him to do so or not.

No doubt, the sections only say that the High Court may interfere in revision, but "may" is the only word that could be used. *In re Village Munsif Ramaswami Goundan*, 15 Cr. L.J. 285=23 Ind. Cas. 493.

SANKARAN NAIR, MILLER and AYLING, JJ.

Reference:—(a) 22 C. 998, F.

(337) S. 439—*Enhancement of sentence—Discretion of the Chief Court to interfere—Accused undergone the sentence.* *The Crown v. Hari Singh*, 29 P.W.R. 1913 (Cr.)=813 P.L.R. 1913=21 Ind. Cas. 471=14 Cr. L.J. 599. See Final Part, 1913, Col. 117.

(338) S. 439—*Criminal case—Revision—Enhancement of sentence—Discretion of Chief Court.* See ACT VI OF 1882 (COMPANIES), No. 3, 37 P.L.R. 1914.

(339) S. 439—*Application to Presidency Magistrate by counter-petitioner to declare that the inclusion of the petitioner as a candidate for the Municipal election by the President of the Madras Corporation was illegal—Order of Presidency Magistrate allowing the application—Revision whether lies.* See ACT III OF 1904 (MADRAS CITY MUNICIPAL), No. 2, 16 M.L.T. 128.

Crim. Pro. Code—(Continued).

(340) S. 439—Receiving and disposing of stolen property—Guilty knowledge—Concurrent finding—Revision. See PENAL CODE, No. 134, 34 P.W.R. 1914 (Cr.).

(341) S. 439—Concurrent findings of fact when may be set aside in revision. See PENAL CODE, No. 133, 18 P. W. R. 1914 (Cr.).

(342) S. 439. See Nos. 10, 13, 120, 180, 196, 229, 248, 249, 264, 280, 303, 333, *supra*.

(343) Ss. 439, 503—Revision—Complaint—Examination of complainant in presence of accused—Practice—Pardanashin woman—Daughter of prostitute married to respectable person—Examination on commission—Power of the Chief Court on revision under S. 439. **Mirza Abdul Ghafor Beg v. The Crown**, 11 P.W.R. 1913 (Cr.) = 18 Ind. Cas. 147 = 14 Cr. L.J. 3 = 43 P.L.R. 1914. See Final Part, 1913, Col. 119.

(344) Ss. 439, 562—Revision—Criminal cases—Question of fact—Witness—Credibility of—Ground for believing witness, testimony against some of the accused—Security to keep peace.

There were two cross complaints, one by M. against C. and his son R. and the other by C. against M. and three others. The Magistrate acquitted M. and the three accused, but convicted C. and fined him Rs. 30 and acquitted his son R. The evidence against C. and R. was the same.

On appeal the District Magistrate gave a finding which was equivalent to rejecting M's evidence as unreliable, but upheld the conviction and for the fine he substituted an order under S. 562 of the Crim. Pro. Code for security for keeping the peace.

On revision the conviction and the order demanding security were set aside, on the ground that no distinction could be drawn between C and R, and none of the evidence seemed reliable and it was difficult to say which party was the aggressor. **Ghahju Mal v. Crown**, 21 P.L.R. 1914 = 12 P.W.R. 1914 (Cr.).

CHREVIS, J.

(345) Ss. 439, 562—Revision—Powers of High Court.

The High Court cannot in revision set aside an order under S. 562 of the Crim. Pro. Code, ordering an accused person to execute a bond to be of good behaviour and substitute in its place a sentence of whipping or imprisonment. **King-Emperor v. Ghasite**, 12 A.L.J. 1244.

PIGGOTT, J.

(346) S. 476—Steps taken five months after close of trial—Order without jurisdiction.

Where a Magistrate acts under S. 476 of the Code of Criminal Procedure, five months after the close of the trial, and there is no explanation for the delay, the Magistrate acts without jurisdiction. **In re Kahatri Siva Singh**, 15 Cr. L.J. 283 = 28 Ind. Cas. 491.

AYLING and TYABJI, JJ.

References:—1 Ind. Cas. 597 = 32 M. 49 (F.B.) = 4 M.L.T. 404 = 19 M.L.J. 42 = 9 Cr. L. J. 41, F.

Crim. Pro. Code—(Continued).

(347) S. 476—'Court'—Successor in office.

The expression 'Court' in S. 476, Crim. Pro. Code, includes the successor in office of the officer who decided the civil case. **Muhammad Ibrahim v. King-Emperor**, 12 A.L.J. 1003.

RICHARDS, C.J. and TUDBALL, J.

References:—37 C. 642; 34 A. 393, R.

(348) S. 476—Order for prosecution—Failure to make preliminary inquiry—Illegality—Action under S. 476—No necessity to take action immediately after close of trial—Time for such action—S. 115, Civ. Pro. Code (1908).

Where a lower Court, without making any preliminary inquiry to decide whether there were *prima facie* reasons to suppose that the accused committed perjury, passed an order directing his prosecution for perjury under S. 476, Crim. Pro. Code.

Held that the failure to make the preliminary inquiry was a material irregularity which was one for correction under S. 115, Civ. Pro. Code (1908).

There is no legal necessity to proceed under S. 476, Crim. Pro. Code, immediately after the trial or proceedings and the section does not limit the time within which action should be taken (a). **Jethmal v. Wadhmal**, 7 S.L.R. 187 = 15 Cr. L.J. 541 = 24 Ind. Cas. 949.

HAYWARD, J.C., and BOYD, A.J.C.

References:—(a) 34 C. 351 and 31 M. 140; 32 B. 184; 32 M. 49; 37 C. 642, R.

(349) S. 476—Appeal—Application asking a Munsif to take criminal action himself against a person—Sanction to prosecute—Appeal to the District Judge—Jurisdiction.

Where an application was made to a Munsif asking him to take action himself against a certain party and to send him to a Criminal Court to be tried there for various offences, without asking the Court for sanction to prosecute those persons and the Munsif declined to take any action, held that no appeal lay to the District Judge against the order of the Munsif. **Bhagirathi v. Suraj Mal**, 12 A.L.J. 684 = 15 Cr. L.J. 575 = 25 Ind. Cas. 327.

CHAMIER, J.

(350) S. 476—Penal Code, S. 182—Calling for a report from interested party as to truth of complaint, propriety of—Order for prosecution, without sufficient enquiry into truth of complaint.

The petitioners filed an application before the Sub-Divisional Magistrate praying for proceedings under Ss. 144 and 107, Crim. Pro. Code, against several servants of a certain factory, whereupon the Magistrate called for a report from the Manager of the factory, and on receipt thereof required the petitioners to show cause against prosecution under S. 182, I.P.C., and then after examining some witnesses on each side, but without examining the petitioners

Crim. Pro. Code—(Continued).

themselves, made an order under S. 476, Crim. Pro. Code, directing their prosecution for an offence under S. 182, I.P.C.

Held, that the order of the Magistrate in calling for a report from the Manager of the factory was open to great objection.

That the accused being the servants of the factory, the Manager was an interested party, and he ought not to have been asked to make a report in these judicial proceedings.

Held (in setting aside the order for prosecution), that further enquiry should be made into the truth of the petitioners' complaint, and they themselves should be examined if they chose to give evidence. **Emperor v. Raffi Raut**, 19 C.W.N. 127.

SHARFUDDIN and TEUNON, JJ.

(351) S. 476—*Sanction to prosecute—Not the same proceeding—Order illegal—High Court's power in revision to grant sanction—Execution proceedings are judicial proceedings.* **Ponnusami Pillai v. Chockallogam Pillai**, 25 M.L.J. 593=14 M.L.T. 512=(1913) M.W.N. 1002=14 Cr.L.J. 624=21 Ind. Cas. 672. See Final Part, 1913, Col. 120.

(352) S. 476—*Court—District Registrar.*

A District Registrar is not a Court within the meaning of S. 476 of the Crim. Pro. Code. *In re Manku Bala Patil*, 16 Bom.L.R. 946=2 Bom. Cr. Cases, 264.

HEATON and SHAH, JJ.

(353) S. 476. See Nos. 3, 178, 179, 180, 184, 291, 319, 326, 327, *supra*.

(354) Ss. 476, 195—*Difference between—Order for prosecution under S. 476—High Court's power to interfere in revision—Duty of Magistrate before taking action under S. 476—Want of, proof of motive whether can defeat charge.* **Abdul Husen v. Emperor**, 9 N.L.R. 184=22 Ind. Cas. 177=15 Cr. L. J. 33. See Final Part, 1913, Col. 121.

(355) Ss. 476, 435—*Small Cause Court directing prosecution of a person under S. 476—Revision—Civ. Pro. Code, S. 115—High Court acting as a Criminal Court, power of, in revision—Order of prosecution, what procedure to adopt in.*

Where a Court of Small Causes had directed the prosecution of certain persons under S. 476, Crim. Pro. Code, *held*, that the order could not be the subject of revision under S. 485, Crim. Pro. Code, but that an application for revision could lie under S. 115, Civ. Pro. Code.

Held also, that a High Court acting as a Criminal Court has no authority to send for the record of a Civil or a Revenue Court and to interfere in revision with the orders of such a Court.

Held further, that the lower Court was wrong in ordering prosecution without giving

Crim. Pro. Code—(Continued).

the persons concerned an opportunity of showing cause against such an order. **Thakur Das v. King Emperor**, 17 O.C. 25=15 Cr.L.J. 217=22 Ind. Cas. 1001.

STUART and PANDIT KANHAIYA LAL, J. CB.

(356) Ss. 476, 537 (b)—*Sanction to prosecute—Order merely directing prosecution, without ordering accused to be sent to the nearest First Class Magistrate—Irregularity or illegality—Whether cured by S. 537 (b).*

An order under S. 476, Crim. Pro. Code, which merely directs the prosecution of the accused, but omits to direct the accused to be taken before the nearest First Class Magistrate, is at most an irregularity which is expressly cured by S. 537 (b) of the Code. *Re S. Suppaya Tharagan*, 37 M. 317.

BENSON and SUNDARA AYYAR, JJ.

Reference:—26 A. 249 (356), *Diss.*

(357) Ss. 481 (2), 537—*Penal Code, S. 228—Offence—Record must show stage of interruption—Evidence—Intention.*

Where a person making a noise in Court is charged with an offence under S. 228 of the Penal Code, the record convicting him must show the stage of judicial proceeding interrupted, and the evidence must establish that such interruption was intentional, as such vital irregularities in procedure are not cured by S. 537 of the Code of Criminal Procedure. *In re Kukati Narasa Reddi*, 15 Cr.L.J. 621=25 Ind. Cas. 629.

MILLER, J.

(358) S. 488—*Wife's refusal to attend Panchayat inquiring into charge of adultery against her—No ground for refusing maintenance.*

A wife's refusal to attend a Panchayat convened to consider a charge of adultery against her is no reason for rejecting an application for maintenance made by her under S. 488, Crim. Pro. Code. **Dasappa Chetty v. Chikathayee**, 15 Cr. L.J. 52=22 Ind. Cas. 324.

MILLER and SPENCER, JJ.

(359) S. 488—*Maintenance of child—Mother's ability to maintain—Bona fide offer by father, to maintain if child lives with him.*

Held, that the father is bound to maintain his child whatever the position of the mother may be.

Merely sending a man to go and ask the child to come and live with the father does not amount to an offer to look after him and cannot absolve the father from his responsibility to maintain him. **M. Thein v. Nga Po Nyan**, 7 Bur. L.T. 34=15 Cr.L.J. 278=28 Ind. Cas. 486.

SAUNDERS, J.O.

(360) S. 488—*Validity of marriage of a Chinese Buddhist with a Burman Buddhist—No maintenance where marriage not according to Chinese Buddhist law.*

Crim. Pro. Code—(Continued).

Where a Burman Buddhist female applied for maintenance as wife against a Chinese Buddhist who denied that he was ever married according to law.

Held, that the personal law of a Chinese Buddhist would be applicable to such a case. That law is considerably more restricted than the Burmese Buddhist law according to which living together by mutual consent constitutes a valid marriage. Amongst the Chinese Buddhists, the following three conditions are essential.

(1) Consent of the parents, the consent of the parties themselves being unimportant.

(2) Certain formalities and ceremonials.

(3) The suitability of the parties in the matter of their respective positions. *Wa Foon v. Ma Thein Tin*, 7 Bur. L.T. 71=15 Cr. L.J. 484=24 Ind. Cas. 572.

SAUNDERS, J.C.

(361) S. 488—*Maintenance—Wife when entitled to maintenance—Husband's father not liable—Father willing to keep child—Rate of maintenance.*

Held, that, where husband quarrels with and ill-treats his wife, she is entitled to live apart and claim maintenance, but her husband's father cannot be made liable for it.

Held, also that, when father is willing to keep the child, no order for the child's maintenance can be passed. *Ralla and Kartara v. Mussammat Atti*, 21 P.W.R. 1914 (Cr.)=115 P.L.R. 1914=15 Cr. L.J. 529=24 Ind. Cas. 841.

CHEVIS, J.

Reference:—18 P.R. 1894 (Cr.), F.

(362) S. 488—*Order against husband's father for wife's maintenance—Legality—Husband marrying second wife—Whether ground for awarding maintenance to first wife.*

A father cannot be made jointly liable with the son for the maintenance of the son's wife. No such arrangement is contemplated by S. 488, Crim. Pro. Code (a).

The fact that the husband has contracted a second marriage cannot alone justify an order under S. 488, in favour of the first wife (b). *Crown, through Mussammat Ram Kaur v. Waryam Singh and Sawan Singh*, 12 P.R. 1914 (Cr.)=245 P.L.R. 1914=15 Cr. L.J. 577=25 Ind. Cas. 829.

KENSINGTON, J.

References:—(a) 26 P.R. 1903 (Cr.), F. (b) 66 P.R. 1887 (Cr.), F.

(363) S. 488—*Maximum sentence—Execution for arrears of maintenance for several months—Construction of cl. 3.*

When a Magistrate issues a warrant for arrears of maintenance for more than one month, and when the allowance for more than one month remains unpaid after the execution of the warrant, he is not competent to pass a

9 Cr.

Crim. Pro. Code—(Continued).

sentence of imprisonment exceeding one month. The words in the sub-S. 3 "for the whole or any part of each month's allowance remaining unpaid" may mean "for the whole or any part of every month's or all months' allowance remaining unpaid," where the arrears remaining unpaid are for a period exceeding a month. *Zaw Ta v. Emperor*, 15 Cr. L.J. 484=24 Ind. Cas. 170=7 Bur. L.T. 225.

HARTNOLL, OFFG. C.J. and ORMOND, J.

References:—9 A. 240=A.W.N. (1887) 54; P. J. L. B. 816, F.; 20 M. 3=2 Weir, 638; 25 O. 291, Diss.

(364) S. 488—*Maintenance allowance paid by a Mahomedan—Subsequent divorce, effect of.*

Where a Magistrate made an order under S. 488, Crim. Pro. Code, directing a Mahomedan to pay a certain monthly allowance towards the maintenance of his wife, *held* that, on a subsequent divorce of his wife by the husband, that order became *functus officio*. *King-Emperor, through Doulat v. (Mussammat) Jadi*, 17 O.C. 260=15 Cr. L.J. 646=25 Ind. Cas. 846.

PANDIT KANHAIYA LAL and KENDALL, A.J.CS.

(365) S. 488—*Maintenance, order for—Death of person against whom order had been made—Execution of order—Whether order enforceable against estate of deceased.* *Ead Ali v. Lal Bibi*, 17 O.W.N. 1180=14 Cr. L.J. 378=20 Ind. Cas. 138=41 C. 88. See Final Part, 1913, Col. 122.

(366) S. 488—*Order for maintenance of an illegitimate son—Declaratory suit, maintainability of, where paternity of an illegitimate son is denied.*

Defendant No. 1 brought a claim for maintenance in the Magistrate's Court under S. 488, Crim. Pro. Code, against the plaintiff whom she averred to be the father of her illegitimate son, defendant No. 2. She obtained an order for maintenance. Basing his cause of action upon that order, the plaintiff brought the present suit for a declaration that the defendant No. 2 is not his son and that he had never an illicit connection with the defendant No. 1.

Held, that the suit for a declaration that defendant No. 2 was not an illegitimate son of the plaintiff was maintainable. *Katlana (Mussammat) v. Raghu Bar*, 17 O.C. 831.

KENDALL, J.C.

References:—18 A. 230, D.; P.R. 1901 (50), P.R. 1903 (26), 20 M. 48, 30 M. 400, R.

(367) S. 488—*Meaning of "neglects or refuses to maintain his wife."*

Held, that the term "neglects or refuses to maintain his wife" in S. 488, does not apply where the husband states that he is willing to maintain his wife and the wife deposes that she is willing to live with her husband but he refuses to maintain her. *Phula Khan v. The Crown*, 46 P.W.R. 1914 (Cr.).

SHADI LALL, J.

Crim. Pro. Code—(Continued).

(868) S. 488—Law relating to marriage among Karens. See **BUDDHIST LAW (MARRIAGE)**, No. 1, 15 Cr. L. J. 590.

(869) S. 488. See **MAINTENANCE**, No. 1, 26 P.W.R. 1914 (Cr.).

(870) S. 488 (4)—*Parties governed by Marumakkattayam Law—Order for maintenance—Father willing to receive and maintain child—Effect—Meaning of 'unable to maintain'—Effect of tarwad being well-to-do—Person entitled to the custody of the child.* In re **Parathy Yalappil Moideen**, 14 M.L.T. 223=25 M.L.J. 855=(1913) M.W.N. 997=21 Ind. Cas. 469=14 Cr. L. J. 597. See Final Part, 1913, Col. 123.

(370-a) Ss. 488, 490—*Maintenance—Recovery of arrears—Person against whom order was made leaving jurisdiction—Magistrate who passed the order—Magistrate within whose jurisdiction the person resides—Competency of either Magistrate to pass order for recovery of arrears.*

Where a husband who, by an order under S. 488, Crim. Pro. Code, was directed to pay his wife monthly a certain sum of money for the maintenance of herself and her child, ceases to live within the local limits of the jurisdiction of the Magistrate who made the order.

Held that an application for an order to enforce the recovery of arrears of maintenance may be made by the wife either to the Magistrate who passed the original order or to the Magistrate having jurisdiction over the place where the husband resides (a).

The provisions of S. 490 cannot be held to derogate from S. 488 (3). **Ma Thaw v. King-Emperor**, 7 L.B.R. 116=15 Cr. L. J. 701=26 Ind. Cas. 149.

TWOMEY, J.

Reference :—(a). 4 M. 230, R.

(871) S. 494—*European British subject, rights of, regarding trial—Conviction by a Magistrate not a Justice of the Peace—Omission of Magistrate to inform accused of such rights, if vitiate trial.*

Where a European British subject was placed on his trial before a Magistrate who was not a Justice of the Peace, on a charge under S. 323, I.P.C., and the Magistrate convicted the accused without asking him whether he was a European British subject and without informing him of his rights as a European British subject under the Code of Criminal Procedure :

Held—that the conviction and sentence should be set aside on account of the error in the procedure of the Magistrate in the trial. **Baladev Miarl v. A. A. M. Clarke**, 18 C.W.N. 385=15 Cr. L. J. 297=23 Ind. Cas. 505.

IMAM and CHAPMAN, JJ.

(372) S. 494—*Prosecution against one of two accused withdrawn—Such accused, if competent witness—Confession and prior statements of such accused if should be produced for cross-examination and contradiction.*

Crim. Pro. Code—(Continued).

The petitioner along with one M was placed on his trial under S. 411, I.P.C., but the prosecution against M was withdrawn under S. 494, Crim. Pro. Code, although no formal order of discharge was recorded. M was thereupon examined as a witness for the prosecution. It appeared that M had made a confession to a Magistrate and this confession was subsequently verified by the same or another Magistrate to whom M made further statements. The confession and these further statements were not placed on the record and copies of these were refused to the petitioner :

Held—That, notwithstanding the omission to record a formal order of discharge, M ceased to be on trial with the petitioner as soon as the prosecution against him was withdrawn, and that being so he became a competent witness; but for the purpose of cross-examination and, if necessary, for contradiction, the prior statements of the witnesses should have been made accessible to the accused. **Sherati Sheikh v. The King Emperor**, 18 C.W.N. 1213=15 Cr. L. J. 693=26 Ind. Cas. 141.

SHARFUDDIN and TEUNON, JJ.

(373) S. 494—See No. 205, *supra*.

(374) Ss. 494, 495—*Withdrawal of a prosecution—Interference of High Court in revision with discharge—Order of Magistrate.*

Under S. 495 of the Crim. Pro. Code, a Magistrate may permit the prosecution to be conducted by any person other than a police officer and may permit the prosecution to be conducted even by a police officer if he is not below the rank prescribed by the Local Government with the previous sanction of the Governor-General in Council.

Under a notification of the Madras Government all superior police officers above the rank of a first class Head Constable in charge of a police station are generally empowered to conduct, the prosecution without even the permission of the Magistrate under cl. 1 of S. 495. Such officers would be entitled under cl. 2 of the section to withdraw from the prosecution with the permission of the Court as mentioned in S. 494

Quere :—Whether the High Court has power to interfere in revision with the discretion of a Magistrate in giving his consent to the withdrawal of the prosecution under S. 494, Crim. Pro. Code? **Anantharama Yathiar v. Muthia Thevan**, (1914) M.W.N. 776=15 Cr. L. J. 614=25 Ind. Cas. 841.

SADASIVA IYER, J.

(375) S. 495. See Nos. 83, 874, *supra*.

(376) Ss. 497, 499, 514—*Powers of officer in charge of Police station when taking action under S. 497—Forfeiture of bond—Liability of surety.* **Crown v. Kanna Ram**, 22 P.R. 1913 (Cr.)=14 Cr. L. J. 681=6 L.B.R. 1914=6 P.W.R. 1914 (Cr.)=21 Ind. Cas. 679. See Final Part, 1913, Col. 124.

Crim. Pro. Code—(Continued).(877) S. 499. See No. 376, *supra*.(878) S. 503. See Nos. 154, 343, *supra*.(879) S. 514. See Nos. 65, 376, *supra*.(880) Ss. 514, 110—*Surety for appearance 'up to the conclusion of the case'—Failure to appear—Forfeiture of security bond.*

Petitioner stood surety for the appearance in Court, up to the conclusion of the case, of a man who had been called upon under S. 110, Crim. Pro. Code, to furnish security for good behaviour. The Court found the case proved against that man and he was directed to produce his sureties, but he failed to appear. Thereupon the Court ordered forfeiture of the petitioner's bond. *Held*, the order as to forfeiture was correct, as the case was not complete, and the Magistrate's duties in connection therewith were not at an end, until the culprit had appeared with his sureties and executed his bond. It cannot be said that the petitioner's liability ceased when the Court held that the case was proved. **Abdul Karim v. Crown**, 32 P.R. 1214 (Cr.).

JOHNSTONE, J.

(881) Ss. 514, 529, 531—*Bond for appearance—Forfeiture of bond for non-appearance—Jurisdiction of Court to order forfeiture—Illegality—Irregularity.*

A personal recognizance to appear was taken from the accused by the Magistrate at Karjat. The accused having failed to appear on the day fixed for hearing, the Magistrate at Karjat issued a notice to the accused under S. 514 of the Crim. Pro. Code, to show cause why the recognizance bond should not be forfeited. In the meanwhile, the accused was transferred to the Court of the Magistrate at Khalapur, who forfeited the bond and directed the accused to pay Rs. 25. The accused applied to the High Court:

Held, that the Magistrate at Khalapur had no jurisdiction to make the order under S. 514, as he was not the Magistrate who had taken the bond or before whom the accused had to appear on the date of the default.

S. 531 of the Crim. Pro. Code relates only to proceedings in a wrong place and cures defects as to local jurisdiction. *In re Mir Husen Abdul Rahman*, 16 Bom. L. R. 84=2 Bom. Cr. Cas. 183=15 Cr. L.J. 295=23 Ind. Cas. 503.

HEATON and SHAH, JJ.

(882) S. 514 and Sch. V, Form 10—*Bond to keep the peace—Forfeiture—Breach of the peace to be the probable and not possible result—Attempt to poison a person—Not entailing forfeiture.*

A bond to keep the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace and the use of the word 'probably' in Form 10, Sch. V of the Crim. Pro. Code, limits forfeiture to cases in which a breach of the peace is the 'probable'

Crim. Pro. Code—(Continued).

and not merely the possible result of the act of the person bound over.

Thus a conviction for theft or for wrongful confinement and extortion or for the abduction of a woman or, as in the present case, a secret attempt to poison a person, cannot reasonably be regarded as an offence which would probably result in a breach of the peace (a). **Ahmed Gul v. Crown**, 23 P. R. 1914 (Cr.)=262 P. L. R. 1914=15 Cr. L. J. 605=25 Ind. Cas. 517=47 P. W. R. 1914 (Cr.).

RATTIGAN, J.

References:—(a) 18 W. R. Cr. 63; 19 W. R. Cr. 48; 7 P. R. Cr. 1906, R.

(883) S. 515. See No. 65, *supra*.(884) S. 517—*Magistrate—Order for disposal of property—Ownership in the property disputed between the parties.*

A complaint of theft was lodged on behalf of a Talukdar against his tenant who had cut and removed certain trees. The trying Magistrate acquitted the accused; but he ordered the property (the wood) to be returned to the complainant. This order was confirmed by the District Magistrate on the ground that there had been a previous decision of the Survey Officer that the ownership in the trees vested in the Talukdar. The accused having applied to the High Court:

Held, that the proper order under the circumstances to make was that the wood should be sold and the proceeds retained by the Court until they were shown to be payable to one or other of the parties either in virtue of a decree of Court or in virtue of an agreement among themselves. *In re Visa Samta*, 16 Bom. L. R. 951=2 Bom. Cr. L. Cases 269.

HEATON and SHAH, JJ.

(885) S. 517. See Nos. 312, 328, *supra*.(886) Ss. 517, 522—*Immoveable property—Restoration, order for—Criminal trespass not attended with force—"Property" in S. 517 does not apply to immoveable property.*

S. 517 of the Crim. Pro. Code has no application to immoveable property (a).

Where the accused dispossessed the complainant of his garden by breaking the padlock of its gate, but used no force or violence and were convicted of the offence of criminal trespass.

Held, that the Court had no power to order the restoration of the garden to the complainant under S. 522 of the Crim. Pro. Code, nor under S. 517, as the latter did not apply to immoveable property. **Blaweswar Singh v. Bhola Nath Pathak**, 15 Cr. L. J. 175=22 Ind. Cas. 751=18 C. W. N. 1146.

IMAM and CHAPMAN, JJ.

References:—(a) 1 Ind. Cas. 202=13 C. W. N. 77=36 C. 44=9 Cr. L. J. 294, F.

(887) Ss. 517, 545—*Complainant unable to recover substantial compensation in Civil Court—Right to compensation under S. 545 (b) or to prosecution expenses—Receiving lottery prize*

Crim. Pro. Code—(Continued).

by false pretence—Order in revision to refund—Mode of recovery. See PENAL CODE, No. 5, 15 Cr. L.J. 555.

(888) S. 520. See No. 312, *supra*.

(889) S. 522—*Civil and Criminal proceedings relating to same cause of action—Jurisdiction—Lapse of time—Cause of delay explained—Illegality of order—Penal Code, S. 447—Complaint under S. 447—Application for possession under S. 522, Crim. Pro. Code.*

K brought a complaint under S. 447, I.P.C. for forcible seizure of his land against G, and G was convicted on 20th November 1911. G filed a petition for revision in the Chief Court which was rejected. G also filed a Civil suit and K applied for possession under S. 522, Crim. Pro. Code, on the 18th January 1912, which application was consigned to the record room on the 24th September 1912, as the Civil proceedings were going on in the Chief Court concerning the same land. Just after the Civil proceedings were disposed of in K's favour, he renewed his application by a petition, dated 19th June 1913. The Magistrate allowed the petition and passed the order asked for. G applied to the Chief Court on the ground that the Magistrate had no jurisdiction to pass order for possession, after such a long time between conviction and order for possession.

Held, that a Magistrate has discretion to pass order for possession under S. 522 of the Crim. Pro. Code, and it is not necessary for him to pass such order simultaneously with the conviction, and that there is no illegality if he passes such order at any time after the conviction, if the cause of delay is fully explained to his satisfaction and the complainant moves the Court promptly after the cause of delay has ceased.

A lapse of 20 months was not considered a very long time under the circumstances of the case. *Ghulam Muhammad v. Karam Singh*, 14 P.W.B. 1914 (Cr.)=112 P.L.R. 1914=15 Cr. L.J. 275=23 Ind. Cas. 493=15 P.R. 1914 (Cr.).

JOHNSTONE and SHAH DIN, JJ.

References:—23 B. 494; 14 Cr. L.J. 172, F.; 4 C.W.N. 308, Diss.; 25 C. 434; 27 C. 174; 25 A. 841, D.

(390) S. 522—*Restoration of possession of garden—Criminal trespass unattended with force—Order for restoration to complainant made by Magistrate—Order set aside by High Court—Effect of High Court's order—Whether order empowers Magistrate to re-deliver possession.*

The accused were convicted of criminal trespass into the complainant's garden, unattended with any force. The Magistrate ordered that possession of the garden should be restored to the complainant. Accordingly, the possession was restored to him. The accused moved the High Court which set aside the order for restoration. The accused then applied to the

Crim. Pro. Code—(Continued).

Magistrate for re-delivery of the possession of the garden to them, but the Magistrate refused the prayer on the ground that he had no power to direct the Police to re-deliver the possession of the garden to the accused:

Held, that the order of the High Court, setting aside the order for restoration, carried with it the incident of restoration of the garden to the accused and that the Magistrate had power to direct the Police to restore possession of the garden to the accused. *Bhola Nath Pathak*, 15 Cr. L.J. 222=23 Ind. Cas. 1006=18 C.W.N. 1147.

IMAM and CHAPMAN, JJ.

(391) S. 522—*Penal Code, Ss. 147, 349—Restoration of possession of immovable property—Criminal force, meaning of—Rioting with the common object of causing violence to inanimate object—Applicability of S. 522.*

When the accused was convicted of rioting for causing violence in the prosecution of a common object, *viz.*, by destroying the complainant's fencing and raising a new fencing on the complainant's land:

Held—That violence having been caused in this case to the fencing only and not to any person, there was no criminal "force" as defined in S. 349, I.P.C., and no order directing delivery of possession could be made under S. 522, Crim. Pro. Code. *Sadasib Mandal v. Emperor*, 18 C.W.N. 1150=15 Cr. L.J. 720=26 Ind. Cas. 168.

IMAM and CHAPMAN, JJ.

(392) S. 522—See Nos. 114, 186, 386, *supra*.

(393) S. 526—*Transfer—Magistrate's duty to make enquiries before putting certain questions—Questions prejudicial to accused put on insufficient ground—Ground for transfer.*

On the assurance given by his police *peshi* clerk, a Magistrate asked the witness whether the accused in a case had ever been challenged in any *badmashi* case; *held*, that it was improper for a Magistrate to put such a question unless he had satisfied himself on the highest and best information that there was some real foundation for the facts mentioned in the question, and that an assurance received from a police *peshi* clerk was not a sufficient ground for putting such a question. The conduct of the Magistrate putting the question gave a sufficient cause to the accused to apprehend that a fair and impartial trial will not be held by that Magistrate and it was a good ground for the transfer of the case from his Court. *Suraj Prasad Vaish v. King Emperor*, 12 A.L.J. 50=23 Ind. Cas. 186=15 Cr. L.J. 234.

KNOX, J.

(394) S. 526—*Transfer of cases—Applications for transfer—Apprehension of parties—Reasonableness—Test.*

In dealing with applications for transfer of cases, the Court has not only to take into

Crim. Pro. Code—(Continued).

consideration the motives which might be supposed to bias the Judge, but also has to see whether there is anything in the case likely to create in the mind of the accused a reasonable apprehension that they may not have a fair and impartial trial. In deciding what will amount to a reasonable apprehension, the Court must have regard to the degree of their intelligence and their honesty and impartiality both probably fairly low. *Machal v. Matru*, 10 N. L.R. 15=15 Cr.L.J. 196=22 Ind. Cas. 980.

HALIFAX, A.J.C.

Reference:—(1877) 2 Q.B.D. 558, R.

(395) S. 526—*Transfer, grounds for.*

An appeal was preferred to the Sessions Judge from a conviction under Ss. 323 and 325 of the Penal Code. The Sessions Judge after hearing arguments came to the conclusion that, if an offence was committed at all, it was one under Ss. 394 and 397, Penal Code, and that the convicting Magistrate had no jurisdiction to try a case of so grave a nature. He accordingly set aside the convictions and sentences under Ss. 323 and 325 and directed the accused to be committed for trial on charges under Ss. 395, 394, 397 and 325 of the Code.

Held, that the circumstances did not justify a transfer of the case from the Court of the Sessions Judge who had directed the commitment and re-trial. *Ram Sewak v. Emperor*, 15 Cr. L.J. 367=23 Ind. Cas. 735.

KNOX, J.

(396) S. 526—*Transfer of criminal case—Impartiality of Magistrate not doubted.*

N and four other persons were put on their trial, the former under S. 411 and the latter under S. 381, Penal Code. The case of N was subsequently separated from that of the other four accused. The Magistrate proceeded first to dispose of the case under S. 381 which resulted in conviction. The case under S. 411 was then taken up.

Held, that, as there was nothing to find that the Magistrate would not try the case with perfect impartiality, the case could not be transferred. *Nathl Mal v. Emperor*, 15 Cr. L. J. 253=23 Ind. Cas. 205.

RYVES, J.

(397) S. 526—*Transfer of case—Fair and impartial trial not expected.*

Where it has not been shown that a fair and impartial trial cannot be had or that an order of transfer is expedient in the interests of justice, a case cannot be transferred from one Court to another. *Ghanshlam Das v. Emperor*, 15 Cr. L. J. 368=23 Ind. Cas. 736.

KNOX, J.

References:—21 Ind. Cas. 906=14 Cr. L. J. 556=12 A.L.J. 33; 26 A. 536=A.W.N. (1904) 94=1 Cr. L.J. 388, R.

(398) S. 526—*Transfer of case—Circumstances giving rise to an apprehension in the mind of the accused.*

Crim. Pro. Code—(Continued).

In proceedings under S. 110, Crim. Pro. Code, the accused was arrested without warrant, an adjournment of the case was refused even on production of medical certificate, his presence was secured under arrest while he was ill, he was not, till a late stage, informed of the charge against him and his prayer to reserve cross-examination and produce certain documents and witnesses was refused. *Held* that the above facts did not in any way show bias or prejudice in the mind of the Court against the accused, but taken with the facts of the institution of several criminal proceedings against the applicant prior to the present proceedings would be likely to give rise to an apprehension in the mind of the accused that he is not likely to have a fair and impartial trial in the Court and it is a good cause for transferring the case from that Court. *Jaffer Hussain v. King Emperor*, 12 A.L.J. 736.

RAFQUE, J.

(399) S. 526—*Transfer—Delay in applying.*

An application for transfer, under S. 526 of the Code, ought to be put forward at the earliest possible opportunity, after the concurrence of whatever facts or circumstances are alleged as affording reasonable basis for such application. *Ashiq Hussain v. Emperor*, 15 Cr. L. J. 536=24 Ind. Cas. 848.

PIGGOTT, J.

(400) S. 526—*Transfer of case—Proceedings initiated under orders of District Magistrate—Deputy Magistrate of District, where accused is tried, appearing as prosecution witness.*

Where the proceedings against an accused were initiated under the orders of a District Magistrate and one of the important witnesses for the prosecution was a Deputy Magistrate of the same District.

Held, that, under such circumstances, the case ought to be transferred to some other District. *Bans Gopal Pande v. Emperor*, 15 Cr. L.J. 543=24 Ind. Cas. 951.

LINDSAY, J.C.

(401) S. 526—*Transfer of case—Security for keeping peace—Magistrate acting as private arbitrator—Magistrate, if can subsequently try. Gobinda Chandra Ray v. Gopal Chandra Pandit*, 18 O.L.J. 350=14 Cr. L. J. 602=21 Ind. Cas. 474. See Final Part, 1913, Col. 127.

(402) S. 526—*Case triable by Sessions—Transfer, grounds of—Magistrate making enquiry, expressing strong views and going to be produced as a witness—Transfer not allowed. Muneshwar v. Rughubar*, 11 A.L.J. 741=14 Cr. L.J. 555=21 Ind. Cas. 155. See Final Part, 1913, Col. 127.

(403) S. 526—*Transfer of Criminal case—Grounds. Sureshwar v. Emperor*, 14 Cr. L.J. 666=21 Ind. Cas. 908=12 A.L.J. 33. See Final Part, 1913, Col. 127.

(404) S. 526. See Nos. 37, 49, 50, 119, 193, *supra*.

Crim. Pro. Code—(Continued).

(495) S. 526 (a), (e)—*Transfer—Grounds for—Fair and impartial trial—Apprehension in the accused's mind—Further evidence—Disallowing questions—Rejection of application to summon witnesses.*

The taking of irrelevant evidence, by a Magistrate dealing with a criminal case, his interference with the cross-examination of witnesses by disallowing questions on the ground that they are indecent or scandalous, his dismissing an application for summoning a large number of witnesses on the ground that it was made for the purpose of vexation or delay, are not sufficient to raise in the mind of the accused a reasonable apprehension that a fair and impartial trial will not be had and do not make it expedient for the ends of justice that the case should be transferred. *Jaggan v. King-Emperor*, 12 A.L.J. 399=15 Cr. L.J. 212=22 Ind. Cas. 996=36 A. 239.

KNOX, J.

References:—12 A.L.J. 33; 6 C. 491; 19 A. 64; 23 C. 495; (1877) 2 Q.B.D. 558 (567); (1899) 43 Ch. D. 866 (884); (1875) 1 Q.B.D. 173; (1881) 8 Q.B.D. 383; (1894) 1 Q.B.D. 750 (758); (1864) B. & S. 915; 26 O. 587, R.

(406) S. 526 (8)—*Transfer of case, accused's intention to apply for, notified where trial about to commence—Adjournment refused by Magistrate—Opportunity of applying to High Court for transfer to be given to accused—Retrial.*

Where the accused notified, when the trial was about to begin, their intention to apply for transfer of the case and asked for an adjournment, and the Magistrate refused to grant it, urgently proceeded with the case and convicted, and sentenced the accused, but it was found that the adjournment could not have been asked for earlier:

Held. that the Magistrate ought to have, under S. 526 (8), Crim. Pro. Code, granted the adjournment so as to allow the accused an opportunity of making an application for transfer before the High Court.

Held. also, that the case should be sent for re-trial to some other Magistrate. *Ramanand Singh v. Emperor*, 15 Cr. L.J. 507=24 Ind. Cas. 595.

CHAMBER, J.C. and EVANS, A.J.C.

(407) Ss. 526, 107—*Transfer—Proceedings under S. 107—District Magistrate's power to send them to Second Class Magistrate.*

The District Magistrate is not competent to transfer a case under S. 107 to a Magistrate of the Second Class who has no jurisdiction to hear the case. *Gobind Sahai v. King-Emperor*, 12 A.L.J. 1136.

CHAMBER, J.

Reference:—24 A. 151, D.

(408) Ss. 526, 110—*Proceedings under S. 110, Crim. Pro. Code, Chief Court not empowered to transfer—Punjab Courts Act, S. 39—*

Crim. Pro. Code—(Continued).

Power of General Superintendence—Whether enlarges power under S. 526, Crim. Pro. Code.

The Chief Court is not empowered under S. 526, Crim. Pro. Code, to direct the transfer of proceedings under S. 110 from the Court of a Magistrate to the Court of another Magistrate (a).

The general powers of superintendence and supervision conferred upon the Chief Court by S. 33 of the Punjab Courts Act relate to the administrative control which it exercises over subordinate Courts, and cannot be interpreted as enlarging the powers which are specifically granted to it for a particular purpose by S. 526, Crim. Pro. Code. *Crown v. Ahmad Baksh*, 5 P.R. 1914 (Cr.).

RATTIGAN and CHEVIS, JJ.

References:—(a) 15 A. 365; 4 P.R. 1896 (Cr.) 42 P.R. 1905 (Cr.); 6 P.R. 1911 (Cr.); 25 B. 179; 48 C. 709; 13 P.R. 1885 (Cr.); 16 C. 781 (787), *Appr.*; 26 M. 188; 2 O.L.J. 614; 34 A. 533, *Diss.*; 1 P.R. 1913 (Cr.), D.

(409) S. 528—*Magistrate becoming Chairman, Municipal Board—Transfer of cases—Jurisdiction as Magistrate.*

When a Magistrate is gazetted to the office of the Chairman of a Municipal Board and takes charge of that office, he is thereby divested of his jurisdiction as Magistrate. He ceases to be subordinate to the District Magistrate and the latter cannot transfer any criminal case to him for trial. *Nathi Mal v. King-Emperor*, 12 A.L.J. 890=36 A. 513=15 Cr. L. J. 693=26 Ind. Cas. 141.

PIGGOTT, J.

(410) S. 528. See No. 288, *supra*.

(411) S. 531. See No. 381, *supra*.

(412) S. 535. See No. 210, *supra*.

(413) S. 537 (d)—*Trial by jury—Irregularity in charging jury. Hooper v. Emperor*, 14 Cr. L.J. 638=21 Ind. Cas. 686=12 A.L.J. 149. See Final Part, 1913, Col. 128.

(414) S. 537. See Nos. 177, 181, 205, 210, 226, 238, 239, 294, 356, 357, *supra*.

(415) Ss. 537, 195—*Application of—No sanction for prosecution—Question of want of jurisdiction not raised—Omission cured by S. 537. Oochan v. King-Emperor*, 11 A.L.J. 809=14 Cr. L.J. 607=21 Ind. Cas. 479. See Final Part, 1913, Col. 128.

(416) S. 540—*Right to summon further witnesses when once the powers exhausted—Power of Magistrate not seized of the case to summon witnesses—Practice—Affidavit, what they should contain and how they should be verified. Mangal Prasad v. King-Emperor*, 11 A.L.J. 986=15 Cr. L.J. 164=36 A. 13=22 Ind. Cas. 740. See Final Part, 1913, Col. 129.

(417) S. 540. See No. 240, *supra*.

(418) S. 541. See No. 299, *supra*.

(419) S. 544. See No. 289, *supra*.

(420) S. 545. See No. 387, *supra*.

Crim. Pro. Code—(Continued).

(421) S. 552, order under—*Custody of wife, application for—No allegation of girl's wish in complaint—Order of restoring wife, passed without inquiry, illegal—Complainant, remedy of.*

Where a husband complained to the District Magistrate that his father-in-law was wrongfully detaining his wife and refused to send her to his house, without alleging that she was being so detained contrary to her own wish, and the District Magistrate passed an order under S. 552, Crim. Pro. Code, directing her restoration to the husband without making any inquiry into the matter of the complaint:

Held, that on the facts the case was not one to which the provisions of S. 552, Crim. Pro. Code, should be applied, and that, if the husband had any grievance, he should seek his remedy in the Civil Court. **Nathu Mistry v. Nari Lal Mistry**, 15 Cr. L.J. 712 = 26 Ind. Cas. 160.

SHARFUDDIN and TEUNON, JJ.

(422) S. 556—*Excise Act (XII of 1896)—Magistrate giving information to the police and directing an enquiry—No such connection as ousts jurisdiction.* **Babu Ram v. King-Emperor**, 11 A.L.J. 852 = 22 Ind. Cas. 161 = 15 Cr. L.J. 17. See Final Part, 1913, Col. 129.

(423) Ss. 556, 195—*Process issued by Cantonment Magistrate in his capacity of a Small Cause Court Judge—Execution by bailiff—Obstruction—Prosecution for—Bailiff not examined—No sanction under S. 195, Crim. Pro. Code—Conviction by Magistrate—Magistrate—Not 'personally interested'—Nor 'party to the proceedings'—Legality of conviction—Penal Code, S. 186.*

The accused were convicted by a Magistrate under S. 186—, I. P. C., of obstructing a bailiff in execution of a process issued by that Magistrate in his capacity as a Judge of a Small Cause Court. The complainant bailiff was not examined but his report was brought on the record through the Nazir.

Held, that the mere fact that the complainant was not examined would not justify the setting aside of the conviction, because there were other witnesses who gave a full account of the matter.

Held, also, that the proceedings were not illegal for want of sanction under S. 195, Crim. Pro. Code, and that it was open to the bailiff, a public officer, to file a complaint without any sanction.

Held, also, the fact that the Magistrate issued the warrant, in respect of which the obstruction occurred, in his capacity as a Small Cause Court Judge, would not make him 'personally interested' in the matter within the meaning of S. 556, Crim. Pro. Code.

Held, also, that, because there was nothing on the record to show that the Magistrate gave sanction to prosecute or in other words directed the prosecution, he was not 'a party to the Criminal Proceedings' and that the trial

Crim. Pro. Code—(Concluded).

was not irregular. **Muse v. The Crown**, 8 S. L.R. 41 = 15 Cr. L.J. 649 = 25 Ind. Cas. 977.

HAYWARD and CROUCH, A.J.CS.

(424) S. 562—*First offender—Criminal misappropriation and cheating in all their forms—Constructions of statute.*

The words "dishonest misappropriation" and "cheating" in S. 562 of the Code of Criminal Procedure apply to and cover the offences of criminal misappropriation and cheating respectively in all their forms.

The words of a Statute should be given an extended meaning of which they are reasonably susceptible when a restricted meaning would reduce those words to a mere surplusage. **Harnarain v. Ramji Das**, 12 A.L.J. 465 = 15 Cr. L.J. 375 = 23 Ind. Cas. 748.

PIGGOTT, J.

(425) S. 562. See Nos. 344, 345, *supra*.

(426) S. 565—*Previous conviction—Subsequent conviction for technical theft—Order under S. 565—Legality.* See **PENAL CODE**, No. 17, 3 P.W.R. 1914 (Cr.).

(427) Ch. VIII. See No. 63, *supra*.

(428) Ch. XVIII. See No. 283, *supra*.

(429) Sch. V, form 10. See No. 382, *supra*.

Criminal Rules of Practice (Madras).

Rule 60. See **CRIM. PRO. CODE**, No. 237, 16 M.L.T. 426.

Cross-examination.

Sessions trial for murder—Examination-in-chief of first prosecution witness—Application by defence counsel for postponement of cross examination till next day—Refusal by Sessions Court—Effect—Accused prejudiced—Re-trial by another Sessions Court ordered.

The accused in this case were tried and convicted for murder. When the case was taken up in the Sessions Court, the Counsel for the defence asked that he might cross-examine the witnesses on the day following, as he was not prepared to cross-examine that day. The Counsel did not ask for an adjournment of the trial itself. The Sessions Court refused to grant the application. *Held*, by the High Court on appeal, that the application was a reasonable one and one which, under the circumstances, should have been granted, as the appellants have been prejudiced in that they lost the opportunity of cross-examination in the Sessions Court.

Though the appellants would not be entitled to such postponement as of right, there is no reason why the Sessions Court, if it thinks the case a proper one, should not show such an indulgence.

The conviction in this case was accordingly set aside by the High Court and the case was ordered to be re-tried by another Sessions Judge. **Sadasiv Singh v. Emperor**, 41 O. 399 = 15 Cr. L.J. 596 = 25 Ind. Cas. 348.

WOODROFFE and SHARFUDDIN, JJ.

Custom (General).

Offence of murder—Baluch custom sanctioning killing for unchastity—No ground for mitigating the sentence. See PENAL CODE, No. 75, 7 S.L.R. 118.

Customs (Punjab—Divorce).

Khatiks—Low class Sudras—Legality of divorce among them. See PENAL CODE, No. 158, 31 P.W.R. 1914 (Cr.).

Deaf-mute.

Possession of stolen property by a—Presumption. See EVIDENCE ACT, No. 31, (1914) M.W.N. 821.

Decree Nisi.

Effect of—See PENAL CODE, No. 105, 18 C.W.N. 484.

Defamation.

- (1) *Penal Code—Defamation—Fair comment—Bounds of.*

In discussing the claims of a person for Municipal Office, the person is entitled to make remarks, in the interests of the public, so long as he abstained from aspersing the private character of the former. *M. Subroya Iyer v. Moulvi Kadar Rowthu Abdul Kadar*, (1914) M.W.N. 851=15 Cr. L.J. 357=23 Ind. Cas. 725.

WALLIS and AYLING, JJ.

- (2) *Defamation—Newspaper article ambiguous—Interpretation.*

Where a newspaper article is ambiguous and capable of an interpretation making it both defamatory and innocent, it should be interpreted in favour of the accused and the more sinister interpretation should not be put on it. *C. Karunakara Menon v. Dr. T.M. Nair*, 15 Cr. L.J. 566=24 Ind. Cas. 974.

SANKARAN NAIR and AYLING, JJ.

- (3) *Defamation—Complaint—Statements in—Absolute privilege. In re Muthuswami Naidu*, 11 M.L.T. 451=14 Ind. Cas. 757=13 Cr. L.J. 293=37 M.110. See Final Part, 1912, Col. 100.

- (4) *Imputation contained in petition to higher authorities for redress of grievances—Whether privileged.* See PENAL CODE, No. 161, 15 Cr. L.J. 281.

Defence.

Nature of defence which accused can set up—Duty of Court—Deficiency in prosecution evidence—Defence not bound to fill up—Right of defence to comment on such deficiency—Case of fraud set up by defence—Opportunity of explanation to prosecution. See PENAL CODE, No. 118, 18 C.W.N. 498.

Dekkhani Agriculturists' Relief Act.

See ACT XVII OF 1879.

Demeanour.

Of witnesses noted by Court—Duty of Appellate Court. See CRIM. PRO. CODE, No. 292, 125 P.L.R. 1914.

Departmental Enquiry.

Admission of guilt while departmental enquiry was going on—Whether could be proved in judicial proceeding. See EVIDENCE ACT, No. 26, 12 A.L.J. 806.

Deposition.

Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and prosecution for perjury if can be made thereon. See CRIM. PRO. CODE, No. 291, 18 C.W.N. 1242.

Detention.

Detention in custody on the mere request of the police—Legality. See CRIM. PRO. CODE, No. 46, 12 A.L.J. 836.

Discharge.

- (1) *Discharge without making any judicial investigation into the merits of the complaint—Inquiry into the same charge on a second complaint.*

Where a Magistrate discharged an accused person without making any judicial investigation into the merits of the complaint, held, that he was competent to again enquire into the same charge on a second complaint. *Alaudin Khan v. King Emperor*, 17 O. C. 273=15 Cr. L.J. 638=25 Ind. Cas. 838.

PANDIT KANHAIYA LAL, J. C.

- (2) *Discharge—Order—Not to be set aside without sufficient reasons. Thirukonam Kuppari v. Emperor*, (1913) M.W.N. 638=14 Cr. L.J. 572=21 Ind. Cas. 172=(1914) M.W.N. 46. See Final Part, 1913, Col. 132.

- (3) *Order saying that the case was 'struck off'—Legality and effect of the order—Order of discharge when legal.* See CRIM. PRO. CODE, No. 250, 17 O.C. 18.

- (4) *Discharge of accused—Further inquiry—No notice to accused—Irregularity.* See CRIM. PRO. CODE, No. 242, 16 M.L.T. 285.

- (5) *Order of discharge under S. 118, Crim. Pro. Code, cannot be revised—Notice to person discharged before ordering further enquiry.* See CRIM. PRO. CODE, No. 63, U. B. R. (1914) 1st Cr., p. 3.

Discretion.

Tribunal invested with discretion—Discretion how to be exercised. See CRIM. PRO. CODE, No. 155, 15 Cr. L. J. 49.

Dismissal.

Magistrate giving date for hearing petitioner—Petitioner not informed of place where case would be heard—Petitioner's failure to appear—Dismissal of petition—Legality. See CRIM. PRO. CODE, No. 72, 53 P.L.R. 1914.

District Board.

- (1) *Acquisition of right by, over land adjacent to road how to be made.* See ACT III OF 1895 (BENGAL LOCAL SELF-GOVERNMENT), No. 1 15 Cr. L.J. 267.

District Municipalities Act (Madras).

See MAD. ACT IV OF 1884.

Divorce.

(1) Khatiks—Low class Sudras—Legality of divorce among them. See PENAL CODE, No. 168, 31 P.W.R. 1914 (Cr.).

Divorce Act.

See ACT IV OF 1869.

Dying Declaration.

Dying declaration—Document containing it not signed—Mode of proof—Evidence of person who heard it—Necessity—Evidence Act, S. 32—Crim. Pro. Code, S. 162

Where the document containing the dying declaration was not signed by the deponent and the Police officer was not bound by law to take it down in writing:

Held, that the proper method of proving the oral statement of a dying man was by the oral evidence of any person who heard it, that person being allowed to refresh his memory by reference to the notes he made or read at the time (a).

The document by itself cannot be admitted in evidence unless it was signed by the person making the declaration. With his signature the document would become a written statement of the kind mentioned in the beginning of S. 32, Evidence Act. *Bhagwan v. Emperor*, 10 N.L.R. 19=15 Cr. L.J. 243=23 Ind. Cas. 195.

HALIFAX. OFFG. A.J.C.

Reference:—(a) 7 C.P.L.R. 14, D.

Encroachment.

What is an—. See ACT III OF 1885 (BENGAL LOCAL SELF-GOVERNMENT), No. 2, 15 Cr.L.J. 187.

English Law.

Beating of English Law of criminal pleading on Indian Criminal Procedure. See CRIM. PRO. CODE, No. 302, 18 C.W.N. 723.

Estates Land Act (Madras).

See MAD. ACT I OF 1908.

European British Subjects.

Rights of—. See CRIM. PRO. CODE, No. 371, 18 C.W.N. 385.

Evidence.

(1) *Evidence—Witnesses produced by accused in defence—Evidence not believed—Accused convicted—Witnesses tried for perjury acquitted—Conviction of accused set aside for irregularity—Fresh trial—Accused applying for consideration of defence evidence formerly produced without producing witnesses—Application refused—Exercise of discretion by Magistrate.*

D was tried for an offence under S. 395, Penal Code. He pleaded an alibi and produced six witnesses to prove it. The Magistrate thought that all this evidence was false.

10 Cr.

Evidence—(Continued).

D was convicted and proceedings were taken against the witnesses for perjury. On appeal by D, his conviction was set aside on the ground of serious irregularity in the trial and it was left to the District Magistrate to see if any fresh trial of D was advisable.

The witnesses tried for perjury were also acquitted some by the Sessions Judge, and others by the Chief Court. D was, however, again tried for the same offence, and in defence he said that he would not produce these witnesses again though he wished their evidence already taken to be considered. The Magistrate declined to consider the previous defence evidence unless the men were again produced in Court:

Held, that, under the circumstances, the Magistrate exercised a wrong discretion in refusing to consider the evidence. *Dalm v. Emperor*, 41 P.L.R. 1914=17 P.W.R. 1914 (Cr.)=15 Cr. L.J. 62=22 Ind. Cas. 334.

KENSINGTON and CHEVIS, JJ.

(2) *Evidence distrusted in part whether should necessarily be rejected altogether—Right of counsel to demand in cross-examination, repetition of story told in examination-in-chief.*

Where the Court distrusts the evidence produced in a case in one particular, or as regards one accused, it does not necessarily follow that it should reject the evidence altogether.

No hard and fast rule can be laid down as to the right of counsel to demand in cross-examination that a witness should repeat the story which he has told in the examination-in-chief. *Lakha Singh v. Emperor*, 89 P.L.R. 1914=15 Cr. L.J. 148=22 Ind. Cas. 724=80 P.W.R. 1914 (Cr.).

RATTIGAN and CHEVIS, JJ.

(3) *Circumstantial evidence, nature of—Theft of currency notes—Opportunity of entering room not accused's exclusively—Encashment of stolen notes in presence of accused's relation—Money in accused's possession after theft, not accounted for satisfactorily—Sufficiency of evidence.*

Circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person, or must point conclusively to the complicity of the accused.

Therefore, where, in a case of theft of currency notes and cash from an office, the evidence against the accused was that he was one of those who entered the office in the absence of the complainant, that a relation of his was present when two of the notes were cashed by that relation's relative and that the accused was after the theft in possession of money for which he could not satisfactorily account, it was held that this evidence did not fulfil the conditions of circumstantial evidence. *Chiraguddin v. Emperor*, 15 Cr. L.J. 298=23 Ind. Cas. 501=18 C.W.N. 1144.

HOLMWOOD and SHARFUDDIN, JJ.

Evidence—(Concluded).

- (4) *Circumstantial evidence—Presumption of innocence—Establishment of prima facie case—Applicability of the presumption—Duty of accused to explain circumstances.*

When no *prima facie* case had been made against the accused, it is open to the accused to rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution. But when a *prima facie* case is made out and the presumption of innocence is displaced, then the force of circumstantial evidence is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain. *Ismarsing Sawansing v. The Crown*, 7 S.L.R. 109=15 Cr. L.J. 497=24 Ind. Cas. 585.

PRATT, J. C., and HAYWARD, A.J.C.

- (5) *Admissibility—Letter self-dissevering—Letter intercepted—Import—Bengal Excise Act (V. B.C. of 1909), Ss. 2 (12), 46, 61—Articles intercepted by Customs House, if brought into Bengal. C. H. Booth v. Emperor*, 18 C.L.J. 567=18 C. W.N. 386=22 Ind. Cas. 179=15 Cr. L.J. 35=41 C. 545. See Final Part, 1913, Col. 134.

- (6) *Circumstantial evidence—Conviction—Facts to be inconsistent with innocence of accused—Reference—Disagreement between Judge and Jury—Reference when to be made to High Court—Crim. Pro. Code, S. 307. Emperor v. Suranmoyee Biswas*, 14 Cr. L.J. 660=21 Ind. Cas. 900=41 C. 621. See Final Part, 1913, Col. 184.

- (7) *Value and effect of circumstantial evidence.* See CIRCUMSTANTIAL EVIDENCE, No. 1, 16 M.L.T. 535.

- (8) *Proceedings under Ch. VIII of the Crim. Pro. Code—Value of evidence of general repute.* See CRIM. PRO. CODE, No. 56, 12 A.L.J. 937.

- (9) *Diary not used to refresh memory whether evidence—Improper admission of such diary whether sufficient ground for interference.* See CRIM. PRO. CODE, No. 136, 15 Cr. L.J. 256.

- (10) *Misappreciation of—Whether ground for interference in revision.* See CRIM. PRO. CODE, No. 336, 15 Cr. L.J. 285.

- (11) *Statement by accused (sepo) in answer to question by Commanding Officer when in custody, if admissible.* See FOREIGN JURISDICTION ACT (1900), No. 1, 18 C.W.N. 705.

- (12) *Conviction on evidence similar to that given in another case—Legality.* See LETTERS PATENT (N.W.P.) No. 1, 12 A.L.J. 281.

- (13) *Conviction for murder whether can be based on circumstantial evidence.* See MURDER, No. 1, (1914) M.W.N. 718.

- (14) *Evidence recorded by Magistrate on the order of officer initiating the prosecution—Conviction based thereon—Legality.* See TRIAL, No. 1, 7 S.L.R. 82.

Evidence Act.

- (1) S. 8. See No. 19, *infra*.

- (1-a) Ss. 6, 122—*Evidence as to what a by-stander said some time after the transaction—Communications between husband and wife—Disclosure by wife—Admissibility.*

S. 6, Evidence Act, gives statutory recognition to a well-known rule of the law of evidence that facts which form part of the *res gestae* are admissible in evidence. But this rule only applies when the facts are so connected together as to form part of the same transaction.

In order to make the statement of a by-stander admissible, it must have been made, as contemplated by S. 6 and illus. (a) to it, at the time the transaction was taking place or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependent on continuity.

In this case the murder took place the previous night. After the transaction had terminated and the murderers had left the place, a by-stander told the witnesses in the next morning that he had seen the accused commit the murder, and the witnesses testified to this statement of the by-stander. The by-stander was also produced, but he denied all knowledge of the occurrence.

Held, that any evidence as to what the by-stander said in the morning was inadmissible as hearsay and that the statement cannot be regarded as forming part of the same transaction as the murder and cannot be used against the accused (a).

Held, also that evidence given by the wife of one of the accused as to certain communications between her and her husband was inadmissible under S. 122 of the Evidence Act (b). *Jowala Sahai v. Crown*, 34 P.R. 1914 (Cr).

CHEVIS and SHADI LAL, JJ.

References;—(a) 11 C.W.N. 266, *Appr.* (b) 27 P.R. 1913 (Cr.), R.

- (2) Ss. 10, 30—*Evidence—Circumstantial evidence—Wife not pulling on well with husband and mother-in-law—Putting white substance at instance of paramour into food served to husband, mother-in-law and to other persons also to whom she was affectionately disposed—Statement of wife that substance was administered being assured by paramour that it would bring about good feeling of husband and mother-in-law—Denial of complicity by paramour—Grave suspicion—Not inconsistent with innocence of accused—Statement of female accused if admissible against male accused. Kusir Bap v. Emperor*, 14 Cr. L.J. 586=21 Ind. Cas. 378=18 C.L.J. 590. See Final Part, 1913, Col. 186.

- (3) S. 11—*Professional misconduct—Judgment and proceedings in Civil Court out of which charge arises—Admissible in evidence.* See PLEADER AND CLIENT, No. 2, 37 M. 238=23 M.L.J. 447.

Evidence Act—(Continued).

(4) Ss. 14, 15—Oheating—Previous and subsequent conduct of accused—Admissibility. See PENAL CODE, No. 140, 269 P.L.R. 1914.

(5) S. 15. See No. 4, *supra*.

(5-a) S. 24—Murder—Confession to Thuggi on inducement to confess, whether admissible—Questions and answers based on such confession, admissibility of.

The thuggi or headman of a village is a person in authority within the meaning of S. 24 of the Evidence Act. Therefore, the confession made by an accused to the thuggi on being sent for by him after he was told that he would not be punished if he had not taken part in the offence, is irrelevant and inadmissible in evidence, as what the thuggi told the accused was an inducement to make a statement.

Other questions and answers in the examination of the accused based on this inadmissible statement are also inadmissible. *Nga Kya Thin v. Emperor*, 15 Cr.L.J. 681=26 Ind. Cas. 129.

FOX, C.J. and PARLETT, J.

(6) Ss. 24, 25 and 26—Confession—Magistrate on leave and outside jurisdiction—Accused ignorant of Magistrate's existence—Value of evidence—Blood stains and injuries on the persons of Chhachh people.

Held, that, the evidence is inadmissible to prove a confession made while an accused person is in police custody, except in so far as any fact is discovered in consequence of the information so received from him.

Held, also, that a Magistrate, though on leave and not in the district in which he has been exercising jurisdiction, is a "Magistrate" within the meaning of S. 26 of the Evidence Act. A confession made in the presence of such a person is admissible and relevant.

Held, further, that very little value can be attached to such a confession, when the fact that a Magistrate was present at the time the confession was made was not known to the accused, who was under the impression that he made the statement in the presence only of the police and their friends.

Held, further, that the presence of certain injuries of the nature of scratches on an accused's hands and detection of blood colouring matter on his kurta and pyjama count for little in a country such as Chhachh tract, particularly when he is a carpenter by trade and the other evidence of murder against him is very weak. *Faiz Ullah v. The Crown*, 8 P.W.R. 1914 (Cr.)=88 P.L.R. 1914=15 Cr.L.J. 6=22 Ind. Cas. 150.

REID, C.J., and RATTIGAN, J.

(7) S. 25. See No. 6, *supra*.

(8) Ss. 25, 26—Accused person in jailor's custody—Statement made in the presence of police—Admissibility in evidence.

A confession contained in a statement made by an accused person to a stranger in the

Evidence Act—(Continued).

presence of a Police Officer while he was in the custody of a jailor does not fall within the purview of S. 25 or S. 26 of the Evidence Act, and is admissible in evidence. *Nadir v. Crown*, 8 P.R. 1914 (Cr.)=214 P.L.R. 1914=15 Cr. L.J. 480=24 Ind. Cas. 568.

KENSINGTON, C.J., and SHAH DIN, J.

Reference :—20 B. 795, R.

(9) Ss. 25, 26, 27, 30—Confession—Plea of guilty—When it can be withdrawn—Incriminating statement made in Police custody and before Magistrate—Admissibility against the maker and accused jointly tried—Curing defective statement with regard to the provisions of S. 364, Crim. Pro. Code.

Held, by the Full Bench that :—

An answer to the following effect to a charge under S. 376, Penal Code, constitutes a plea of guilty.

"I did not commit rape, I only held the lady's hands."

But, when the accused at the time of making such a statement, is enfeebled by illness and is undefended, withdrawal of the plea can be allowed if the accused wishes to withdraw it.

No part of a criminating statement whether amounting to a confession or not, written by an accused person himself while in Police custody, is admissible either against him or against the person jointly tried with him, unless it has led to the discovery of any fact within the terms of S. 27, Evidence Act.

A deposition (not amounting to a confession) of a person recorded on solemn affirmation by a Magistrate is admissible against the deponent only but not against the person jointly tried with him.

A statement made by an accused person before a Magistrate who subsequently commits him to the Court of Session must be recorded in the form prescribed by S. 364, Crim. Pro. Code, but any defect therein can be cured by proving it by the evidence of the Magistrate recording the same.

A confession of an accused is not admissible under S. 30, Evidence Act, against a co-accused, if the former is convicted on his own plea of guilty. *Crown v. Shuldham*, 44 P.W.R. 1914, (Cr.) (F B.).

CLARK, C.J., REID and RATTIGAN, JJ.

References :—5 C. 954 ; 5 A. 253, R.

(10) Ss. 25, 33—Statements made by accused to police officers—Admissibility in evidence—Exclusion of confessions—Admissions and confessions—Distinction between—Exculpatory statements—Statements leading to discovery of guilt—Admissibility of—Witness not found—Absence not accounted for—Previous deposition of such witness—Inadmissibility.

The law as laid down in S. 25, Evidence Act, does not say that all statements made to the police are inadmissible, but it excludes only

Evidence Act—(Continued).

confessions made to them: there being a distinction between mere admissions and confessions which are statements either directly admitting the guilt of the accused or statements which suggest the inference that he committed the crime with which he is charged. Further, the general rule is subject to that which admits statements leading to discovery, whether such statements amount to a confession or not.

Statements made by the accused to the police pointing out the place where the alleged dacoity was committed by others, the place where after the dacoity he concealed himself in the paddy field, and also the houses where, he said, he went for assistance, may be regarded as information leading to discovery or as statements made by the accused as part of his defence. In either view no objection can successfully be taken to the admissibility of those statements in evidence.

Statements made by the accused as to what according to his case actually happened or statements exculpating himself and put forward by way of defence are also admissible, notwithstanding that by other evidence it may be shown that they are inconsistent with truth.

A useful test as to admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution.

If the prosecution rely on the statement of the accused as being true, then they may, and probably in many cases will be found to, amount to confessions. If, on the other hand, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible. They are in such cases brought forward to show what the defence of the accused is, and that as the defence is untrue this is a circumstance tending to prove the guilt of the accused.

Where to a police officer the accused 'first said that the marks on his dhoti were tobacco stains, then he said they were stains of betel-nut and lastly he said it was blood.'

Though this statement was of an incriminating character from which an inference might be drawn as to the guilt of the accused, yet, having regard to the fact that the attack was made at some distance from the accused, and that the dhoti might have been stained in an attack by others, and having regard also to other circumstances in the case, *held* that this statement of the accused should be excluded as not being admissible in evidence.

Where there was no satisfactory evidence to prove that a witness could not be found, where no warrant said to have been issued for the production of the witness was produced and there was no evidence on record to show that an attempt was made to serve the warrant and the person who said that a search was made, did not say that he himself made the search for witness, *held* that, under these circumstances, no sufficient ground was made for the admission of a previous deposition of the witness under S. 38,

Evidence Act—(Continued).

Evidence Act, and that such deposition should have been excluded from consideration.

In order to justify the inference of guilt, the prosecution must show that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. *Emperor v. Kanga Mall*, 41 C. 801—15 Cr. L.J. 718—26 Ind. Cas. 161.

WOODROFFE and MOOKERJEE, JJ.

(11) S. 26. See Nos. 6, 8 and 9, *supra*.

(12) Ss. 26, 27—*Statement by accused that he stole property and that it will be found in a rubbish heap—Former part—Inadmissibility in evidence—Production of property from that place by accused—Whether latter part of statement relates to discovery—Admissibility in evidence.*

An accused person made the following statements, *vis.*, that he and another accused stole the missing money from a *dabbi* and that the stolen money will be found in a heap of rubbish close to his house. Immediately after making these statements, he went to that rubbish heap in the presence of two police constables and of witnesses who made the search in his house, and took out certain coins and metal plates similar to the one kept in the *dabbi*.

Held that, on the above facts, the accused was rightly convicted. The statement that the accused himself committed the offence is not admissible in evidence (a). But the portion of the statement signifying that the property stolen from the *dabbi* about which the police were then making an investigation, will be found in the rubbish heap, is a statement which is distinctly related to the discovery of the stolen property and is therefore clearly admissible (b). *Manjunathaya v. King-Emperor*, 26 M.L.J. 352—15 Cr. L.J. 533—24 Ind. Cas. 845.

SADASIVA IYER, J.

References:—(a) 31 M. 127, R. (b) 14 B. 260, F.

(13) S. 27—*Information given by accused to Police Officer, how far admissible in evidence—Admission by accused of his guilt before Sub-Inspector—Crim. Pro. Code, S. 342—Statement of accused in answer to questions put by Magistrate, admissibility of, in evidence against accused—Confession—Magistrate, power of, to put questions to accused—Questions of inquisitorial nature not to be put.*

Where a Police Sub-Inspector, the investigating officer in a murder case, was *inter alia* informed by the accused of the fact that the latter had committed the murder, and the Sub-Inspector was allowed to depose to regarding this information:

Held, that such information not being admissible in evidence under S. 27 of the Evidence Act, the Sub-Inspector should not have been allowed to state in Court that the accused said that he had committed the murder.

Evidence Act—(Continued).

The provisions of S. 342, Crim. Pro. Code, apply to all sorts of proceedings in Magistrates' Courts, whether the case is one triable by a Court of Sessions or otherwise.

Under S. 342, Crim. Pro. Code, a Magistrate is empowered at any time and without any previous warning to put questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, and under sub-S. (9) of the same section the answers which the accused gives to the questions so put may be used in evidence against him. The admissibility of the accused's statement thus made is not necessarily governed by those sections of the Evidence Act which relate to the admission of confessions, as the statement is not made *extra-judicially*.

But under S. 342, Crim. Pro. Code, a Magistrate is not justified in putting to the accused questions of an inquisitorial nature. *Malik Hussain v. Emperor*, 15 Cr. L.J. 474 = 24 Ind. Cas. 562.

LINDSAY, J.C., and STUART, A.J.C.

(14) S. 27. See Nos. 9 and 12, *supra*.

(15) S. 29—*Inadmissibility of evidence of discovery made by several persons—Theft—Tracks compared several days after the occurrence.*

Held, that, where more than one accused person in custody of the Police point out this or produce that jointly, it is usually impossible to be sure which of them really does the pointing out or the production and which simply follows the other. Consequently such an evidence of joint discovery is inadmissible against any of the accused persons, particularly where the witnesses on this point are not precise and trustworthy (a).

Held, also, that track evidence is not of any value whatever, where the comparison has been made 8 or 9 days after the affair. *Pathana and Walli v. The Crown*, 9 P.W.R. 1914 (Cr.) = 63 P.L.R. 1914 = 15 Cr. L.J. 499 = 24 Ind. Cas. 587.

JOHNSTONE, J.

Reference :—(a) 8 P.W.R. 1909 (Cr.), *F*.

(16) S. 30—*Confession of co-accused—Independent corroboration—Court may take into consideration—Evidence. Emperor v. Gangapa Kardepa*, 15 Bom. L.R. 975 = 2 Bom. Cr. C. 143 = 14 Cr. L.J. 635 = 21 Ind. Cas. 673 = 38 B. 156. See Final Part, 1913, Col. 138.

(17) S. 30—*Prosecution of 18 accused before a Magistrate—Accused bailed on to enter upon their defence—Two of the accused then pleading guilty and implicating all the accused—Trial of all together—Value of the confession of the 2 accused as against the rest. In re Yempalli Ball Reddy*, 14 M.L.T. 458 = 22 Ind. Cas. 157 = 15 Cr. L.J. 13. See Final Part, 1913, Col. 138.

(18) S. 30—See Nos. 2 and 9, *supra*.

Evidence Act—(Continued).

(19) Ss. 80, 114(b), 138 and 3—*Joint trial—What constitute—Test—Co-accused—Confession—Conviction of other accused—Value to be given to the confession. King-Emperor v. Nga Po Tha*, U.B.R. (1913), 2nd Cr., 170 = 21 Ind. Cas. 166 = 14 Cr. L.J. 566. See Final Part, 1913, Col. 140.

(20) S. 32(1)—*Dying declaration—Signed by deponent—Admissibility in evidence—Absence of his signature—Mode of proof. See DYING DECLARATION*, No. 1, 10 N.L.R. 19.

(21) S. 38. See No. 10, *supra*.

(22) Ss. 54, 165 — *Previous conviction—Relevancy of—Enhancing punishment—Penal Code*, S. 75.

The proof of a previous conviction not contemplated by S. 75, Penal Code, may be adduced after the accused is found guilty, provided the previous conviction is relevant under the Evidence Act. *Emperor v. Ismail Alibhai*, 16 Bom.L.R. 934 = 2 Bom. Cr. Cas. 252.

HEATON and SHAH, JJ.

(23) Ss. 65, 74—*Letter of village Nikah Khawan to the Moharir regarding a marriage—Document whether a public document—Secondary evidence of its contents—Admissibility. See PENAL CODE*, No. 65, 1 P.R. 1914 (Cr.).

(24) S. 74. See No. 23, *supra*.

(25) S. 80—*Confession made before a Magistrate in a Native State—Admissibility of confession—Magistrate must prove the confession.*

A confession made by an accused before a Magistrate in a Native State cannot be admitted into evidence under S. 80 of the Evidence Act. The Magistrate recording the confession must be examined to prove the confession, before it can be used as evidence. *Emperor v. Dhanka Amra*, 16 Bom. L. R. 261 = 2 Bom. Cr. Cas. 197 = 15 Cr. L. J. 433 = 24 Ind. Cas. 169.

HEATON and SHAH, JJ.

(26) S. 91—*Admission of guilt while departmental enquiry going on—Whether could be proved in judicial proceeding.*

One S stated to a Bench of Magistrates that he was willing to compromise a case pending in their Court if the opposite party paid him Rs. 9, seven of which were paid to their Peshkar. The Peshkar was sent for and admitted having received Rs. 5 from S, but when he was prosecuted he denied the receipt of money. One of the Magistrates was examined and proved the confession. *Held*, that the statement of S, was not a complaint but a confession of guilt punishable under S. 161, Penal Code, and should have been recorded like a confession. *Held*, further that the statement of the Peshkar being recorded when departmental enquiry was going on was not a matter required by law to be in writing, and S. 91 of the Evidence Act

Evidence Act—(Continued).

had no application. The Magistrates therefore were competent to prove the confession. **Haidar Raza v. King-Emperor**, 12 A.L.J. 306=36 A. 222=15 Cr.L.J. 569=25 Ind. Cas. 321.

PIGGOT, J.

(27) S. 105—*Onus* that game is game of mere skill. See ACT II OF 1867 (BENGAL GAMBLING), No. 1, 15 Cr.L.J. 276.

(28) Ss. 105, 114. See PENAL CODE, No. 1-a, 15 Cr. L. J. 243.

(29) S. 114—*Accomplice—Suspected participant in crime appearing as prosecution witness, statement of weight of—Presumption—S. 302, Penal Code.*

A prosecution witness, against whom there is, apart from his own statement, ground for suspicion that he was himself a participant in the very crime for which the accused are on their trial, though, strictly speaking, not an "accomplice," stands, in view of the provisions of S. 114 of the Evidence Act, practically on the same basis as an "accomplice." Therefore a conviction ought not to be based on the sole uncorroborated testimony of such a witness (a).

The principle laid down by S. 114 of the Evidence Act is one of a very wide application, which covers not merely the particular instances given in the illustrations to the said section, but all sorts of the analogous cases in which the actual facts are distinguishable from the facts presumed by any one of the illustrations, but are equally amenable to the general principle enunciated by the section itself. **Rustom Singh v. Emperor**, 15 Cr.L.J. 410=24 Ind. Cas. 146.

RAFIQUE and PIGGOT, A.J. CS.

Reference:—(a) 17 C. 642, R.

(30) S. 114. See No. 28, *supra*.

(31) S. 114 (a)—*Possession of stolen property by a deaf-mute—Presumption.*

Where a deaf-mute was found in possession of stolen property a week after the theft, held in the special circumstances of the case, the presumption authorised in S. 114(a) of the Evidence Act cannot be applied. **Gomyan v. Emperor**, (1914) M.W.N. 821=15 Cr. L.J. 578=25 Ind. Cas. 380.

AYLING and SESHAGIRI IYER, JJ.

(32) S. 114 (b). See No. 19, *supra*.

(33) S. 118—*Child witness—Failure to administer oath—Evidence whether inadmissible—Plea of insanity of accused—Time.* See ACT X OF 1873 (OATHS), No. 1, 15 Cr. L.J. 161.

(34) S. 122—*Wife charged with murder of stepson—Admission of confession by wife to husband—Confession by the woman in police custody—Confession retracted—Effect—Meaning of 'offence.'*

In this case F, wife of A, was convicted of murdering her stepson on the strength of a confession by her to her husband and the pointing

Evidence Act—(Continued).

out by her to him alone of the body of the stepson floating in a pond. Held, that such evidence is not admissible, as the crime was not committed by the wife against the husband within the meaning of S. 122, Evidence Act (a).

An offence 'against' a person is an offence calculated to injure his person or property or reputation, as in cases of defamation, and does not include an offence against a son, though such offence may cause to the father grief in mind.

A confession by a woman in police custody, to which she had been relegated by her own husband and to which she was remanded after the confession was made, is of little value, when the confession is retracted only five days later before the same Magistrate (b). **Musammam Fatima v. Crown**, 10 P. R. 1914 (Cr.)=261 P.L.R. 1914=15 Cr.L.J. 613=25 Ind. Cas. 525.

JOHNSTONE and BEADON, JJ.

References:—(a) 24 P. W. R. 1913 (Cr.), R. (b) 18 A. 78, R.

(35) S. 122—*Communications between husband and wife—Death of husband—Disclosures by widow—"Representative in interest"—Consent.* **Nawab Howlader v. Emperor**, 40 C. 891=23 Ind. Cas. 511=15 Cr. L.J. 303. See Final Part, 1913, Col. 148.

(35a) S. 122. See No. 1-a, *supra*.

(36) S. 126—*Relevancy of evidence, how to be determined—Evidence—Counsel appearing as witness for his client—Evidence recorded—Duties of the counsel.*

On a letter addressed by the accused to the legal adviser of the complainant, criminal proceedings for defamation were started by him and he was represented at the trial by the same legal adviser. The latter offered himself as the principal witness in the case and his evidence was recorded. The Magistrate before whom the trial was had while writing judgment was of opinion that the evidence of the counsel for the complainant was inadmissible and dismissed the complaint for want of proof.

Held, that, inasmuch as the evidence of the counsel for the complainant was admitted on the record and was ruled out by the Magistrate only when he came to pass judgment, there was no trial of the case on the merits; and it would not be improper for the High Court to exercise its revisional powers (a).

Held, further, that, in determining the relevancy or otherwise of any evidence, the Court is precluded from considering matters outside the purview of the Evidence Act, and the Magistrate was in error in ruling out as inadmissible the evidence that had already been recorded, on the ground that the witness was appearing as counsel in the case.

It is an error of judgment on the part of a counsel, and against his professional obligations, to appear on behalf of a party in a case in

Evidence Act—(Concluded).

which he is to appear as a witness for his client to prove certain facts which are known to him. *W. A. Hearsay v. Eva Forster*, 12 A.L.J. 285 = 15 Cr. L.J. 429 = 24 Ind. Cas. 165.

PIGGOTT, J.

Reference:—(a) 9 Bom. L.R. 1044, D.

(37) S. 133. See No. 19, *supra*.

(38) S. 157—Statements made to police when reduced to writing are not admissible—Police officer can depose to the statements. See CRIM. PRO. CODE, No. 127, 16 Bom. L.R. 603.

(39) S. 165. See No. 22, *supra*.

Excise Act.

See ACT XII OF 1896.

See BEN. ACT V OF 1909.

Execution of Decree.

Decree-holder realizing more than is due to him—Duty of executing Court to find out amount due—Decree holder when punishable. See PENAL CODE, No. 62, 11 P.W.R. 1914 (Cr.).

Executive Officers.

Powers of Executive or Judicial officers from what source derived. See MAGISTRATE, No. 1, 17 O.C. 263.

Experts.

Two thumb markings exactly agreeing—Value of opinion of experts. See PENAL CODE, No. 189, 9 P.R. 1914 (Cr.).

Etradition Act.

See ACT XV OF 1903.

False Pretence.

Promise to do something in future whether amounts to. See PENAL CODE, No. 140, 269 P.L.R. 1914.

Fish.

Fish in a pond—Whether can be subject of theft. See PENAL CODE, No. 110. (1914) M.W. N. 169.

Foreign Jurisdiction Act (1890).

(1) *China and Corea Order-in-Council*, 1904—Arts. III, V, cls. (1), (3), (4), XXXV (2), *Order-in-Council—Ex-territorial jurisdiction over foreigners*—"British protected person," jurisdiction over—Jurisdiction of Supreme Court of China and Corea to try Afghan soldier enlisted in Indian army for murder committed at Canton—Consent of Ameer to exercise of jurisdiction, if to be implied from public recruitment of Afghans to the Indian army—Proof of exercise of ex-territorial jurisdiction in China by oral evidence—Admissibility—English rules of evidence how far binding on Supreme Court at Hong-Kong—Statement by accused in answer to question by Commanding Officer when in custody, if admissible—Substance and not mere formalities of law, to be complied with—Misdirection to jury on

Foreign Jurisdiction Act (1890)—(Continued).

matter of comparatively small importance, if a ground for reversal—Privy Council when will interfere with order in criminal case—Violation of natural justice.

The specified conditions under which only, according to cl. (3) to Art. V of the China and Corea Order-in-Council, 1904, the Supreme Court of China and Corea has civil and criminal jurisdiction over a "foreigner" as such, have no application to "British protected persons" who, even when in fact natural-born foreigners, are "British subjects" as defined by Art. III and so subject to the jurisdiction of that Court under cl. (1) to Art. V.

The accused, a natural-born subject of the Ameer of Afghanistan, was duly enlisted and enrolled in a British Indian regiment, took the oath of allegiance to His Majesty and made a solemn declaration undertaking among other things to go wherever ordered by land or sea, and whilst serving with the detachment of that regiment which was encamped on Shameen Island at Canton as a guard of the Concession, was alleged to have murdered a Subadar of that regiment. The Acting Consul at Canton, who also served as Judge under Art. XIX of the Order-in-Council, gave evidence (which was uncontradicted) "that the place of murder was within his jurisdiction and that the jurisdiction exercised at Canton on Shameen was the same ex-territorial jurisdiction as was exercised throughout China by the Supreme Court, that Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Courts exercise jurisdiction over them, and that consular protection extends to trying persons and protecting them if they are improperly arrested."

Held—that S. 4 (1) of the Foreign Jurisdiction Act, 1890, did not make this evidence inadmissible to prove that, by "usage, sufferance or other lawful means," His Majesty has jurisdiction at Canton.

That the accused being, during his service in the Indian Army, subject to Military Law, was entitled to His Majesty's protection and was a "British protected person" within Art. III.

When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as are the duties of British enlisted subjects, it extends to them the same protection in a foreign country where all are serving together in the armed forces of His Majesty.

Protection enjoyed by virtue of the Foreign Jurisdiction Act, 1890, "or otherwise," as mentioned in Art. III, includes that derived from other statutes, Imperial or Indian, applicable to the person in question.

Quere.—Whether the Court could take judicial notice of the political change in China in considering the question of jurisdiction.

Quere.—Whether it may not be reasonably inferred from the practice (which is a matter of public knowledge) of enlisting native Afghans

Foreign Jurisdiction Act (1890)—(Continued).

in the Indian army whereby they are *de facto* brought under the authority of His Majesty, that the Ameer does in fact consent to such enlistment with its consequences, so as to bring such enlisted Afghans within the terms of cl. (4), Art. V, *i.e.*, "foreigners with respect to whom any State, King, Chief of Government whose subjects they are, consents to the exercise of power or authority by His Majesty."

The Officer commanding the detachment, who spoke to the accused shortly after the occurrence, deposed to having asked the accused why he had done such a senseless act—not thereby meaning to convey a threat or inducement—and to the accused having replied that he was being abused by the deceased three or four days and that without a doubt he had killed him. The Judicial Committee found that the words of the officer though formally a question were really an exclamation of dismay:

Held—That the prosecution having by the evidence of this officer proved to the satisfaction of the trial Judge that the statement of the accused was voluntary in the sense that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, its admission in evidence was not in breach of the long established rule of English Criminal law which makes statements obtained from the accused by pressure of authority and fear of consequences inadmissible in evidence and which casts on the prosecution the *onus* of proving that the statement relied on was voluntary.

On the question whether the statement should not have been excluded from evidence on the ground of its having been made by a person in custody in answer to a question put by a person having authority over him and having custody of him through his subordinates,

Held, on a review of English authorities, that the English law on the point was still unsettled, some Judges being of opinion that such a statement is admissible in evidence without exception, whilst others treat its exclusion from evidence as a matter for the Judge's discretion depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case.

That the trial Judge in admitting this evidence decided in accordance with what at any rate was a "probable opinion" of the present law if it was not actually the better opinion, and his so doing was not a violation of "the principles of natural justice," calling for His Majesty's interference.

That even if the evidence was admissible, in the exercise of the trial Judge's discretion, that discretion in the present case was not shown to have been exercised improperly.

With reference to Art. XXXV (2) of the China and Corea Order-in-Council which provides that, subject to the provisions of that order, criminal jurisdiction under the Order shall, as far as

Foreign Jurisdiction Act (1890)—(Continued).

circumstances admit, be exercised on the principle of and in conformity with English law for the time being.

Held—that, in the absence of any provision in the Order on the point modifying or excluding the principles and practice of the English law, the question of the admissibility of the statement of the accused might justly be treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong-Kong, subject, however, to the following reservations: (1) That such law and practice are not to be considered as in all respects and particulars binding on that Court; (2) That regard must be had to the necessary distinction that must be drawn between the criminal procedure of a European country whose jurisprudence has a defined history extending over many centuries and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of Law by European Judges whose duty it is to have regard alike to the principle of British justice and to the necessities of local order; (3) That the words "so far as circumstances admit" may well (i) refer to absence of facilities at Hong-Kong for formal proof of Statutes passed and administrative orders made in various parts of His Majesty's dominions, and (ii) be intended to cover some necessary departures from the formalities only as distinguished from the essentials of English justice, when as in the present case a force detailed for the protection of European residents beyond His Majesty's dominions in the midst of a population often turbulent and at the particular time disturbed, was itself disturbed by such a crime as the murder of a Subadar by a Native Private in the ranks.

That, in view of the position which the Privy Council held in regard to criminal proceedings, the Judicial Committee did not in this case decide what the rule of English law should be with regard to the admissibility in evidence of statements made by an accused person in answer to a question put by a person in authority in whose custody he is; that should be left to a Court which exercises the revising functions of a general Court of criminal appeal (a).

The Privy Council cannot in a criminal matter allow an appeal on grounds that would not have sufficed for granting leave to appeal. Misdirection as such or irregularity as such will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of law into a new course which may be drawn into an evil precedent in future (b).

The jurisdiction of the Privy Council in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter.

Foreign Jurisdiction Act (1890)—(Concluded):

Held, upon a review of the evidence, that the preponderance of unquestioned over the questioned evidence (the accused's statement to the commanding officer) was so great, that it was impossible, at any rate highly improbable, that the jury was substantially influenced by that evidence. Therefore, the fact that the Judge left the objectionable evidence for the consideration of the jury without any warning to disregard it did not justify the conclusion that there was any miscarriage of justice, substantial, grave or otherwise.

Semle :—Whether it is highly improbable that evidence improperly admitted can have had any influence on the verdict of the jury, the Appellate Court will be justified in refusing to interfere (c). *Ibrahim v. The King*, 18 C.W. N. 705 = 15 Cr. L. J. 326 = 23 Ind. Cas. 678 (P.C.).

LORD CHANCELLOR, LORD ATKINSON,
LORD SHAW, LORD MOULTON and
LORD SUMNER.

References :—(a) 40 I.A. 241, R. (b) (1893) A. C. 346; 16 L.J.N.S. 752, F.; 10 A.C. 675, (1895) 12 A.C. 459 (1897), R. (c) (1894) A.C. 57 (1893), *Considered*.

Forest Act (Madras).

See MAD. ACT V OF 1882.

Further Enquiry.

(1) Power to direct further enquiry when accused released. See CRIM. PRO. CODE, No. 323, 12 A.L.J. 167.

(2) Order for further enquiry when to be made. See CRIM. PRO. CODE, Nos. 327 and 326, 15 Cr. L.J. 1 and 16.

Gambling.

(1) Ring game—Whether game of mere skill—Meaning of 'mere' skill. See ACT II OF 1867 (BENGAL GAMBLING), No. 1, 15 Cr. L.J. 276.

(2) Gaming materials found on premises—Presumption. See ACT III OF 1898 (MADRAS CITY POLICE), No. 1, 15 Cr. L.J. 408.

Gambling Act.

See ACT III OF 1867.

See BEN. ACT II OF 1867.

See BOM. ACT III OF 1866.

See BUR. ACT I OF 1899.

Gazette.

Proclaimed offender—Publication in Criminal Intelligence Gazette whether sufficient notice. See PENAL CODE, No. 66, 15 Cr. L.J. 349.

General Clauses Act.

See ACT X OF 1897.

Guardians and Wards Act.

See ACT VIII OF 1890.

11 Cr.

Hackney Carriage.

Refusal of driver to ply for hire—Liability of driver and owner. See ACT XIV OF 1879 (HACKNEY CARRIAGES), No. 1, 15 Cr. L.J. 552.

Hackney Carriages Act.

See ACT XIV OF 1879.

High Court.

(1) Small Cause Court directing prosecution of a person under S. 476, Crim. Pro. Code—Powers of High Court acting as a Criminal Court in revision. See CRIM. PRO. CODE, No. 355, 17 Q.C. 25.

(2) Temporary orders in urgent cases of nuisance—Permanent injunction—Interference of High Court. See CRIM. PRO. CODE, No. 88, (1914) M.W.N. 169.

(3) Appeal against conviction—High Court's power to alter the finding and enhance sentence. See CRIM. PRO. CODE, No. 303, 37 M. 119.

(4) High Court—Power of interference with order for restoration of property by lower Courts. See CRIM. PRO. CODE, No. 312, 15 Cr. L.J. 184.

(5) Revision—High Court—Order of Subordinate Courts granting sanction under S. 195, Crim. Pro. Code—Discretion of such Courts—Interference—Not to be claimed as matter of right—Grounds of interference—Third appeal to High Court in sanction cases when allowable. See CRIM. PRO. CODE, No. 178, 26 M.L. J. 486.

High Court (Allahabad).

Appointment of sixth Judge to the High Court—Constitution of the High Court. See LETTERS PATENT (N.W.P.), No. 1, 12 A.L.J. 231.

Hindu Law (General).

Kumhars in Punjab—Whether bound by Hindu Law. See PENAL CODE, No. 106, 24 P.W.R. 1914 (Cr.).

Hindu Law (Guardianship).

Lawful guardian setting up adverse title to property of the minor—Whether entitled to guardianship of the person of the minor. See PENAL CODE, No. 100, 15 Cr. L.J. 640.

Hire-purchase Agreement.

(1) Hire-purchase agreement—Installments—Rent—Possession—Sale of article hired—Penal Code, S. 408—Criminal breach of trust.

In a hire-purchase agreement the hirer is under no legal obligation to buy, but has an option either to return the article hired or to become its owner on payment in full, whereas the seller is bound to keep his offer open; it is not a sale within the meaning of S. 78 of the Contract Act, the hirer being merely a bailee.

Therefore, where a hirer of a sewing machine without making payments in full sells the

Hire-purchase Agreement—(Concluded).

machine, he is guilty of criminal breach of trust. *Maung Mya Gyi v. Mg Po Shwe*, 15 Cr. L.J. 425 = 24 Ind. Cas. 161 = 7 Bur. L. T. 222.

HARTNOLL, OFFG. C.J. and TWOMEY, J.

References;—8 Ind. Cas. 969 = 5 L.B.R. 20, Dis.; (1894) 2 Q.B. 262 = 68 L.J.Q.B. 577, F.

Honorary Magistrates.

Settlement of differences of opinion between. See ACT VIII of 1912 (BENGAL, BEHAR, ORISSA AND ASSAM LAWS), No. 1, 19 C.L.J. 92.

Husband and wife.

(1) Order under S. 552, Crim. Pro. Code—Application for custody of wife—No allegation of girl's wish in complaint—Order of restoring wife passed without inquiry—Legality—Remedy of complainant. See CRIM. PRO. CODE, No. 421, 15 Cr. L. J. 712.

Immoveable Property.

Doors whether immoveable property. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 1, 16 M.L.T. 429.

Imprisonment.

Sentence of, to take effect in continuation of a period which accused is undergoing in default of security—Legality. See SENTENCE, No. 4, (1914) M.W.N. 500.

Income Tax.

(1) Collector assessing income tax whether Government—Assessing income tax on the profits of lotteries whether tantamount to authorisation of the lotteries. See PENAL CODE, No. 1-a, 15 Cr. L.J. 243.

Income-Tax Act.

See ACT II OF 1886.

Income-tax Collector.

Perjury and forgery committed before—Income-tax Collector whether a Court—Sanction to prosecute. See CRIM. PRO. CODE, No. 175, 16 Bom. L.R. 446.

Insanity.

Of accused—Plea of—When valid. See ACT X OF 1873 (OATHS), No. 1, 15 Cr. L. J. 161.

Insolvent.

Unadjudicated insolvent—Receiving property from him—Not receiving stolen property—No offence. See PENAL CODE, No. 132, 8 S.L.R. 55.

Inventions and Designs Act.

See ACT II OF 1911.

Joint Trial.

(1) Trial for more than one offence—Same transaction—Separate offences committed on a different day being part of the same transaction. See CRIM. PRO. CODE, No. 214, 19 C.W.N. 181.

(2) Legality of—Several offences whether forming the same transaction—Test. See PENAL CODE, No. 151, 17 O.C. 276.

Joint Trial—(Concluded).

(3) Two accused tried jointly for one offence—Power of appellate Court to convict one of them of different offence. See CRIM. PRO. CODE, No. 208, 15 Cr. L. J. 680.

(5) Trespass and on ejection assembling men to force entry, whether part of some transaction—Joint trial whether legal. See CRIM. PRO. CODE, No. 221, 15 Cr. L.J. 695.

Judgment.

Repugnancy in—Conviction if can be set aside on such ground—Tendency of modern legislation. See PENAL CODE, No. 118, 18 C.W.N. 498.

Judicial Officers.

Powers of Executive or Judicial officers from what source derived. See MAGISTRATE, No. 1, 17 O.C. 268.

Judicial Proceedings.

Enquiry by Registrar of the Presidency Small Cause Court as to proper service of summons if Judicial proceedings—Sanction to prosecute for false personation in service of summons. See CRIM. PRO. CODE, No. 159, 18 C.W.N. 1323.

Jurisdiction.

(1) *Jurisdiction—Bhatinda Railway Station—Offence committed in—Proper Court to try—Ferozepur and Hissar Courts—Exclusive jurisdiction of Ferozepur Courts—Appeal—Political Agent of Phulkian and Bhawalpur—Proper appellate forum.*

According to the Government of India Notification No. 515, I-B dated the 17th March 1913, the Courts of Hissar District and those of Ferozepur have concurrent jurisdiction over the Bhatinda Railway Station under its cl. (3), and trial by neither of cases occurring there can be said to be illegal.

The arrangement being inconvenient, the Chief Court directed that, for the purposes of the notification, the Bhatinda Railway Station be in future, deemed to be part of the North-Western Railway system, and that the Ferozepur Courts shall exercise jurisdiction there and not the Hissar Courts.

Held also that, under the notifications Nos. 515 I-B, and 516 I-B, the appeal lies to the Political Agent for the Phulkian States and Bhawalpur. *Ram Lal v. Crown*, 7 P.R. 1914 (Cr.) = 141 P.L.R. 1914 = 15 Cr. L.J. 550 = 24 Ind. Cas. 958.

JOHNSTONE, J.

(2) *Jurisdiction—Criminal breach of trust—Cheating—Offence committed and completed.*

The complainant received a letter from Calcutta from a firm there which caused him to order goods of this firm and to send currency notes by registered cover which was handed over to the Post Office at Moradabad. The goods proved to be worthless, whereupon the complainant lodged a complaint at Moradabad

Jurisdiction—(Concluded).

charging the accused with cheating and criminal breach of trust. *Held*, that the offence of cheating, if at all committed, was completed at Moradabad, and the Magistrate of Moradabad had jurisdiction to try the complaint. *Held*, further, that the Courts at Moradabad had no jurisdiction to try the offence of criminal breach of trust which was committed, if at all, at Calcutta. *Yusuf Ali v. Wahajuddin*, 12 A.L.J. 1022 = 15 Cr. L.J. 719 = 26 Ind. Cas. 167.

PIGGOTT, J.

(3) Criminal breach of trust—Offence where deemed to have been committed—Jurisdiction. See PENAL CODE, No. 123, (1914) M. W. N. 894.

(4) Accused sentenced by Magistrate under two offences, one of which was exclusively triable by Court of Sessions—Sentence under each offence not specified—Objection as to irregularity and jurisdiction verbally taken for first time before High Court—Apportionment of aggregate sentence—Setting aside of conviction and sentence. See CONFESSION, No. 1, 15 Cr. L.J. 502.

(5) Theft within British territory—Retention of stolen articles outside British territory—British Courts if have jurisdiction to try accused for such retention of stolen articles. See CRIM. PRO. CODE, No. 140, 18 C.W.N. 1178.

(6) Acts amounting to abduction—Committal in Native State—Trial by British Indian Courts—No jurisdiction—Repetition of the acts in British India—Jurisdiction to try. See PENAL CODE, No. 103, 7 S.L.R. 128.

Jury.

(1) Unanimous verdict, due to misdirection, of acquittal on charge of rioting, agreed to by Judge—Verdict of guilty of grievous hurt not charged—Power of High Court, on reference, to re-consider charge of rioting. See CRIM. PRO. CODE, No. 265, 18 C.W.N. 668.

(2) Proceeding under S. 133, Crim. Pro. Code—Function of.—See CRIM. PRO. CODE, No. 80, 19 C.L.J. 631.

(3) Juror discharged—New juror added—Fresh trial. See CRIM. PRO. CODE, No. 256, 12 A.L.J. 802.

(4) Jury—Verdict—No power to put questions under S. 303, Crim. Pro. Code—Proper course for Sessions Judge—Submission to High Court. See CRIM. PRO. CODE, No. 260-a, 7 L.B.R. 140.

(5) Verdict of not guilty on charge of conspiracy in favour of co-accused at previous trial—Effect on accused in supplementary trial on charge under Ss. 34, 307, I.P.C.—Repugnancy in verdict of Jury—Effect—Weight to be attached to opinion of Judge and Jury. See PENAL CODE, No. 10, 18 C.W.N. 580.

(6) Judge's right to state his own views without withdrawing case from the Jury—Misdirection to Jury when sufficient for interference by Privy Council. See PENAL CODE, No. 164, 18 C.W.N. 785.

See MISDIRECTION TO JURY.

Karens.

Law relating to marriage among Karens. See BUDDHIST LAW (MARRIAGE), No. 1, 15 Cr. L.J. 590.

Landlord and Tenant.

(1) Tenant in possession of paddy—Conviction for theft—Legality. See PENAL CODE, No. 111, (1914) M.W.N. 106.

(2) Tree on tenant's holding—Severance by action of wind—Malguzar trying to remove the tree—Obstruction by tenant—Malguzar's right of private defence. See PENAL CODE, No. 21, 10 N.L.R. 88.

(3) Trees—Theft—Possession of tenant—Exclusive or joint. See PENAL CODE, No. 114, (1914) M.W.N. 483.

(4) Tenant cutting trees on *jirayati* land after execution of *Kadapa*—No theft. See PENAL CODE, No. 4, 15 Cr. L.J. 586.

Land Revenue Code Act.

See BOM. ACT V OF 1879.

Legal Practitioners Act.

See ACT XVIII OF 1979.

Legal Representative.

Legal representative—Necessity to be brought on record—Criminal proceedings. See CRIM. PRO. CODE, No. 97, 16 M.L.T. 248.

Letters Patent.

1.—CALCUTTA.

2.—MADRAS.

3.—N.-W. PROVINCES.

—1.—Calcutta.

(1) Cl. 10—Proceeding under—Attorney proceeded against making affidavit—Alleged false statements—Public prosecutor applying for sanction to prosecute—What Bench to give sanction. See CRIM. PRO. CODE, No. 155, 15 Cr. L.J. 49.

(2) Cls. 10, 39—Review—Civ. Pro. Code, 1908, S. 114, O. XLVII, r. 1—Crim. Pro. Code, S. 195—Order of High Court—Disciplinary jurisdiction—High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of Letters Patent—Privy Council, appeal to—Public Prosecutor of Calcutta—Order granting leave to appeal whether may be reviewed at instance of Public Prosecutor.

Cl. 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter not being of criminal jurisdiction, if it is a final judgment, decree or order of the Court made on appeal or in the exercise of original jurisdiction. A proceeding under cl. 10 of the Letters Patent, under which the High Court is empowered to deal with professional misconduct, does not fall under any of the jurisdiction specified in the Letters Patent, and, therefore, is not governed by cl. 39.

Letters Patent—(Concluded).**—1.—Calcutta—(Concluded).**

Therefore, no leave to appeal to the Privy Council can be given by the High Court in such a proceeding.

Where the High Court, in a proceeding under cl. 10 of the Letters Patent, has granted sanction to the Public Prosecutor to prosecute an Attorney for alleged perjury, the High Court cannot, under cl. 39 of the Letters Patent, grant leave to the Attorney to appeal to the Privy Council against the order of the High Court.

Where such a sanction was granted to the Public Prosecutor, and under some misconception the High Court granted leave to the Attorney to appeal to the Privy Council:

Held, that the order granting leave was clearly an order affecting the authority which the Public Prosecutor had under the sanction to prosecute the Attorney, and an application for review of the order of the High Court was maintainable at the instance of the Public Prosecutor. *Mr. Hume v. Poresh Chandra Ghosh*, 15 Cr. L. J. 52=22 Ind. Cas. 324=41 C. 734.

IMAM and CHAPMAN, JJ.

—2.—Madras.

Cls. 39, 11, 12, 13—Deputy Collector acting as Income Tax Officer—Order sanctioning prosecution for offence under S. 193, I.P.C., by such officer—Order of High Court refusing to quash the order by writ of certiorari—No appeal to Privy Council. In re Nataraja Iyer, 14 M.L. T. 421=25 M.L.J. 565=14 Cr. L.J. 656=21 Ind. Cas. 897. See Final Part, 1913, Col. 148.

—3.—N.W. Provinces.

Letters Patent, 24, 25 Vict C. 194, S. 16—Constitution of Court—Appointment of the sixth Judge to the High Court for N.W.P.—Practice—Conviction on evidence similar to that given in another case—Appeal from acquittal.

It was perfectly competent by Letters Patent to appoint a sixth Judge to the High Court of Judicature for the North-Western Provinces and it is a properly constituted High Court.

Where three persons were charged of the same offence on the same facts, and two of them, who were found, were tried and convicted, the case of the third, when found, should be heard and decided altogether irrespective of the fact that there had been a previous trial and conviction upheld by the High Court against the other accused.

There is no distinction between the right of appeal against an acquittal and a right of appeal against a conviction. *King-Emperor v. Ghure*, 12 A.L.J. 281=36 A. 168=15 Cr. L. J. 200=22 Ind. Cas. 984.

RICHARDS, C.J. and KNOX, J.

*References:—*20 A. 459, *Appr.*; 16 A. 212, *R.*

Limitation Act (1908).

(1) Not applicable to applications under S. 195 (6), Crim. Pro. Code. See CRIM. PRO. CODE, No. 172, 8 S. L. R. 49.

(2) S. 5—Applicability. See ACT I OF 1910 (PRESS), No. 9, 126 P.L.R. 1914.

Local Boards Act (Madras).

See MAD. ACT V OF 1884.

Local Enquiry.

Jurisdiction of Court to order local enquiry by pleader in the nature of Commission in a civil case. See CRIM. PRO. CODE, No. 166, 18 C.W.N. 399.

Local Self-Government Act (Bengal).

See BENG. ACT III OF 1885.

Lotteries.

(1) Assessing income-tax on the profits of lotteries whether tantamount to authorization of the—. See PENAL CODE, No. 1-a, 15 Cr. L. J. 243.

(2) Dishonestly obtaining lottery prize—Offence—Chief Court in revision ordering person receiving prize to refund it to lottery officials—Magistrate directed to recover it in manner provided for recovering fines. See PENAL CODE, No. 5, 15 Cr. L.J. 555.

Magistrate.

(1) Order passed by a District Magistrate in the absence of statutory authority, effect of—Power of Magistrate to do an act, where to be derived from.

Held, that an order passed by a District Magistrate cannot be supported as an executive order in the absence of any Statutory authority which would justify the making of it.

The authority of every Magistrate to do any act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the Local Administration, but the power of the Local Administration to make an order must be derived either directly or indirectly, from Parliament and it is a mistake to assume that because an officer is an Executive Officer or a Judicial Officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin. *Gouhar (Musammat) v. King-Emperor through Ramanand*, 17 O.C. 263=15 Cr. L.J. 658=25 Ind. Cas. 996.

LINDSAY, J.C.

(2) Magistrate becoming Chairman of Municipal Board—Transfer of case—Jurisdiction as Magistrate. See CRIM. PRO. CODE, No. 409, 12 A.L.J. 890.

(3) Order under S. 146(2), Crim. Pro. Code—Magistrate's authority to retain property after Civil Court determines the rights of the parties. See CRIM. PRO. CODE, No. 117, 15 Cr. L.J. 500.

Magistrate—(Concluded).

(4) Jurisdiction of Magistrate to summon persons not named in the complaint. See CRIM. PRO. CODE, No. 2, 18 C.W.N. 921.

(5) Powers of District Magistrate to distribute work—District Magistrate cannot delegate his powers. See CRIM. PRO. CODE, No. 9, 12 A. L.J. 803.

(6) Magistrate on leave and outside jurisdiction whether a "Magistrate." See EVIDENCE ACT, No. 6, 8 P.W.R. 1914 (Cr.).

(7) Magistrate cannot be both Judge and a delegate of the prosecutor—Trial by Magistrate—Evidence recorded on order of officer initiating prosecution—Conviction based thereon—Legality. See TRIAL, No. 1, 7 S.L.R. 82.

Mahomedan Law (Divorce).

Order under S. 488, Crim. Pro. Code—Maintenance allowance paid by a Mahomedan—Effect of subsequent divorce. See CRIM. PRO. CODE, No. 864, 17 O.C. 260.

Maintenance.

Maintenance — Husband and wife — When wife is entitled to be maintained by living separate from him — Rate when may be reduced.

Held, that, where the breach between husband and wife is irremediable and it is quite impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him.

Held, also, that the rate of maintenance should be reduced when the husband's income falls down. *Nihan Kaur v. Sardar Bhagwan Singh*, 26 P.W.R. 1914 (Cr.) = 170 P.L.R. 1914 = 15 Cr.L.J. 554 = 24 Ind. Cas. 962.

KENSINGTON, C.J.

Master and Servant.

(1) Coolies engaged by employer—Discovery by them of treasure in the course of performance of their work—Treasure removed by employer—Liability of coolies as 'finders' of the treasure. See ACT VI OF 1878 (TREASURE TROVE), No. 1, 27 M.L.J. 477.

(2) Servant's possession whether master's. See ACT IX OF 1890 (RAILWAYS), No. 1, (1914) M.W.N. 124.

(3) Charge against both coachman and owner whether illegal. See ACT XI OF 1890 (PREVENTION OF CRUELTY TO ANIMALS), No. 1, 15 Cr.L.J. 695.

Medical practitioner.

(1) Medical practitioner putting brandy into medicine and selling it to a patient whether guilty under the Excise Act. See ACT XII OF 1896 (EXCISE), No. 5-a, 33 P.R. 1914. (Cr.).

Merchandise Marks Act.

See ACT IV OF 1889.

Misdirection to Jury.

(1) *Trial by Jury—Misdirection in charge to Jury—Questions of fact, Judge's expression of opinion in dogmatic and unqualified terms—Material evidence, omission to refer to—Conditions precedent to using certain evidence and drawing adverse inference against accused, omission to point out—Absconding not incompatible with innocence, omission to point out—Retrial by a new Judge. Ofel Mollah v. The King-Emperor*, 18 C.W.N. 180 = 15 Cr. L.J. 147 = 22 Ind. Cas. 723. See Final Part, 1918, Col. 151.

(2) *Trial by Jury—Sessions Judge explaining away a fact—Explanation at variance with evidence—Misdirection—Illegality. Subbu Tevan*, 14 M.L.T. 442 = 14 Cr. L.J. 623 = 21 Ind. Cas. 671. See Final Part, 1918, Col. 151.

(3) What amounts to—See CRIM. PRO. CODE, No. 259, 7 Bur. L.T. 20.

(4) Misdirection on matter of small importance if a ground for reversal of judgment. See FOREIGN JURISDICTION ACT (1890), No. 1, 18 C.W.N. 705.

Misjoinder.

Charges, misjoinder of—Joint trial—Objection, taken for the first time in the High Court, whether can be allowed.

An objection as to misjoinder of charges, although not taken in either of the lower Courts, can for the first time be taken in the High Court, and such an objection being a fatal one, there must be a proper re-trial of the accused. *Shyambar Koyal v. The King-Emperor*, 19 O.L.J. 633 = 15 Cr. L.J. 472 = 24 Ind. Cas. 352.

HOLMWOOD and SHARFUDDIN, JJ.

Reference:—25 M. 61, F.

Mortgage.

Mortgagee cutting trees to repair mortgaged premises whether guilty of mischief. See PENAL CODE, No. 145, 15 Cr. L.J. 290.

Motor Vehicles Act.

See N.W.P. ACT II OF 1911.

Municipal Act (Calcutta).

See BEN. ACT III OF 1899.

See MAD. ACT III OF 1904.

See PUNJ. ACT III OF 1911.

Municipal Election.

Application to Presidency Magistrate by counter-petitioner to declare that the inclusion of the petitioner as a candidate for the Municipal election by the President of the Madras Corporation was illegal—Order of Presidency Magistrate allowing the application—Revision whether lies. See ACT III OF 1904 (MADRAS CITY MUNICIPAL), No. 2, 16 M.L.T. 128.

Municipalities Act (U.P.).

See N.W.P. ACT I OF 1900.

Municipality.

Magistrate becoming chairman of Municipal Board—Transfer of case—Jurisdiction as Magistrate. See CRIM. PRO. CODE, No. 409, 12 A.L.J. 890.

Murder.

- (1) *Murder—Circumstantial evidence—No direct evidence—Conviction.*

In a case of murder when there is no direct evidence and the prosecution case is based purely on circumstantial evidence, such considerations would be entitled to weight if the question were between this and an alternative explanation of the deceased's death, or if there were ground for suspicion of any person other than the accused. Where the evidence points to the accused alone and admits of no reasonable doubt, the accused can rightly be convicted. *Muhammad Khasim v. Emperor*, (1914) M.W.N. 718.

OLDFIELD, J.

- (2) *Practice—Witness improving on his former statement—Evidence—Colouring matter of blood on cloths and nail parings of an accused—Murder.*

Held, that it is very unsafe to rely upon a witness who materially improves on his former statement.

Held, also, that, in the absence of reasonable proof of guilt, the presence of colouring matter of blood on certain articles of clothing of a person accused of murder or of mammalian blood on his nail parings is not of much consequence and can be explained in various ways. *Nadir and Ram v. The Crown*, 43 P.W.R. 1914 (Cr.).

JOHNSTONE and SCOTT-SMITH, JJ.

- (3) *Murder—Circumstantial evidence—Unsatisfactory evidence of the identification of body.*

Held, that a conviction of murder cannot be sustained where the only circumstantial evidence against the accused was that the deceased was seized by the accused and the husband of the deceased in the road, placed on a camel, carried towards a canal in which her body was afterwards found completely dismembered; especially when the evidence of identification of the body is unsatisfactory and there is no direct evidence connecting the accused with the commission of the crime. *Chuhar Singh v. The Crown*, 40 P.W.R. 1914 (Cr.).

JOHNSTONE and SCOTT SMITH, JJ.

- (4) *Murder—Evidence purely circumstantial—Sentence of death or transportation for life—Legality—Age of accused also to be taken into account in imposing sentence.* See CIRCUMSTANTIAL EVIDENCE, No. 1, 16 M.L.T. 535.

Native States.

Abduction—Acts amounting to—Commitment in Native State—Trial in British Indian Courts—No jurisdiction. See PENAL CODE, No. 108 7 S.L.R. 128.

Newspaper.

Newspaper article ambiguous—Interpretation. See DEFAMATION, No. 2, 15 Cr. L.J. 566.

Not guilty.

Pleading 'not guilty' and 'autrefois-acquit' at one and the same time if proper—Plea of 'not guilty' not recognized by Indian Crim. Pro. Code. See CRIM. PRO. CODE, No. 302, 18 O.W.N. 723.

Oaths Act.

See ACT X OF 1873.

Offence.

What it includes. See EVIDENCE ACT, No. 34, 10 P.R. 1914 (Cr.).

Opium Act.

See ACT I OF 1873.

Pardanashin Ladies.

(1) Complaint by—Duty of Magistrate—Whether Complainant may be examined by Commission. See CRIM. PRO. CODE, No. 154, 15 Cr. L.J. 348.

Pardon.

Formal withdrawal and forfeiture of pardon if necessary before proceeding against approver for original offence. See CRIM. PRO. CODE No. 271, 19 C.W.N. 179.

Patwari.

Patwari making unauthorized entries in Revenue Registers—Offence—Intention. See PENAL CODE, No. 6, 25 P.R. 1914 (Cr.).

Penal Code.

- (1) S. 1. See No. 103, *infra*.

(1-a) Ss. 11, 34, 294-A—Committee of club—Person—"Keeps," meaning of—Common object—Liability of members—Purpose, double, effect of—Official acts—Presumption—Government, Collector assessing income-tax, whether—Assessing income-tax, whether tantamount to authorisation—"Not authorized," meaning of—Exception—Onus of proof—Evidence Act, Ss. 105, 114—Proposal—Drawing list, whether proposal.

The members of the Committee of a club who exercise full control over club matters, inclusive of the premises, 'keep' the premises of the club within the meaning of that expression as used in S. 294-A, Penal Code.

Where a house is kept open for a double purpose, *viz.*, as an honest social club for those who do not desire to play as well as for the purpose of gaming for those who desire to play, it is a house opened and kept for the purpose of gaming, and it is not necessary to show that the house is used exclusively for the purpose of drawing a lottery (a).

Where the common object is the keeping of a place for the purpose of drawing a lottery not authorized by Government, all who engage in such an object are individually guilty and can be prosecuted jointly or severally.

Penal Code—(Continued).

The presumption is that official acts are regularly performed. A Collector who is a Revenue officer is not authorized to sanction a lottery, nor would the mere act of taking income-tax from the club on the profits of the lotteries constitute authorization.

The words 'not authorized' in S. 394-A, Penal Code, mean no more and no less than 'unless authorized, or not having been authorized or without authority,' and are in the nature of an exception or proviso, and under S. 105 of the Evidence Act, the burden of proof lies on the accused to show that the lottery was authorized by Government (b).

A drawing list which set out on the first page the list of the winners drawn on a certain day in the month of May, and on its back contained the description. "The sweep for June is now open. It will close on the 20th June 1913. Settling day 23rd June 1913. All tickets must be taken in the name of a member, etc.," was held to be a proposal within the meaning of S. 294-A, Penal Code. *Emperor v. A.J. Cooke*, 15 Cr. L.J. 243=23 Ind. Cas. 195=7 Bur. L.T. 187.

HARTNOLL, OFFG. C.J. and ORMOND, J.

References:—(a) (1884) 13 Q.B.D. 505=53 L.J.M.C. 16=15 Cox. C.O. 496=49 J.P. 20=50 L.T. 808, *F.* (b) 2 B. & Ald. 40=106 Eng. Rep. 578; (1907) 1 K.B.D. 64=79 L.J.K.B. 81=96 L.T. 197=71 J.P. 30=23 T.L.R. 53=51 S.J. 50, *F.*; (1902) 1 K.B.D. 540=71 L.J. K.B. 211=66 J.P. 217=50 W.R. 286=86 L.T. 202=18 T.L.R. 284=20 Cox. C.C. 156, *D.*

(2) Ss. 23, 379, 411—*Theft—Stolen property, receipt of—Guilty knowledge—Wrongful gain—Wrongful loss—Intention, criminal.*

The accused produced a Choukidar's birth register in a Court to prove the date of birth of a certain person and stated that the book was lent to him by the Choukidar. The Choukidar however denied this and the accused was tried and convicted of the offence under S. 411, I.P.O. *

Held, that the conviction was illegal:—assuming that the facts were as found by the Magistrate, the accused had not committed any offence. A register of the kind in question had no intrinsic value, and even if the accused person took it, it could not be supposed for a moment that he took it in order to gain the money value of the paper of which it was made, and, there was no attempt to achieve a wrongful gain or to cause wrongful loss within the meaning of S. 23, I.P.O. The fact that he produced the register in a Court showed that there was no guilty knowledge on the part of the accused. *Chuni v. The Crown*, 57 P.L.R. 1914=19 P.W.R. 1914 (Cr.)=15 Cr. L.J. 522=24 Ind. Cas. 834. *

JOHNSTONE, J.

(3) Ss. 23, 415—*Wrongful gain and wrongful loss—Acting fraudulently or dishonestly.*

The accused was in charge of a mare belonging to C, who had given it to him for sale. One

Penal Code—(Continued).

L made an offer for the mare and insisted on the offer being communicated to the owner. The accused showed L a telegram which the latter understood to have come from C refusing the offer. He thereupon raised the offer and purchased the mare. Subsequently he instituted these proceedings against the accused on the ground that deception was practised on him, but, when he was examined, stated that he would have paid the same price had he known that the mare belonged to the accused. *Held* that no wrongful loss was caused to L within the meaning of S. 23, Penal Code, by reason of the fact that he was induced to bid up to what he considered to be the full value of the mare.

Held also that, by merely placing before L the telegram which purported to have been received from C, the accused could not be said to have acted fraudulently. *G.W. Dick v. King-Emperor*, 12 A.L.J. 1258.

PIGGOTT, J.

(4) Ss. 24, 379—*Acting "dishonestly" — Tenant cutting trees on jirayati land after execution of Kadapa—Theft—Landlord's intent—Madras Estates Land Act (I of 1908), S. 12.*

A tenant cutting trees standing on his own *jirayati* land and for which he has executed a *kadapa*, which gives the landlord only a claim for compensation for trees so cut, cannot be said to be acting "dishonestly" within the meaning of S. 24 of the Penal Code and is not guilty of theft, and the provisions of S. 12 of the Madras Estates Land Act do not apply. *Reddi Yerranna v. Emperor*, 15 Cr. L.J. 586=25 Ind. Cas. 338.

AYLING and SESHAGIRI AIYAR, JJ.

(5) Ss. 24, 420—*Dishonestly obtaining lottery prize—Wrongful gain—Wrongful loss—Crim. Pro. Code, S. 517, 545—Compensation—Refund—Revision.*

A person, who, by falsely pretending to be the winner of a lottery prize, dishonestly induces the lottery officials to pay the prize to him does not cause "wrongful loss" to the rightful winner of the prize but causes a "wrongful gain" to himself by obtaining by false pretence what he is "not legally entitled" to and, therefore, he acts "dishonestly" within the meaning of S. 24, Penal Code. *

Where a complainant cannot recover substantial compensation in a Civil Court, compensation cannot be awarded to him under cl.(b) of S. 545, Crim. Pro. Code, but a sum may be awarded to him under cl. (a) of the section to defray the expenses of the prosecution.

The Chief Court, in the exercise of its revisional power, ordered, under S. 517, Crim. Pro. Code, the appellant, who had received money by false pretence from the lottery officials, to refund the money to the lottery officials, and directed the Magistrate to recover it in the

Penal Code—(Continued).

manner provided for the recovery of fine. *Nga Tha Yin v. Emperor*, 15 Cr. L.J. 555=24 Ind. Cas. 963.

TWOMEY, J.

- (6) Ss. 24, 464, 466, 477 A—*Essentials of offences under—Patwari making unauthorized entries in Revenue Registers—Offence—Intention.*

The accused, a Patwari, was charged with having made unauthorized entries in the *Khatamni* *partial* book and *Jamabandi* in regard to the status of certain donees of land. The effect of those entries was to show the donees as *malkan gabsa*, i.e., as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors. The deed under which those persons acquired their rights made no mention of the *shamilat* and it was a moot point of law as to whether a deed of gift not specifying the *shamilat* rights as going with the area gifted does or does not carry with it the rights in the *shamilat*. It was also found that the accused acted *bona fide* though in disregard of the Revenue Rules.

Held, that it was not shown that the making of the entries was likely to deprive the donees of any right to which they were entitled or that he made the entries with intent to defraud or dishonestly within the meaning of S. 24, I.P.C. In other words there was no finding that he made a false document as defined in S. 464 or that he fraudulently altered any book or register within the meaning of S. 477-A, and that his conviction under those sections cannot be sustained. *Muhammad Sirdar v. Crown*, 25 P.R. 1914 (Cr.).

SCOTT-SMITH, J.

- (7) S. 27—What proof necessary to raise presumption—Possession of wife or mistress—Effect. See ACT XII OF 1896 (EXCISE), No. 5, 97 P.L.R. 1914.

(8) Ss. 27, 141—Servant's possession whether master's—Use of force—Assertion of right—Not equalised. See ACT IX OF 1890 (RAILWAYS), No. 1, (1914) M.W.N. 124.

- (9) S. 34—See No. 1, *supra* and 81, *infra*

(10) Ss. 34, 107—Crim. Pro. Code. Ss. 306, 439—*Quashing of proceedings—Verdict of not guilty on charge of conspiracy in favour of co-accused at previous trial—Effect on accused in supplementary trial on charge under S. 307, read with S. 34, I.P.C.—Recalling of warrant after acquittal of co-accused—Jurisdiction of District Magistrate to issue fresh warrant on same materials—Verdict of jury—Repugnancy in, effect of, in Indian law—Opinion of Judge and jury, weight to be attached to—S. 34, I.P.C.—Necessary elements in.*

In a previous trial two persons were tried for having conspired with one B (against whom a warrant had been issued but who was not before the Court) and two others named and

Penal Code—(Continued).

others unknown, to kill one M or to cause grievous hurt to him. They were acquitted by the unanimous verdict of the jury whereupon the warrant against B was recalled, but subsequently the District Magistrate issued a fresh warrant against B and proceedings were started against him, under S. 307 read with S. 34, I.P.C.

Held, (on an application by B for the quashing of the proceedings)—That the District Magistrate had jurisdiction to take cognizance of the case and issue fresh warrant without further materials or enquiry, if he was of opinion that the evidence brought the accused within the purview of the law.

As to the contention that the case for the prosecution in the previous trial being one of conspiracy between the accused then before the Court and the present accused and that charge having failed, the present proceeding could not go on:

Held, agreeing with the view expressed in *Romesh Chandra Banerjee v. The Emperor* (18 C.W.N. 498)—That the repugnancy in the verdict of a jury in India is not in itself sufficient to justify the quashing of a conviction; and the technicalities which are borrowed from the English Law, and founded on ideas as to the sacred character of a verdict by a jury whose findings of fact are unknown, cannot be imported so as to give to verdicts of juries in India a character which by the express provisions of law does not attach to them.

Where two of the accused at the previous trial were acquitted by the Judge agreeing with the jury on account of the evidence of their identification being weak.

Held—that this did not affect the evidence of identification of the present accused even by the same witnesses, as the question of his identification was not before the jury at that trial.

That, in the circumstances, where the Judge had expressed a clear opinion and the jury had expressed none, the High Court ought not to interfere with the ordinary course of justice by quashing the proceedings against the present accused.

In this country the opinion of the Judge is to be weighed by the High Court in exactly the same balance as the opinion of the jury.

Section 34, I.P.C., does not involve abetment and therefore does not imply any conspiracy and does not require proof that any particular accused was responsible for the commission of the actual offence and the present proceeding under S. 307-34, I.P.C., could not be quashed on the ground that there was no suggestion at any stage of the previous trial that any particular accused was responsible for the offence. *Manindra Chandra Ghose v. The King Emperor*, 18 C.W.N. 580=15 Cr. L.J. 402=41 C. 754=28 Ind. Cas. 1002.

HOLMWOOD and SHARFUDDIN, JJ.

Penal Code—(Continued).**(11) Ss. 34, 302, 326—Common intention.**

The appellant and his companions went together to strike the deceased. The appellant was found to have inflicted only one injury out of three, all of which were contused wounds caused by blunt weapons. One was on the left eye and was slight; the second on the nose and dangerous to life but could be cured; and the 3rd on the parietal bone which fractured the skull was necessarily fatal. The appellant stated that he inflicted one blow with a light cane.

Held, that it would not be safe to assume that the common act intended by all the assailants was more than to cause grievous hurt. **Nga Ba E v. King-Emperor**, 15 Cr. L.J. 484 = 24 Ind. Cas. 572.

ORMOND, J.

(12) Ss. 37, 302, 325—Murder—A number of persons acting in concert—Assault by Lathis by all of them—Death caused by a number of blows—Attack, single and indivisible—Liability of each for murder. King-Emperor v. Ram Newaz, 11 A. L.J. 804 = 35 A. 506 = 14 Cr. L.J. 615 = 21 Ind. Cas. 663. See Final Part, 1913, Col. 156.

(12-a) S. 40. See No. 18, *infra*.

(12-b) S. 52. See No. 164, *infra*.

(13) Ss. 52, 191 and 193—Perjury—False verification—Statement made, believed to be true—"Good faith."

A man cannot be convicted of perjury for having acted rashly and credulously and having failed to make reasonable enquiry with regard to the facts alleged by him to be true. It must be found that he made some statement which he knew or believed to be false or which he did not believe to be true. This finding should be arrived at independently of the definition of good faith in S. 52 of the Code. **Mohammad Ishaq v. King-Emperor**, 12 A. L.J. 550 = 36 A. 362 = 15 Cr. L.J. 579 = 25 Ind. Cas. 331.

PIGGOTT, J.

(14) S. 62—Forfeiture of property—Crimes against the State or affecting public safety.

S. 62, Penal Code, dealing with forfeiture of property in respect of certain offenders, should generally be applied in cases of crimes against the State or affecting the safety of the public. **Gaya Prasad v. King-Emperor**, 12 A. L.J. 760 = 36 A. 395 = 15 Cr. L.J. 606 = 25 Ind. Cas. 518.

RAFIQUE and PIGGOTT, JJ.

(14-a) S. 71. See No. 141, *infra*.

(15) Ss. 72, 303, 201—Crim. Pro. Code, Ss. 236, 367 (8)—Doubt as to guilt of accused in regard to one of the offences—Alternative convictions—Legality—Benefit of doubt to be given. Partapa v. Crown, 11 P. R. 1913 (Cr.) = 14 Cr. L.J. 664 = 21 Ind. Cas. 904 = 271 P. L. R. 1914. See Final Part, 1913, Col. 157.

(16) S. 75—Enhancing punishment—Relevancy of previous conviction. See EVIDENCE ACT, No. 22, 16 Bom. L. R. 984.

12 Cr.

Penal Code—(Continued).

(17) Ss. 75, 379, Crim. Pro. Code, S. 565—Previous conviction—Subsequent conviction for technical theft.

Held, that, whether a person is found technically guilty of theft, it is absurd to treat this offence more seriously with reference to S. 75, I. P. O., or to make his conviction of such a trifling offence the occasion for a long period of Police supervision under S. 565, Crim. Pro. Code.

The sentence of 7 years' rigorous imprisonment was reduced to six months, and the order under S. 565, Crim. Pro. Code, was also set aside. **Jowahir Singh v. Crown**, 3 P. W. R. 1914 (Cr.) = 4 P. L. R. 1914 = 15 Cr. L. J. 163 = 22 Ind. Cas. 759.

KENSINGTON, J.

(18) Ss. 79, 40—Applicability to offence under Forest Act—Accused's belief that he was justified in his act—Effect.

The principle of S. 79, Penal Code, should not be applied to an offence created by the Forest Act for the protection of the Government revenue and of property belonging to Government. S. 79 itself cannot apply, as the definition of offence in S. 40, I. P. O., covers only a 'thing made punishable' by the Penal Code, except when the word is used in certain section which do not include S. 79.

The belief of the accused that he was justified in his act cannot exculpate him from punishment for any of the offences created by S. 21 of the Madras Forest Act. *In re Lewis*, 16 M. L. T. 124 = 15 Cr. L. J. 171 = 22 Ind. Cas. 747.

SADASIVA IYER, J.

References: -9 M. L. T. 216, F.; 14 Bom. L. R. 365, Diss.

(19) Ss. 90, 366—Gift of the offence of kidnapping—Consent obtained on misrepresentation—Effect—Scope of expression "under misconception of fact" in S. 90, I. P. C.—Misrepresentation as to intention of a person is a misrepresentation of fact within S. 3, Evidence Act—Consent obtained by coercion or fraud—Effect in Civil and Criminal law. Re N. Jaladu, 36 M. 453 = 22 Ind. Cas. 168 = 15 Cr. L. J. 24. See Final Part, 1913, Col. 161.

(20) Ss. 95, 504, 351—Acts causing slight harm—Abuse—Ejecting a trespasser from the pleader's room after warning. Emperor v. Moro Balvant Marathe, 15 Bom. L. R. 1089 = 2 Bom. Cr. C. 169 = 15 Cr. L. J. 14 = 22 Ind. Cas. 158. See Final Part, 1913, Col. 162.

(21) S. 98—Tree on tenant's holding—Severance by wind's action—Malguzar trying to remove the tree—Obstruction by tenants—Malguzar using trivial force in defence of his rights over it—No offence—Right of private defence—Existence of.

Where a tenant did not object to the Malguzar entering upon the land, but to the removal of a tree growing thereon after its severance from the ground by the action of the wind and

Penal Code—(Continued).

where the *Malgusar* used force not more than what is justified by law, to protect his rights over the tree, *held*, that the *Malgusar* did not commit any offence.

The *Malgusar* as owner of the tree had, under S. 98 of the Penal Code, a right of private defence against the tenant, when the latter attempted to remove the tree by cutting it and stocking with a view to appropriating it for himself. The act of the tenant would amount to theft, though, if put on his trial, he would have been acquitted on the ground that he had no dishonest intention, he having acted under a *bona fide* claim of right. *Padu v. Emperor*, 10 N.L.R. 38=15 Cr. L.J. 352=23 Ind. Cas. 704.

MITTRA, A.J.C.

(21-a) S. 99, See No. 93, *infra*.

(21-b) Ss. 99, 100—*Right of private defence of person—Plea need not be set up when shown by circumstances—Right, when to be exercised—Persons aiding in such defence, whether commit offence.*

If the circumstances show that the right of private defence was legitimately exercised, the Court should take it into consideration even though self-defence was not specifically pleaded (a).

Where danger to the person of the accused was imminent and where the evidence shows that he had no time to seek the aid of the public authorities :

Held that he was entitled to use all force necessary to repel the attack, even to the extent of firing a gun at his assailants. Such acts for repelling the attack do not amount to a criminal offence, nor are the persons aiding him in such acts, guilty of being members of an unlawful assembly (b). *In re Pachai Gounden*, 15 Cr. L.J. 710=26 Ind. Cas. 158.

KUMARASAWMY SASTRI, J.

References:—(a) 15 Ind. Cas. 310=(1912) M.W.N. 404=13 Cr. L.J. 470=11 M.L.T. 251, B. (b) 20 Ind. Cas. 140=14 Cr. L.J. 380=41 C. 43; 24 C. 686=1 C.W.N. 423; 4 Ind. Cas. 19=36 C. 865=13 C.W.N. 80=10 Cr. L. J. 471, F.

(22) Ss. 99, 100, 304—*Right of private defence of person and property, when arises—Party in possession—Attempt to dispossess—Use of force—Death caused—Liability of party in possession.*

Per Wallis, J.—When some people, though in peaceful and lawful possession of property, go armed and, on their opponents appearing, stab some of them to death and inflict injuries on others, they are required to discharge the *onus* which the law throws on them of showing that they acted in self-defence and inflicted no more injuries than were necessary for this purpose.

Per Sadasiva Iyer, J.—Where the right of private defence of property exists, it is difficult to distinguish between the right of private

Penal Code—(Continued).

defence of property and the right of private defence of the person in cases where the prosecution party comes upon the land in possession of the accused not only to deprive them of their property but also to violently attack them if they tried to defend their possession by force.

Where, therefore, the prosecution partly comes with the war cries of "Kobali" and 'Konu' and armed with sticks capable of causing grievous hurts, the right of private defence of person arises almost simultaneously with the right of private defence of property, and the accused party is justified even in causing the death of the members of their opponents' party till the latter party gives up the fight.

Per Ayling, J.—Where the accused were in possession of the disputed land and the affray originated from the prosecution party trespassing upon it and obstructing the accused party from ploughing it, the accused's party is entitled to defend their land and their bodies against any violence used by the prosecution party, but it extends to the right of causing death only when exercised against such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the result. *In re Ponthala Narai Reddi*, 15 Cr. L.J. 447=24 Ind. Cas. 927.

WALLIS, SADASIVA IYER and AYLING, JJ.

(23) Ss. 99, 105, 147, 378—*Orderly of Deputy Commissioner, chaprasi, etc., forcible seizure of bullocks by, not bona fide act of public servant as such—Private defence, right of, exercise and continuance of—Theft—Bullocks, seizure and recovery of—Crim. Pro. Code, S. 342—Examination of accused before completion of prosecution evidence, contrary to law and unfair to accused.*

Some country carts containing the camp-luggage of a Deputy Commissioner were on their way in charge of an orderly, a constable and some *chaprasis*. While on their way one of the carts struck in a rut and the orderly and the *chaprasi* took hold of the bullocks of the accused against their will, yoked them to the cart and dragged it out of the rut. The accused then forcibly unyoked their bullocks and took them away. They were convicted and sentenced under S. 147, Penal Code.

Held, that the orderly and his companions could not be regarded under S. 99, Penal Code, as public servants, acting in good faith under the colour of their office, and the accused were justified in their action by the right of private defence.

Held, also, that the act of the orderly and his companions technically amounted to theft under S. 378, Penal Code, and the right of private defence of the accused continued under S. 105, Penal Code, till the recovery of the bullocks and did not cease with the yoking of the bullocks to the cart (a).

Penal Code—(Continued).

The examination of the accused generally on the case, before the examination of the prosecution witnesses is completed, is contrary to law and unfair to the accused. *Ram Harakh v. Emperor*, 15 Cr. L.J. 436=24 Ind. Cas. 172.

OHAMIER, J.C.

Reference:—(a) 15 B. 344, R.

- (24) Ss. 99, 147—*Right of private defence—Rioting—Trespass—Wrongful possession for 14 hours—Repelling trespass by force if any offence.*

Where the opposite party erected some huts stealthily at night, on a plot of land of which the petitioners were in peaceful possession, and it was alleged that the opposite party were in possession of the land for about 14 hours, and the petitioners, at break of day, on coming to know of this, took the earliest opportunity to exercise their own right of private defence, and came to the spot armed to turn out the opposite party who were found by them still engaged in erecting more huts, and there was a free fight between the parties, and the petitioners did not inflict more hurt than was necessary for defending themselves.

Held, that the petitioners were not guilty of rioting, and that, in the circumstances of the case, the petitioners had no time to have recourse to the public authorities, and they were entitled to their right of private defence. *Chandulla Sheikh v. The King-Emperor*, 18 C.W.N. 275=15 Cr. L.J. 209=22 Ind. Cas. 993.

SHARFUDDIN and COX, JJ.

- (25) Ss. 99, 353—*Assault—Public servant acting under colour of office and in good faith—Right of private defence.*

Where the petitioner was convicted under S. 353, I.P.O., of having assaulted a Civil Court peon when executing a writ of delivery of possession of a share in a tank by ordering some fishermen to cast their nets in the tank and catch fish for the decree-holder as provided in the writ;

Held that, whatever mistake there might be in the procedure of the Munsif in giving the direction in the writ, the petitioner had no right of private defence under S. 99, I.P.C., against the peon who was a public servant acting under colour of his office and in good faith. *Preo Lal Mukerjee v. The King-Emperor*, 18 C.W.N. 543=15 Cr. L.J. 427=24 Ind. Cas. 163.

IMAM and CHAPMAN, JJ.

- (25-a) S. 100. See Nos. 21-b and 22, *supra*.

(26) Ss. 104, 105, 147, 325—*Possession of land, delivered by Civil Court to master of accused—Accused cultivating land—Opposition by complainants—Right of private defence—Rioting—Possession, enjoying not enforcing.* *Fateh Blagh v. Emperor*, 14 Cr. L.J. 380=20 Ind. Cas. 140=41 C. 43. See Final Part, 1913, Col. 165.

Penal Code—(Continued).

- (26-a) S. 105. See Nos. 23 and 26, *supra*.

- (27) Ss. 105, 403, 411, 304, 325, 141—*Property dishonestly acquired under Ss. 403, 411—Right of private defence—Members of an unlawful assembly—Death caused by some of them only—Punishment.*

The Penal Code does not give any right of private defence of property in regard to which an offence under Ss. 403 or 411, I.P.O., has been committed (a).

In this case 26 persons were convicted under S. 304, Part II, I.P.O., read with S. 149, of culpable homicide. A and B were the only 2 persons among them who actually struck the deceased. *Held*, under the circumstances, that all the 26 persons constituted an unlawful assembly within the meaning of S. 141, I.P.O., but that all of them could not be convicted of culpable homicide under S. 304, I.P.O., as it could not be said that that offence was committed in prosecution of the common object of the unlawful assembly, nor was it such as the members of that assembly knew to be likely to be committed in prosecution of that object.

Held also that all of them were guilty of rioting.

As regards A and B, it was proved that they attacked the deceased, but that the deceased received only one blow on the head, and there was no evidence to show which of these 2 persons gave him that blow. *Held* that neither of these 2 persons could be convicted of an offence under S. 304, I.P.O. (b), but that, when they attacked him, they intended or knew that they were likely to cause him grievous hurt and they were therefore guilty of an offence under S. 325, I.P.O., and the other 24 persons were guilty of an offence under S. 147, I.P.O. *Agra v. Crown*, 37 P.R. 1914 (Or.).

SCOTT-SMITH, J.

- References*:—(a) 36 C. 296; 7 Cr. L.J. 49, D. (b) 29 A. 282, F.

- (27-a) S. 107. See No. 10, *supra*.

- (28) Ss. 107, 306—*Abetment of suicide—Facts constituting.* *Ram Dial v. King-Emperor*, 11 A.L.J. 997=14 Cr.L.J. 634=21 Ind. Cas. 682=36 A. 26. See Final Part, 1913, Col. 166.

- (29) Ss. 107 (3), 121, 131-A—*Waging war—Abetment—Failure to report plot—Conspirator forming intention to leave conspiracy—Crim. Pro. Code, S. 44.* *Goman Sava v. Emperor*, 6 Bur.L.T. 152=21 Ind. Cas. 658=14 Cr.L.J. 610. See Final Part, 1913, Col. 166.

- (29-a) S. 109. See Nos. 81, 82, 113, 128, *infra*.

- (30) Ss. 109, 469, 471—*Forgery—Abettor—Conviction of abettor for using forged document as genuine, legality of.*

An abettor of the forgery of a document cannot be convicted of the offence of using it as

Penal Code—(Continued).

genuine. *In re Authoor Yalappil Syed Ahmed Musaliyar*, 15 Cr.L.J. 568 = 24 Ind. Cas. 976.

SADASIVA IYER and SPENCER, JJ.

References:—23 A. 84; 26 P.R. 1901 (Cr.), F.

(30-a) S. 114. See Nos. 81, and 96, *infra*.

(81) Ss. 114, 302—*Abetment*—S. 114, if applied when abettor present—Duty of prosecution to call all available eye witnesses—Purpose of criminal trial—Duty of Public Prosecutor.

One R was charged with having committed murder of one B by being present and abetting one M in striking and thereby killing him. The allegation was that R gave orders to M to strike B who was thereupon hit on the head with a *lathi*. R was convicted under S. 302, read with S. 114, I.P.C. In the course of the trial, two persons who were admittedly eye-witnesses to the occurrence were not called as witnesses by the prosecution either in the committing Magistrate's or the Sessions Courts.

Held, that, the conviction of R for murder under S. 302/114, I.P.C., could not stand for the simple reason that the only abetment charged necessarily required the presence of R, while to come within S. 114 the abetment must be complete apart from the presence of the abettor.

That the purpose of a criminal trial is not to support, at all costs, a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police but the Crown and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

That it was undoubtedly the duty of the Public Prosecutor in a capital case to have placed before the Trial Court the testimony of all available eye-witnesses (a).

Mistake in the report *In re Dhumno Kazi* (b) pointed out. *Ram Ranjan Ray v. King Emperor*, 19 C.W.N. 28.

JENKINS, C.J., and N.R. CHATTERJEA, J.

References:—(a) (1898) 8 C. & P. 606, 609, R. (b) 8 C.121 (124), R.

(31-a) S. 121. See No. 29, *supra*.

(32) S. 141, cl. (4)—*Unlawful assembly*—Maintenance of existing peaceful possession with or without title—Enforcement of right by person out of possession.

Where certain persons were merely acting in maintenance of an existing peaceful possession, no matter whether the possession was with or without title, *held*, that they could not be said to have been enforcing any right or supposed right and, therefore, could not be held to form

Penal Code—(Continued).

an unlawful assembly within the meaning of S. 141, cl. (4), Penal Code.

Held further, that a person who is out of possession, if he has the right, must enforce it in the way prescribed by law and cannot be permitted to vindicate it by the use of criminal force. *Sarabdawn Singh v. King Emperor*, 17 O.C. 21 = 23 Ind. Cas. 184 = 15 Cr.L.J. 232.

LINDSAY, J.C.

(32-a) S. 141. See Nos. 8, 27, *supra* and No. 43, *infra*.

(33) Ss. 143, 447—*Unlawful assembly and criminal trespass*—Bona fide belief in the existence of right to land and assertion of such right.

In consequence of a dispute between two landlords, the disputed property was attached under S. 146, Crim. Pro. Code, in a proceeding under S. 145, Crim. Pro. Code, and a Receiver appointed, but the Magistrate appointing the Receiver omitted to give any direction as regards the management of the property. There was a dispute between the tenants on both sides as regards the grazing rights over the property, but it appeared that the Zemindar of the petitioners gave them the grazing rights over the land and they objected to the tenant of the rival Zemindar ploughing up a portion of the land over which they alleged they had grazing rights, under colour of a lease from the Receiver. The petitioners were convicted under Ss. 143, 447, I.P.C.

Held—that the petitioners could not be convicted of criminal trespass when they were asserting a right which had never been declared against them, which they *bona fide* believed they had, and for the same reason they could not be said to have formed an unlawful assembly, because they went and protested against the land being ploughed up. *Reajaddin Molla v. King Emperor*, 18 C.W.N. 1245 = 15 Cr.L.J. 725 = 26 Ind.Cas. 173.

HOLMWOOD and SHARFUDDIN, JJ.

(34) S. 147—Rioting over disputed possession of *chur*—Sentence—Finding of Settlement officer pronounced after issue of Rule considered by High Court in revising sentence. See CRIM. PRO. CODE, No. 334, 18 C.W.N. 646.

(34-a) S. 147. See Nos. 23, 24, 26, *supra* and No. 93, *infra*.

(35) Ss. 147 and 304—*Unreliable story for the prosecution—Reliance on defence evidence—Free fight—Death caused—Non-liability of accused—First report. Fateh Sher v. The Crown*, 35 P.W.R. 1913 (Cr.) = 318 P.W.R. 1913 = 21 Ind.Cas. 465 = 14 Cr.L.J. 593. See Final Part, 1913, Col. 168.

(36) Ss. 147, 323—*Crim. Pro. Code, Ss. 286, 287—S. 287, Crim. Pro. Code, when applies—Conviction of rioting without any charge under S. 323, I.P.C.—Conviction under S. 323, I.P.C., by appellate Court after setting aside conviction of rioting, legality of.*

Penal Code—(Continued).

The petitioners were convicted by the Magistrate, under S. 147, I.P.C. On appeal the Sessions Judge set aside the conviction and sentence under S. 147, I.P.C., and convicted the petitioners under S. 323, I. P. C. No charge had been framed against the petitioners under S. 323, I.P.C.

Held, that S. 237 has to be read with S. 236. If the facts of the case do not fall under S. 236, S. 237 has got no application. There was no charge framed against the petitioners for an offence of causing hurt and they had therefore no opportunity to defend themselves on this charge and the conviction and sentence must be set aside. *Genu Manjhi v. The King-Emperor*, 18 C.W.N. 1276=15 Cr.L.J. 704=26 Ind. Cas. 152.

SHARFUDDIN and TEUNON, JJ.

(37) *Ss. 147, 323, 353—Conviction of rioting with common object of assault—Acquittal by appellate Court on charge of rioting and conviction of assault if proper—Necessity of finding against individual accused on charge of assault.*

The petitioners were charged under S. 147, I. P. C., the common object of the alleged unlawful assembly as stated in the charge being to assault the Police. No charge under S. 353 or S. 323 was framed. The Magistrate convicted the petitioners under S. 147, I. P. C. The Sessions Judge in appeal acquitted the petitioners of the offence of rioting and convicted them under S. 353, I.P.C., in respect of the assault committed upon the several Police officers. The Sessions Judge did not find which Police officer was assaulted by which petitioner :

Held, that the Sessions Judge was wrong in convicting the petitioners of an offence under S. 353, I.P.C., the petitioners not having been called upon to answer any such charge.

That, in the view taken by the Sessions Judge of the case, a finding as to which Police officer was assaulted by which petitioner was essential. *Har Naran Sardar v. The Emperor*, 18 C.W.N. 1274.

SHARFUDDIN and TEUNON, JJ.

(38) *Ss. 147, 324 and 149—Separate terms of imprisonment, legality of.*

Where the applicants were convicted under S. 147 of being members of an unlawful assembly and under Ss. 324, 149 by reason of hurt caused by one of them and were sentenced to separate terms of imprisonment in respect of both the offences, *held*, that the sentences were legal and no exception could be taken to them. *Mahpal Singh v. King-Emperor*, 17 O.C. 184=15 Cr. L.J. 625=25 Ind. Cas. 633.

LINDSAY, J.C.

References :—Oudh S.C. 125; A.W.N. (1895), 195 and 17 B. 260, R.; 16 C. 442 and 8 C.W.N. 805, D.

(39) *Ss. 147, 349—Meaning of 'criminal force'—Rioting with the common object of*

Penal Code—(Continued).

causing violence to inanimate object—Applicability of S. 592, Crim. Pro. Code. See CRIM. PRO. CODE, No. 391, 18 C.W.N. 1150.

(40) *Ss. 147, 353—Rioting—Separate sentence. See ACT V OF 1909 (BENGAL EXCISE), No. 8, 15 Cr. L.J. 251.*

(41) *Ss. 147, 447—Charge—Rioting—Common object, not trespass—Conviction of trespass, whether legal—Crim. Pro. Code, S. 238 (2)—Criminal trespass—Criminal intention.*

Where the accused were charged only under S. 147, Penal Code, and the common object stated in the charge was to take forcible possession of the complainant's land and to assault him, and they were convicted only under S. 447, Penal Code.

Held, that the common object did not make out a case of trespass, as the criminal intention necessary to be made out in the case of a trespass was not established, and in the absence of any charge and complaint under S. 447, Penal Code, the conviction of the accused under S. 447 was illegal.

If the common object constituting the unlawful assembly had been to commit criminal trespass, a conviction under S. 447 without a charge under that section might be legally valid under S. 238 (2) of the Crim. Pro. Code, for in that case the offence of trespass would have been considered as a minor offence in comparison with that of rioting. *Ariff Munchi v. Emperor*, 15 Cr. L.J. 188=22 Ind. Cas. 764=18 C.W.N. 992.

IMAM and CHAPMAN, JJ.

Reference :—23 W.R. Cr. 59, F.

(42) *Ss. 148, 323, 326, 326, 149—Rioting—Dispute regarding possession of land—Title with accused—Lawful common object—Propriety of conviction—Right of private defence—Hurt. Jhalaku Tewari v. The King-Emperor*, 17 C.W.N. 1081=14 Cr. L.J. 590=21 Ind. Cas. 382. See Final Part, 1913, Col. 169.

(42-a) S. 149. See Nos. 38, 43, *supra*.

(43) *Ss. 149, 141, 304 (2)—Members of lawful assembly—One of them committing an offence—His companions not liable.*

M, W and N were ploughing the disputed field when the members of the complainant's party came up to interfere with them and to turn them out.

M struck B (one of the complainant's party) on the head and hereby caused his death. M was convicted under S. 304 (2) and W and N were convicted of offence under S. 314 (2) read with S. 149, I.P.C. There was no finding that the common object of M, W and N was any of those specified in S. 141, I.P.C. On the contrary it was found that the members of the deceased's party were the aggressors, their object being to forcibly dispossess the other party of certain land.

Held, under the circumstances, that M and his party were perfectly justified in exercising their right of private defence, and if M exceeded

Penal Code—(Continued).

that right, he and he alone was guilty of any offence, but that S. 149, I.P.C., did not operate to make M's companions (W and N) equally guilty with him, as they were not at the time members of an unlawful assembly, and the conviction of W and N must therefore be set aside. *Mihan Singh v. Crown*, 26 P.R. 1914 (Cr.).

SCOTT-SMITH, J.

(44) S. 155—*Person not having property in land nor claiming interest therein if liable—Record of riot case if admissible.* *Pramotha Nath Roy Chowdhry v. The King Emperor*, 17 C.W.N. 1247—15 Cr. L. J. 191—22 Ind. Cas. 767. See Final Part, 1913, Col. 170.

(45) S. 161. See EVIDENCE ACT, No. 26, 12 A.L.J. 806.

(46) S. 174—*Disobeying notice—Officer entitled to issue summons—Legally competent.*

In order to sustain a conviction under S. 174, Penal Code, it has to be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same, and that the accused intentionally omitted to attend in pursuance of the summons.

A Collector is empowered to transfer the proceedings in regard to sale of ancestral land to an Assistant Collector, first class. When he transfers proceedings to a second class Assistant Collector who issues a summons for the attendance of the accused who disobeys it: *Held* that the accused is not guilty of an offence under S. 174, Penal Code. *Shiam Lal v. King-Emperor*, 12 A.L.J. 680—15 Cr. L.J. 595—25 Ind. Cas. 347.

BANERJI, J.

(47) Ss. 177, 182, 193, 199—*False report to Revenue Surveyor for securing mutation of name—Declaration contemplated by S. 199, nature of—Crim. Pro. Code, Ss. 195, 537—Sanction to prosecute—Revision—Conviction under S. 199, whether can be converted to one under S. 182.*

The declaration contemplated in S. 199, Penal Code, is a statement of facts in the form simply of a declaration which, for the purpose of proof of the fact declared to, has by itself all the legal force of evidence given on oath or solemn affirmation, that is to say, it must be a declaration which having been made is afterwards receivable as evidence of the fact declared.

By reporting falsely that his father had died, the petitioner induced the Revenue Surveyor to enter his name in the Revenue Registers as owner of certain gardens and paddy lands in succession to his father:

Held, that the petitioner had not committed an offence under Ss. 199, 177 or 193, but that he had committed an offence under S. 182, Penal Code.

A conviction under S. 199, Penal Code, in respect of which no sanction is necessary, cannot be converted in revision to a conviction

Penal Code—(Continued).

under S. 182 in respect of which a sanction is necessary, especially where the attention of the trying Magistrate was drawn to the necessity of such sanction. *Ismail v. Emperor*, 15 Cr. L.J. 603—25 Ind. Cas. 515—278 P.L.R. 1914.

TWOMEY, J.

(48) S. 182—*False information to a Police officer—Statements made by persons to corroborate the informant during investigation—Ss. 161 and 162, Crim. Pro. Code.*

Held, that, in order to corroborate an informant, the making of a statement under S. 161, Crim. Pro. Code, in answer to questions put by the Police officer investigating the case, does not amount to giving information within the meaning of S. 182, Penal Code.

The expression "give information" in the latter section means to volunteer information and is not intended to apply to a statement made in answer to questions put by a public servant. *Mangu v. The Crown*, 85 P.W.R. 1914 (Cr.)—227 P.L.R. 1914—15 Cr. L. J. 650—25 Ind. Cas. 978.

SHADI LAL, J.

References:—31 M. 506; U. B. R. (1905), p. 13—2 Cr. L. J. 474, R.

(49) S. 182—*Calling for a report from interested party as to truth of complaint, propriety of—Order for prosecution under S. 182, I.P.C., without sufficient enquiry into truth of complaint. See CRIM. PRO. CODE, No. 350, 19 C.W.N. 127.*

(49-a) S. 182. See No. 47, *supra*.

(50) Ss. 182, 193—*Sanction to prosecute—Police officer or Sub-Magistrate no Subordinate of Sessions Judge within S. 195 (7), Crim. Pro. Code—Essentials to grant sanction for contradictory statements. See CRIM. PRO. CODE, No. 160. (1914) M.W.N. 793.*

(51) Ss. 182, 211—*Application in Judge's Court—False information—Prosecution sanctioned by Judge—Legality of.*

The appellant was an insolvent against whom proceedings were pending before a District Judge. He made a petition to the Court alleging that the respondent had misappropriated certain things belonging to him and prayed that the respondent's house might be searched by the police. The District Judge forwarded the petition to the Magistrate with the result that the respondent was arrested and his house was searched. Eventually the Magistrate discharged the respondent. The latter applied to the District Judge for sanction to prosecute the appellant under Ss. 182 and 211, Penal Code.

Held, that the District Judge was a public servant before whom false information was given and he was competent to grant sanction to prosecute under S. 182, Penal Code.

Held further, that, with regard to S. 211, Penal Code, the Court of the District Judge before whom insolvency proceedings were pending was not the Court in which criminal proceedings were instituted, and it could not be

Penal Code—(Continued).

said that the offence of causing criminal proceedings to be instituted without just and lawful grounds was committed in relation to a proceeding pending in the Court of the District Judge. *Mahammad Fakhruddin v. Bikhli Ram*, 12 A.L.J. 278=36 A. 212=15 Cr. L.J. 360=28 Ind. Cas. 728.

RYVES and PIGGOTT, JJ.

(51-a) *Ss. 182, 211—Autrefois acquit—Burden of proof—Offence under S. 182—Complaint to public servant whether necessary.*

The burden of establishing the existence of facts necessary for the application of the doctrine of *autrefois acquit* lies upon the accused.

To sustain a prosecution for an offence under S. 182, Penal Code, it is not necessary that the complaint should have been made to a public servant with the intention of inducing such public servant to take action of a sort which a public servant of the description in question could take and which would not be open to a private individual. *Imandy Appalaswami v. Emperor*, 15 Cr. L.J. 672=25 Ind. Cas. 1000.

OLDFIELD and TYABJI, JJ.

(52) S. 186. See CRIM. PRO. CODE, No. 428, 8 S.L.R. 41.

(53) S. 188—*Erection of 'sayats' on land granted for Christian burial ground—Order to remove the buildings—Disobedience, whether punishable—Powers of Revenue Officers under the Burma Land and Revenue Act.* *Ba Nyun v. King-Emperor*, 7 L.B.R. 75=7 Bur. L. T. 25=22 Ind. Cas. 166=15 Cr. L.J. 22. See Final Part, 1918, Col. 174.

(54) S. 188—*Crim. Pro. Code, S. 550 Order issued by Police Sub-Inspector to a Station Master to detain certain logs lying on trucks suspected to be stolen property, legality of.* *King-Emperor v. Bithal Nath*, 16 O.C. 371=15 Cr. L.J. 177=22 Ind. Cas. 753. See Final Part, 1918, Col. 174.

(54-a) S. 191. See No. 13, *supra*.

(55) *Ss. 192, 196—'Fabrication of false evidence,' meaning of—Evidence not admissible—Whether there can be fabrication—Document not a 'public document'—Copy of document is not evidence—Meaning of 'corruptly using evidence'—Ss. 65, 74, Evidence Act—Explanation consistent with innocence of accused—Duty of prosecution.*

The prosecution must in a criminal case exclude all explanations of the facts which is reasonably consistent with the innocence of the accused.

There can be no fabrication of false evidence within the meaning of S. 192, I.P.C., if the evidence is not admissible in itself (a).

A document purported to be a report by a village *Nikah Khawan* to the Moharir in charge of the central office (in which entries in the village registers are copied into another register), informing him that, on the day after the entry of the marriage of B and A, F (former husband of B) had come to the writer and stated that he

Penal Code—(Continued).

had not divorced B. The writer accordingly desired the Moharir not to take action upon his report of the marriage of B and A. *Held*, that such a report was not a public document within the meaning of S. 74, Evidence Act, and under S. 65, no secondary evidence of its contents could be given. *Held* also that the production of the copy of that letter was an attempt to use the original (b).

The word 'corruptly' is not intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence. An intention to procure a false conviction is a corrupt intention within the meaning of S. 196, I.P.C.(c). *Fazl Ahmad v. Crown*, 1 P.R. 1914 (Cr.)=139 P.L.R. 1914=15 Cr.L.J. 344=28 Ind. Cas. 696.

AGNEW, J.

References:—(a) 6 A. 42; 21 A. 159; 2 C.L.J. 46, R. (b) 6 W.R. 41 (Cr.); 28 A. 403, R. (c) 5 C. 717; 7 W.R. 23 (Cr.); 7 M. 289, R.

(56) S. 193—*Order to prosecute—Case pending before Court of Sessions—Alleged perjury—Propriety of prosecution by committing Magistrate.*

Where a committing Magistrate had ordered the prosecution of a witness under S. 193, Penal Code, while the case in which he had deposed was pending before the Court of Sessions, the High Court set aside the order.

The impropriety of taking proceedings against a witness while the case is still pending, commented on. *Bharendra Nath Das Gupta v. The Emperor*, 18 C.W.N. 1342.

SHARFUDDIN and TEUNON, JJ.

(57) S. 193—*Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and prosecution for perjury if can be made thereon.* See CRIM. PRO. CODE, No. 291, 18 C.W.N. 1242.

(58) S. 193—*Stay of criminal proceedings pending disposal of Civil appeal.* See STAY OF PROCEEDINGS, No. 1, 8 S.L.R. 20.

(59) S. 193. See PERJURY, No. 2, 7 S.L.R. 108.

(59-a) S. 193. See Nos. 13, 47, 50, *supra*.

(60) *Ss. 193, 196, 199, 471—Perjury and forgery committed before Income-tax Collector—Sanction to prosecute.* See CRIM. PRO. CODE, No. 175, 16 Bom.L.R. 446.

(61) *Ss. 193, 468—Endorsement on a mortgage-deed showing payment—Intention to fabricate false evidence and defraud the mortgagee—Cheating and forgery.*

The accused transferred the whole of his property in favour of his wife, but before registering the sale-deed mortgaged the property to F. The sale deed was, however, registered after the mortgagee had made all necessary enquiry at the Registration Office. After the registration of the sale-deed, the mortgage-deed

Penal Code—(Continued).

also registered. The accused was charged for cheating the mortgagee. It appeared during the trial that the mortgage-deed filed by the complainant bore on it an endorsement of the return of the consideration, although there was no such endorsement on it when it was filed in Court. The accused was thereupon further charged for fabricating false evidence and forgery.

Held, that the accused was guilty of fabricating false evidence and cheating, as the accused must be presumed to know the probable result of his action and it obviously could not have been absent from his mind when he forged the endorsement that he was thereby attempting to defraud the mortgagee of his money. **Abdul Rashid Khan v. King-Emperor**, 12 A. L. J. 104=15 Cr. L.J. 221=22 Ind. Cas. 1005.

TUDBALL, J.

(61-a) S. 196. See Nos. 55, 60 and *supra*.

(61-b) S. 199. See Nos. 47, and 60 *supra*.

(61-c) S. 201. See No. 15, *supra*.

(62) S. 210—*Decree-holder realizing more than what is due to him—Duty of executing Court to find out the amount due.*

Held, that, where a decree-holder draws the executing Court's attention to the final decree both in the heading and at the foot of his application for execution, but misdescribes its precise terms, he cannot be made criminally liable under S. 210, I.P.C., for such a mistake, particularly where the executing Court fails in its duty of verifying the amount due to him in terms of the decree sought to be executed. **Qaya Ram v. The Crown**, 11 P. W. R. 1914 (Cr.)=23 Ind. Cas. 471=15 Cr. L.J. 263.

KENSINGTON, J.

(63) S. 211—*Laying false information before police—Duty of prosecution—Onus of proof—Elements necessary to be proved—Failure of defence to examine witness, effect of.*

Where the petitioner was convicted under S. 211 of the Penal Code of having laid a false information of theft before the police, and the petitioner's case was that he had heard from his wife that the persons named in the information had disappeared and the properties named therein were missing and his information was based on this statement of the wife, and prosecution did not prove that there was no such statement by the wife who was not examined as a witness for the prosecution, nor did the petitioner examine her as a witness on his side:

Held, that the duty of the prosecution in a case under S. 211, I.P.C., is to prove by satisfactory evidence that the charge was wilfully false to the knowledge of the maker of the charge.

That it is for the prosecution to establish their case, and if they fail to supply that proof which is required to secure the conviction of the accused, the failure on the part of the latter

Penal Code—(Continued).

to examine any particular witness or witnesses will not imply the guilt of the accused.

That the case against the petitioner being that no theft took place, the obligation of proving it rested on the prosecution.

In the present case the prosecution not having established that there was, as a matter of fact, no theft and the petitioner knew that there was no theft, the High Court set aside the conviction and sentence under S. 211, I. P. C. **Mirza Hassan Mirza v. Musat, Mahtubau**, 18 C.W.N. 391=15 Cr. L.J. 355=23 Ind. Cas. 723.

IMAM and CHAPMAN, JJ.

(64) S. 211. See CRIM. PRO. CODE, No. 122, (1914) M.W.N. 382.

(64-a) S. 211. See Nos. 51, 51-a, *supra*.

(65) Ss. 215, 379, 411—*Scope of S. 215—S. 215 not applicable to thief—Accused convicted in the alternative for offence under S. 379 or S. 411, I.P.C.—Conviction under S. 215, I.P.C.—Legality—Close association between the accused—One trial for offences under Ss. 215, 379, 411, I.P.C.—No misjoinder of charges—S. 239, Crim. Pro. Code.*

S. 215, I.P.C., is not intended to apply to the actual thief, but to some one, who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted (a).

Where the principle of the above ruling in 23 A. 81 would apply where the receiver of the gratification was also in dishonest possession of the stolen property under S. 411, I.P.C., but not the actual thief, is open to argument. But where the accused is convicted in the alternative of an offence under S. 379 or S. 411, I.P.C., the spirit of the ruling in 23 A. 81 should apply and his conviction under S. 215 should be set aside.

Where the evidence of close association between the accused persons justifies the inference that the theft and retention of the stolen properties and their restoration on payment were all part of one plot and one transaction within the meaning of S. 239, Crim. Pro. Code, the trial of the accused for charges under Ss. 215, 379 and 411, I.P.C., is not bad for misjoinder. **Nalli Veera Thevan, In re**, 26 M.L.J. 598=15 Cr. E. J. 471=24 Ind. Cas. 351.

AYLING, J.

Reference:—(a) 23 A. 81, F.

(66) S. 216—*Harbouring proclaimed offender—Criminal Intelligence Gazette, publication in, whether sufficient notice—Offender adopting false name—Harbourer misdescribing offender as his relation—Knowledge.*

In order to establish an offence under S. 216, Penal Code, it must be proved that a public servant in the exercise of his lawful

Penal Code—(Continued).

authority ordered a certain person to be apprehended for an offence and that the person charged with harbouring him did so, knowing of such order with the intention of preventing his apprehension.

Such knowledge cannot be presumed from the mere publication of the name of the offender in the *Criminal Intelligence Gazette*, nor can it be inferred from the offender's adopting a false name and the harbourer's misdescribing him as his relation. *Baiwant Singh v. Emperor*, 15 Cr. L. J. 849 = 23 Ind. Cas. 701.

KANHAIYA LAL, A.J.C.

(67) S. 218—Pay-sheets drawn up in Railway Offices whether a 'record.' See *CONFESSION*, No. 1, 15 Cr. L.J. 502.

(68) S. 225—Civil warrant not addressed to bailiff by name—Arrest—Legal.

A Civil warrant not addressed to a particular bailiff by name but addressed "to the bailiff of the Court" is not invalid; therefore, the rescuer of a person arrested under such warrant is guilty of an offence under S. 225 of the Penal Code. *In re Abdul Rahiman Saheb*, 15 Cr.L.J. 439 = 24 Ind. Cas. 175 = (1914) M.W.N. 498 = 15 Cr.L.J. 576 = 25 Ind. Cas. 328.

AYLING, J.

References:—5 C.W.N. 843; 26 C. 748 = 3 C. W.N. 741, D.

(69) S. 228—Offence under—Record must show stage of interruption—Evidence—Intention. See *CRIM. PRO. CODE*, No. 357, 15 Cr. L.J. 621.

(70) S. 290—Skinning of animals dying natural death—Nuisance.

Skinning of an animal which dies a natural death, does not in itself constitute a public nuisance. *King Emperor v. Beni*, 12 A.L.J. 849 = 15 Cr.L.J. 600 = 25 Ind. Cas. 352.

PIGGOTT, J.

(70-a) S. 291. See No. 1-a, *supra*.

(71) S. 299—Savage attack with deadly weapons upon the deceased—High fever following the wounds caused by the attack—Blood poisoning and brain fever—Death—Wounds the cause of death—Conviction for murder—Legality.

There was a savage attack upon L with dangerous weapons by the accused resulting in dangerous wounds. Following the attack, the victim was continuously suffering from high fever for 40 days at the end of which period symptoms of blood poisoning developed, followed on the next day by symptoms of brain fever, and died the next day. *Held*, that the wounds were the cause of death within the meaning of S. 299, I.P.C., and that the accused were rightly convicted of murder. *The Crown v. Nuro*, 7 S.L.R. 88 = 15 Cr.L.J. 376 = 23 Ind. Cas. 744.

PRATT, J.C., and HAYWARD, A.J.C.

18 Cr.

Penal Code—(Continued).

(72) Ss. 299, 300—Conviction for murder whether can be based on circumstantial evidence. See *MURDER*, No. 4, (1914) M.W.N. 718.

(73) Ss. 299, 300, 304—*Crim. Pro. Code*, S. 307—Duty of High Court—Murder—Culpable homicide not amounting to murder—Intention—Knowledge.

On a reference under S. 307, *Crim. Pro. Code*, the High Court has all the powers of an appellate Court and should form its own opinion after considering the entire evidence and giving weight to the opinion of the Sessions Judge and the Jury (a).

If a person strikes another on a vital part with a cutting instrument, the striker should be presumed to have intended to cause bodily injury sufficient in the ordinary course of nature to cause death; but it does not follow that the striker must be found guilty of murder: his act may fall under one of the exceptions to S. 300, Penal Code (b).

The parts of Ss. 299, 300, 304, Penal Code, dealing with "knowledge" are not applicable to a case in which bodily injury intended for a particular individual has resulted in death. Where a death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in only "as a means of arriving at his intention when he committed the act, and for that purpose, and not for the purpose of deciding whether the case falls within the last part of S. 304, must the question be considered?" (c). *Emperor v. Kotliya*, 15 Cr.L.J. 613 = 24 Ind. Cas. 601.

ORMOND and TWOMEY, JJ.

References:—(a) 29 C. 123; 6 C.W.N. 253; 2 C.W.N. 593 = 25 C. 852, F. (b) 2 L.B.R. 63, R. (c) 3 L.B.R. 122 = 3 Cr.L.J. 355, R.

(74) S. 300—Several persons beating the deceased to death—Intention and knowledge to be inferred from the reasonable and probable result of their act—Distinction between intention and desire. *Hanuman v. King-Emperor*, 11 A.L.J. 926 = 14 Cr. L.J. 685 = 85 A. 560 = 21 Ind. Cas. 1005. See Final Part, 1918, Col. 181.

(75) S. 300, exception I—Sister—Suspicion of unchastity against—Killing her and stranger—Deliberate act—No grave or sudden provocation—Baluch custom sanctioning killing for unchastity—No ground for mitigation of sentence.

Where the accused met his sister and a stranger not far from his house and took no immediate action but quietly brought them home, and sat down and talked with them, and, after satisfying himself that there were grounds for suspicion, deliberately fell upon them and killed them.

Held, that the facts of the case did not disclose either grave or sudden provocation within the meaning of Except. I, S. 300, I.P.C.

Penal Code—(Continued).

A Baluch custom justifying the accused in taking the life of his sister for unchastity is no ground for mitigation of sentence. **The Crown v. Rahimkhan wd. Arzee**, 7 S.L.R. 118=15 Cr. L.J. 501=24 Ind. Cas. 589.

HAYWARD and BOYD, A.J.CS.

(76) S. 300, cl. (iv) — *Distinction between fourth clause and first three clauses—Intention.*

The cases in which the fourth clause of S. 300, Penal Code, has any application, are extremely rare, and though it is not easy, and perhaps not desirable, to attempt to define with any strictness the kind of cases in which that clause comes in, still there is one very broad distinction between it and the first three clauses—in the latter the important thing is an *intention* to kill or to hurt, while the fourth clause says nothing about intention. **Nawab v. Emperor**, 263 P.L.R. 1914=15 Cr. L.J. 610=81 P.R. 1914 (Cr.)=25 Ind. Cas. 522=45 P.W.R. 1914 (Cr.).

JOHNSTONE and SCOTT-SMITH, JJ.

(76-a) S. 300. See Nos. 72, 73, *supra*.

(77) Ss. 300, 323—*Murder—Four accused joined in beating of which two only gave fatal blows—Responsibility of the other two—Hurt.*

When four persons joined in beating 5th, out of which two gave him fatal blows on his head which resulted in his death, while the remaining two struck him on the body not with exceptional violence and were not shown to have realized that they were taking part in a murder or how grave the injuries inflicted by their comrades were:

Held, that the latter were guilty only of causing simple hurt under S. 323, Penal Code.

Their sentence of transportation was altered to one year's rigorous imprisonment. **Gul Shah v. Crown**, 41 P.W.R. 1914 (Cr.).

JOHNSTONE and SCOTT-SMITH, JJ.

(78) Ss. 300, 325—*Murder—Grievous hurt—Hanging a human body believing the person to be dead and thereby causing death, if murder—Intention to kill.*

The accused assaulted his wife and gave her kicks, blows and slaps. The kicks were given below the navel. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body and hung it by a rope. The *post-mortem* examination showed that death was due to hanging.

Held, that the accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder. The offence that the accused committed was an offence under S. 325, I.P.C., for having given her kicks, blows and slaps before

Penal Code—(Continued).

she fell down. **The Emperor v. Dalu Sardar**, 18 C.W.N. 1279=15 Cr. L.J. 709=26 Ind. Cas. 157.

SHARFUDDIN and TEUNON, JJ.

(79) S. 302. See EVIDENCE ACT, No. 29, 15 Cr. L.J. 410.

(80) S. 302. See CRIM. PRO. CODE, No. 260-a, 7 L.R.R. 140.

(80-a) S. 302. See Nos. 11, 12, 15, 31, *supra*.

(81) Ss. 302, 84, 109, 114—*Acquittal on charge of murder if bar to trial on charge of culpable homicide where culpable homicide was charged in previous trial—Acquittal on charge under S. 302/34, I.P.C., if bar to trial on charge under S. 302/114, or 302/109, I.P.C. See CRIM. PRO. CODE, No. 302, 18 C.W.N. 728.*

(82) Ss. 302, 109—*Privy Council, jurisdiction in Criminal cases—Conviction when to be set aside on appeal—Violation of principles of natural justice or grave injustice done or disregard of legal process—Suspicion of guilt—Inadmissible and hearsay evidence admitted and used to grave prejudice of accused—Absence of reliable evidence—Motive, evidence of, however strong and convincing, if can take the place of reliable evidence—Approver's evidence—Confession, retracted—Corroboration—Evidence not reliable against co-accused, if may be relied on for conviction of an accused for abetment—Police, sending for, delay in. **Yathinatha Pillai v. The King-Emperor**, 17 C.W.N. 1110=14 M.L.T. 263=(1913) M.W.N. 806=15 Bom. L.R. 910=25 M.L.J. 518=2 Bom. Cr. Cas. 123=18 C.L.J. 365=14 Cr. L.J. 577=21 Ind. Cas. 369=11 A.L.J. 881=36 M. 501 (P.C.). See Final Part, 1913, Col. 184.*

(83) Ss. 302, cl. 4 and 325—*Murder—Grievous hurt—More than one accused—Common intention to inflict bodily injuries likely to cause death—All guilty of murder. **Kanhai v. King-Emperor**, 11 A.L.J. 752=35 A. 329=14 Cr.L.J. 609=21 Ind. Cas. 657. See Final Part, 1913, Col. 185.*

(84) S. 304—*Culpable homicide not amounting to murder—Causing death by a chhavi blow given on head in spur of the moment and heat of passion—Sentence.*

Held, that, where a person, on the spur of the moment, in the heat of passion, and without any premeditation and motive for causing death, seizes a *chhavi*, the first weapon which came to his hands, and inflicts with it a blow on the head of another which results in the death of the latter, the former's act falls within the 2nd part of S. 304, Penal Code. But in such a case the culprit deserves the maximum sentence of imprisonment provided for that offence. **Kunda Singh v. Crown**, 4 P.W.R. 1914 (Cr.)=3 P.L.R. 1914=15 Cr. L.J. 178=22 Ind. Cas. 754.

JOHNSTONE and BEADON, JJ.

(85) S. 304—*First report—Culpable homicide not amounting to murder—Grave discrepancies between the first report and subsequent evidence—Benefit of doubt.*

Penal Code—(Continued).

Held, that, grave discrepancies between the statement of the deceased contained in the first report and the evidence of his witnesses as to the persons attacking him and giving him fatal injuries, throw a great doubt on the whole case, the benefit of which must be given to the accused. *Rajwall v. The Crown*, 28 P.W.R. 1914 (Cr.)=172 P.L.R. 1914=15 Cr. L.J. 530 =24 Ind. Cas. 842.

SHAH DIN, J.

(85-a) S. 304. See Nos. 22, 27, 35, 43 and 73, *supra*.

(85-b) S. 306. See No. 28, *supra*.

(86) Ss. 307, 324—*Hurt with dangerous weapon—Wound with axe—Attempt to murder. Emperor v. Martu Yithoba Prabhu*, 15 Bom. L.R. 991=2 Bom. Cr. C. 159=14 Cr. L.J. 641 =21 Ind. Cas. 881. See Final Part, 1913, Col. 187.

(87) S. 317—*Mother giving birth to illegitimate child—Throwing it into bush—Concealing fact—Never showing any solicitude for child—Guilty of offence.*

Where a woman immediately after giving birth to an illegitimate child and throwing it into a thorn bush, walked nearly a mile and a half, gave a false account of her condition to her companions, dispensed with any assistance even after she reached home, denied having given birth to a child when questioned by the Headman next morning, and never asked after the child's welfare at any time or showed any solicitude on the subject:

Held, that the woman was guilty of the offence under S. 317, Penal Code. *Emperor v. Ml Mein Gale*, U.B.R. (1914), 1st Cr., 5=24 Ind. Cas. 837=15 Cr. L.J. 525.

SHAW, J.C.

(87-a) S. 323. See Nos. 36, 37, 42 and 77, *supra*.

(88) Ss. 323, 325—*Knowledge to cause grievous hurt essential—Imprisonment, obligatory under S. 325.*

Where a number of accused intended to beat the complainant but grievous hurt was inflicted.

Held, (1) that it must be proved, before any one could be convicted of causing grievous hurt, that the common object was the intention to cause grievous hurt or the knowledge that any one of them might likely cause grievous hurt in the course of the beating which they intended to give to the complainant (a).

(2) That the imposition of the punishment of imprisonment on a conviction for causing grievous hurt is obligatory. *In re Soogoor Basauna Gowd*, 15 Cr. L.J. 192=22 Ind. Cas. 768.

*SADASIVA IYER, J.

References:—(a) 19 M. 498=1 Weir 298, F.

(88-a) S. 324. See Nos. 38 and 86, *supra*.

(89) S. 325—*Fight in the course of which a person was killed—Accused charged under*

Penal Code—(Continued).

S. 325—*Compounding of the offence by the relations of the deceased—Order of acquittal—Legality—Revision—Re-trial. See CRIM. PRO. CODE, No. 280, 7 S.L.R. 200.*

(90) S. 325—*Parties willing to compromise—Effect—Composition when may not be refused. See CRIM. PRO. CODE, No. 276, 17 O.C. 92.*

(90-a) S. 325—See Nos. 12, 26, 27, 78, 83 and 88 *supra*.

(91) S. 326—*Causing grievous hurt with Ohhavis by way of succeeding self-defence—Sentence reduced to 2 from 5 years and to 1 from 3 years.*

Where A, B and C were convicted under S. 326, I.P.C., for causing grievous hurt, though not serious, in protecting D by means of Ohhavis, and thus exceeded the right of self-defence which they had by law, the sentence of 5 years to A and of 3 years each to B and C was reduced respectively to 2 and 1 year's rigorous imprisonment. *Glyan Singh v. The Crown*, 29 P.W.R. 1914 (Cr.)=182 P.L.R. 1914=15 Cr. L.J. 540=24 Ind. Cas. 948.

RATTIGAN, J.

(91-a) S. 326. See Nos. 11 and 42, *supra* and 89, No. 117, *infra*.

(92) S. 328—*Offence—Mere administration of drug is not enough—Intent must be proved.*

In order to convict a person of an offence under S. 328, Penal Code, mere administration of the drug will not do. There must also be evidence to show that such administration was with the intent specified in the section and to cause injury to the person to whom it was administered. *Muruga Goundan v. Emperor*, 15 Cr. L.J. 599=25 Ind. Cas. 351.

AYLING and TYABJI, JJ.

(93) Ss. 332, 147, 99—*Police search—Place beyond the limits of the station of the officer conducting search—No written order from officer having jurisdiction over the place—Illegality—Arrest of suspected person and attachment of property—Riot—Escape of person and disappearance of property—Police beaten—Offence committed—Private defence—Crim. Pro. Code, Ss. 54, 165, 166, 550.*

During the course of a search by an officer in charge of a police station at a place beyond the limits of his station, a riot took place in which the appellants took part. The policemen were beaten, the arrested person escaped and the attached property disappeared. It was found that the common object of the riot was to prevent search being made, and not to take back the property which had been attached or to release the prisoners.

Held that, in the absence of a written order of the officer in charge of the police station within the limits of which the search took place, the search was illegal (*vide* Ss. 165, 166, Crim. Pro. Code).

Held, also, that in spite of the illegal search, the police would still be justified in arresting

Penal Code—(Continues)

suspected persons under S. 51, Crim. Pro. Code, or attaching suspected property under S. 550 of the same Code..

The accused could not be found guilty of offence under S. 332, I.P.O., because the object of the riot was to resist the search, and in making the searches, the police were not acting in discharge of their duty (a).

Held, further, that the accused have under S. 99, I.P.O., no right of private defence, for the police were acting in good faith under color of their office (b), and that the accused were guilty of the offences of hurt and rioting.

Even if the accused had a right of private defence, they exceeded it when they beat the police, *Mir Shah Nawaz Khan v. The Crown*, 8 S.L.R. 1.

PRATT, J.C., and KEMP, A.J.C.

References:—(a) 108 R.R. 186, R. (b) 7 Bom. H.C. Cr. 50 and 18 A. 246, R.

(94) S. 336—*Doing an act endangering human life or the safety of others*—Temple resorted to by pilgrims on festive occasions—Duty of person in charge to ensure safety of pilgrims attending by license and invitation.

The petitioner was the lessee of a certain temple from some of the *shebait*s and was the general manager of all of them. It appeared that on a certain day in the year pilgrims and others in large number visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform $1\frac{1}{2}$ to 2 feet high and the ring or parapet of the well stood again about 1 foot above the platform. Early at night on the day of the congregation of pilgrims an accident having occurred, the petitioner at the instance of the Police-officer in charge had a light placed on or near the one foot parapet, but at a later hour the petitioner had the light removed, and thereafter between 1 and 2 A.M. while the people were again entering into the inner temple, a boy who had no previous knowledge of the well and in the darkness could not see it fell into it:

Held, that the facts constituted an offence within the meaning of S. 336, I.P.O.

That, on the occasion of the festival in question, the temple becomes a place of public resort, and it was the bounden duty of the petitioner as the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. *Narsing Charan Mahapatra v. The King-Emperor*, 18 C.W.N. 1176.

SHARFUDDIN and TEUNUN, JJ.

(95) S. 341—*Obstruction under bona fide colour of title, &c.*

Held, that voluntarily obstructing any person from entering upon the land under *bona fide* colour of title and possession is not such an obstruction as can be made the subject of a

Penal Code—(Continued).

criminal prosecution under S. 341 of the I.P. C. *Sheo Nath v. Crowa*, 5 P.W.R. 1914 (Cr.) = 34 P.L.R. 1914 = 15 Cr. L.J. 582 = 24 Ind. Cas. 844.

SHAH DIN, J.

(96) Ss. 347, 352, 114. See CRIM. PRO. CODE, No. 244, 19 C.W.N. 181.

(97) S. 349—*Lathi raised by the accused and the person attacked ran away to save himself*—Whether criminal force.

Where the accused went to the field of another and cut the crops sown by him, and on the latter resisting, they raised their lathis to strike him and that other ran away to save himself, *held*, that the accused were guilty of using force by means of bodily power within the meaning of S. 349, Penal Code. *Jai Ram v. King-Emperor*, 12 A.L.J. 154 = 23 Ind. Cas. 193 = 15 Cr. L.J. 231.

TUDBALL, J.

Reference:—1 A.L.J. 604, D.

(97-a) S. 349. See No. 39, *supra*.

(97-b) S. 351. See No. 20, *supra*.

(97-c) S. 352. See No. 96, *supra*.

(98) S. 353—Distraint of doors under the Madras Local Boards Act—Assault on distraining officer—Conviction—Legality. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 1, 16 M.L.T. 429.

(98-a) S. 353. See Nos. 25, 37 and 40, *supra*.

(99) Ss. 354, 376, 511—Trial under S. 354—Prosecution and defence witnesses examined and cross-examined—Accused committed to Sessions on charges under Ss. 376 and 511—Legality. See CRIM. PRO. CODE, No. 283, 15 Cr. L.J. 366.

(100) S. 361—*Lawful guardian—Hindu girl, custody of—Paternal uncles, setting up adverse title, kidnapping by—Guardians and Wards Act (VIII of 1890)—Order by Deputy Magistrate making over minor to lawful guardian, ultra vires.*

Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles and had obtained mutation in her favour of certain property which was claimed by her paternal uncles after having lived for 18 months with the maternal uncles, was forcibly carried away by her paternal uncles and was caused to be married:

Held, that the paternal uncles were rightly convicted under S. 361 of the Penal Code

Held, also, that, though, under the Hindu Law, paternal uncles are preferential guardians to maternal uncles, where paternal uncles claim an interest in the minor's property adverse to her, they are not entitled to the custody of the minor's person under the provisions of Act VIII of 1890.

Held, further, that the order of the Deputy Magistrate making over the girl to the maternal uncles on certain conditions and entrusting

Penal Code—(Continued).

the girl to a trustee until those conditions were fulfilled, was *ultra vires*, and it was open to them to take such legal steps for the minor's custody as they thought fit. **Baij Nath v. Emperor**, 15 Cr. L.J. 640=25 Ind. Cas. 840.

STUART, J.C.

- (101) Ss. 361, 362 and 366—*Minor girl leaving her guardian of her own free will—Not induced by force or deceit—Whether abduction or kidnapping.*

Where a girl under sixteen years of age left the guardianship of her husband and father-in-law of her own free will and not for the first time, and after that stayed with the accused quite voluntarily and without any force having been exercised or deception practised upon her, *held*, it did not amount to taking or enticing the girl out of the keeping of her lawful guardian, nor did it amount to compelling her by force or inducing her by deceitful means to go from any place, and it was not an offence within the meaning of Ss. 361, 362 and 366, Penal Code. **King-Emperor v. Ram Chander**, 12 A.L.J. 265=23 Ind. Cas. 478=15 Cr. L.J. 265.

RICHARDS, C.J., and BANERJI, J.

- (102) Ss. 361 and 366—*Kidnapping from lawful guardianship—"Taking" to be physical.*

The word "taking" in S. 361, Penal Code, is nothing but physical taking.

Where a father sent his daughter to live in a house with certain of his relations and one of those relations married in that house the daughter without the consent of the father:

Held, that no offence under S. 366, Penal Code, was committed by the relative, because there was no taking out of lawful guardianship, inasmuch as the daughter never left the house where she was residing with the consent of her father. **Jagan Nath v. Emperor**, 15 Cr. L.J. 690=25 Ind. Cas. 638.

STUART, A.C.J.

- (102-a) S. 362. See No. 101, *supra*.

- (103) Ss. 362, 366 and 4—*Abduction—Using deceitful means—Inducing a woman in a Native State to go to a place in British India—Trial in British Indian Courts—Want of jurisdiction—Repeating the same means in British India to go to another place—Jurisdiction of British Indian Courts to try.*

The accused, who was a subject and resident of Kathiawar, and within a Native State, induced a woman, by promising to take her to her brother, to go to Sind, and committed the offence of abduction under S. 366, I.P.C.

Held, that his conviction and sentence in Sind on a charge of abduction from Kathiawar must be quashed.

He could only be tried in Sind for acts amounting to abduction committed in Sind, that is, within British India, in view of the provisions of S. 4, Penal Code.

But if it should be proved, that the accused repeated the same deceitful means, namely, the

Penal Code—(Continued).

promises to take the woman to her brother were used in Karachi to induce her to go on to another place, then it would appear that he committed an independent offence of abduction in Sind for which he would be liable to be tried and punished in British India under Ss. 363 and 366, I.P.C. **The Crown v. Anandgir wd. Jiwangir**, 7 S.L.R. 128=15 Cr. L.J. 511=24 Ind. Cas. 599.

HAYWARD and BOYD, A.J.C.S.

- (104) Ss. 362, 366—*Abduction an offence only when committed with certain intent or knowledge.*

The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another. Chapter XIV, Penal Code, makes abduction an offence only when it is committed with certain intent, and the mere taking of a girl to an immigration recruiter is not necessarily the taking of the girl to his house with a knowledge that it was likely that she would be forced or seduced to illicit intercourse. **Ganga Dei v. King-Emperor**, 12 A.L.J. 91=15 Cr. L.J. 154=22 Ind. Cas. 730.

KNOX, J.

- (105) S. 363—*Kidnapping—Indian Divorce Act—Decree nisi by District Judge for dissolution of marriage—Direction to deliver up child to husband—Removal of child from husband's custody before confirmation of decree by High Court, if offence.*

Where, on an application by the husband for divorce, the District Judge made a decree *nisi* for dissolution of marriage and also directed the petitioner (the wife) to deliver up to the husband the son born of the marriage, and subsequent to the decree the husband without the assistance of the Court obtained the custody of the son, but before the confirmation of the decree by the High Court under S. 17, Divorce Act, the petitioner removed the boy from the father's custody and was charged under S. 363, I.P.C.

Held, that the order for custody which was made, not being intended to be an *ad interim* order which it is open to a District Judge to make at any time while a case is pending, was an order *nisi* without legal effect until confirmed by the High Court, and the petitioner committed no offence under S. 363, I.P.C., in removing the boy from the father's custody. **Mrs. Anne Elizabeth Barthwick v. Herbert Charles Barthwick**, 18 O.W.N. 484=15 Cr. L.J. 72=22 Ind. Cas. 424=41 C. 714.

IMAM and CHAPMAN, JJ.

- (106) S. 363—*Father when not liable for kidnapping his own child—Kumhar not bound by strict Hindu Law—Technical offence—Nominal sentence.*

M betrothed his minor daughter to a minor son of B. Later on, B objected to marriage when arranged and in consequence M married

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suspected persons under S. 54, Crim. Pro. Code, or attaching suspected property under S. 550 of the same Code..

The accused could not be found guilty of offence under S. 332, I.P.O., because the object of the riot was to resist the search, and in making the searches, the police were not acting in discharge of their duty (a).

Held, further, that the accused have under S. 99, I.P.O., no right of private defence, for the police were acting in good faith under color of their office (b), and that the accused were guilty of the offences of hurt and rioting.

Even if the accused had a right of private defence, they exceeded it when they beat the police, *Mir Shah Nawaz Khan v. The Crown*, 8 S.L.R. 1.

PRATT, J.C., and KEMP, A.J.C.

References:—(a) 108 R.R. 186, R. (b) 7 Bom. H.C. Cr. 50 and 18 A. 246, R.

(94) S. 336—*Doing an act endangering human life or the safety of others*—Temple resorted to by pilgrims on festive occasions—Duty of person in charge to ensure safety of pilgrims attending by license and invitation.

The petitioner was the lessee of a certain temple from some of the *shebaitis* and was the general manager of all of them. It appeared that on a certain day in the year pilgrims and others in large number visited this temple. Close by the gate leading from an outer courtyard into the inner temple there was a well which was surrounded by a masonry platform 1½ to 2 feet high and the ring or parapet of the well stood again about 1 foot above the platform. Early at night on the day of the congregation of pilgrims an accident having occurred, the petitioner at the instance of the Police-officer in charge had a light placed on or near the one foot parapet, but at a later hour the petitioner had the light removed, and thereafter between 1 and 2 A.M. while the people were again entering into the inner temple, a boy who had no previous knowledge of the well and in the darkness could not see it fell into it;

Held, that the facts constituted an offence within the meaning of S. 336, I.P.O.

That, on the occasion of the festival in question, the temple becomes a place of public resort, and it was the bounden duty of the petitioner as the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. *Narsing Charan Mahapatra v. The King-Emperor*, 18 C.W.N. 1176.

SHARFUDDIN and TEUNUN, JJ.

(95) S. 341—*Obstruction under bona fide colour of title, &c.*

Held, that voluntarily obstructing any person from entering upon the land under bona fide colour of title and possession is not such an obstruction as can be made the subject of a

Penal Code—(Continued).

criminal prosecution under S. 341 of the I.P. C. *Sheo Nath v. Grown*, 5 P.W.R. 1914 (Cr.) 34 P.L.R. 1914=15 Cr. L.J. 582=24 Ind. Cas. 814.

SHAH DIN, J.

(96) Ss. 317, 352, 114. See CRIM. PRO. CODE, No. 244, 19 C.W.N. 181.

(97) S. 349—*Lathi raised by the accused and the person attacked ran away to save himself*—Whether criminal force.

Where the accused went to the field of another and out the crops sown by him, and on the latter resisting, they raised their lathis to strike him and that other ran away to save himself, *held*, that the accused were guilty of using force by means of bodily power within the meaning of S. 349, Penal Code, *Jai Ram v. King-Emperor*, 12 A.L.J. 154=23 Ind. Cas. 193=15 Cr. L.J. 231.

TUDBALL, J.

Reference:—1 A.L.J. 602, D.

(97-a) S. 349. See No. 39, *supra*.

(97-b) S. 351. See No. 20, *supra*.

(97-c) S. 352. See No. 96, *supra*.

(98) S. 353—Distrain of doors under the Madras Local Boards Act—Assault on distraining officer—Conviction—Legality. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 1, 16 M.L.T. 429.

(98-a) S. 353. See Nos. 25, 37 and 40, *supra*.

(99) Ss. 354, 376, 511—Trial under S. 354—Prosecution and defence witnesses examined and cross-examined—Accused committed to Sessions on charges under Ss. 376 and 511—Legality. See CRIM. PRO. CODE, No. 283, 15 Cr. L.J. 866.

(100) S. 361—*Lawful guardian—Hindu girl, custody of—Paternal uncles, setting up adverse title, kidnapping by—Guardians and Wards Act (VIII of 1890)—Order by Deputy Magistrate making over minor to lawful guardian, ultra vires.*

Where an orphan minor Hindu girl, who was entrusted to the care of her maternal uncles and had obtained mutation in her favour of certain property which was claimed by her paternal uncles after having lived for 18 months with the maternal uncles, was forcibly carried away by her paternal uncles and was caused to be married:

Held, that the paternal uncles were rightly convicted under S. 361 of the Penal Code

Held, also, that, though, under the Hindu Law, paternal uncles are preferential guardians to maternal uncles, where paternal uncles claim an interest in the minor's property adverse to her, they are not entitled to the custody of the minor's person under the provisions of Act VIII of 1890.

Held, further, that the order of the Deputy Magistrate making over the girl to the maternal uncles on certain conditions and entrusting

Penal Code—(Continued).

the girl to a trustee until those conditions were fulfilled, was *ultra vires*, and it was open to them to take such legal steps for the minor's custody as they thought fit. **Baij Nath v. Emperor**, 15 Cr. L.J. 640=25 Ind. Cas. 840.

STUART, J.C.

- (101) Ss. 361, 362 and 366—*Minor girl leaving her guardian of her own free will—Not induced by force or deceit—Whether abduction or kidnapping.*

Where a girl under sixteen years of age left the guardianship of her husband and father-in-law of her own free will and not for the first time, and after that stayed with the accused quite voluntarily and without any force having been exercised or deception practised upon her, *held*, it did not amount to taking or enticing the girl out of the keeping of her lawful guardian, nor did it amount to compelling her by force or inducing her by deceitful means to go from any place, and it was not an offence within the meaning of Ss. 361, 362 and 366, Penal Code. **King-Emperor v. Ram Chander**, 12 A.L.J. 265=23 Ind. Cas. 478=15 Cr. L.J. 265.

RICHARDS, C.J., and BANERJI, J.

- (102) Ss. 361 and 366—*Kidnapping from lawful guardianship—"Taking" to be physical.*

The word "taking" in S. 361, Penal Code, is nothing but physical taking.

Where a father sent his daughter to live in a house with certain of his relations and one of these relations married in that house the daughter without the consent of the father :

Held, that no offence under S. 366, Penal Code, was committed by the relative, because there was no taking out of lawful guardianship, inasmuch as the daughter never left the house where she was residing with the consent of her father. **Jagan Nath v. Emperor**, 15 Cr. L.J. 680=25 Ind. Cas. 638.

STUART, A.C.J.

- (102-a) S. 362. See No. 101, *supra*.

- (103) Ss. 362, 366 and 4—*Abduction—Using deceitful means—Inducing a woman in a Native State to go to a place in British India—Trial in British Indian Courts—Want of jurisdiction—Repeating the same means in British India to go to another place—Jurisdiction of British Indian Courts to try.*

The accused, who was a subject and resident of Kathiawar, and within a Native State, induced a woman, by promising to take her to her brother, to go to Sind, and committed the offence of abduction under S. 366, I.P.C.

Held, that his conviction and sentence in Sind on a charge of abduction from Kathiawar must be quashed.

He could only be tried in Sind for acts amounting to abduction committed in Sind, that is, within British India, in view of the provisions of S. 4, Penal Code.

But if it should be proved, that the accused repeated the same deceitful means, namely, the

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promises to take the woman to her brother were used in Karachi to induce her to go on to another place, then it would appear that he committed an independent offence of abduction in Sind for which he would be liable to be tried and punished in British India under Ss. 363 and 366, I.P.C. **The Crown v. Anandgir wd. Jiwangir**, 7 S.L.R. 128=15 Cr. L.J. 511=24 Ind. Cas. 599.

HAYWARD and BOYD, A.J.C.S.

- (104) Ss. 362, 366—*Abduction an offence only when committed with certain intent or knowledge.*

The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another. Chapter XIV, Penal Code, makes abduction an offence only when it is committed with certain intent, and the mere taking of a girl to an immigration recruiter is not necessarily the taking of the girl to his house with a knowledge that it was likely that she would be forced or seduced to illicit intercourse. **Ganga Dei v. King-Emperor**, 12 A.L.J. 91=15 Cr. L.J. 154=22 Ind. Cas. 730.

KNOX, J.

- (105) S. 363—*Kidnapping—Indian Divorce Act—Decree nisi by District Judge for dissolution of marriage—Direction to deliver up child to husband—Removal of child from husband's custody before confirmation of decree by High Court, if offence.*

Where, on an application by the husband for divorce, the District Judge made a decree *nisi* for dissolution of marriage and also directed the petitioner (the wife) to deliver up to the husband the son born of the marriage, and subsequent to the decree the husband without the assistance of the Court obtained the custody of the son, but before the confirmation of the decree by the High Court under S. 17, Divorce Act, the petitioner removed the boy from the father's custody and was charged under S. 363, I.P.C.

Held, that the order for custody which was made, not being intended to be an *ad interim* order which it is open to a District Judge to make at any time while a case is pending, was an order *nisi* without legal effect until confirmed by the High Court, and the petitioner committed no offence under S. 363, I.P.C., in removing the boy from the father's custody. **Mrs. Anne Elizabeth Barthwick v. Herbert Charles Barthwick**, 18 O.W.N. 484=15 Cr. L.J. 72=22 Ind. Cas. 424=41 C. 714.

IMAM and CHAPMAN, JJ.

- (106) S. 363—*Father when not liable for kidnapping his own child—Kumhar not bound by strict Hindu Law—Technical offence—Nominal sentence.*

M betrothed his minor daughter to a minor son of B. Later on, B objected to marriage when arranged and in consequence M married

Penal Code—(Continued).

the girl to a minor. The girl returned almost immediately to the house of her father.

On this B was convicted under S. 363, Penal Code, and M under S. 363/103, I.P.O.

Held, that strict Hindu Law on the subject could not be applied to the parties and that neither B, nor M, committed any offence. Such a matter concerns the Civil rather than a Criminal Court.

In such a case even if it be supposed that a technical offence has been committed, only a nominal sentence is appropriate. **Ballia v. Crown**, 24 P.W.R. 1914 (Cr.)=161 P.L.R. 1914=15 Cr. L.J. 639=25 Ind. Cas. 839.

KENSINGTON, J.

(107) Ss. 365, 366—*Evidence, admissibility of—Previous incident, complaint, as to—Evidence Act, S. 14. Baharudin Mandal v. Emperor*, 18 C.L.J. 578=22 Ind. Cas. 187=15 Cr. L.J. 49. See Final Part, 1913, Col. 191.

(107-a) S. 366. See Nos. 19, 101, 103, 108, 104 and 107, *supra*.

(108) S. 376—What amounts to plea of guilty under. See EVIDENCE ACT, No. 9, 44 P.W. R. 1914 (Cr.).

(108-a) S. 376. See No. 99, *supra*.

(109) S. 377—*Evidence—Unnatural offence—Uncorroborated testimony of complainant—When prosecution not bound to produce all witnesses.*

Held, that in the case of unnatural offence under S. 377, Penal Code, conviction can safely be based on uncorroborated testimony of the boy, if it is not otherwise doubtful.

Held also, that the prosecution is not bound to produce witnesses who are not expected to speak the truth. **Sardar Ahmad v. The Crown**, 42 P.W.R. 1914 (Cr.).

SCOTT SMITH, J.

(110) S. 378—*Theft—Fish in a pond—Possession—Nature of.*

The test of possession in all cases under S. 378 of the Penal Code, relating to fish or birds, is "could they escape." If they are unable to escape, they become the subject of theft. **Manchau Paidigadu v. Kadimsetti Tammayya**, (1914) M.W.N. 368=22 Ind. Cas. 499=15 Cr. L.J. 77.

MILLER, J.

(110 a) S. 378. See No. 23, *supra*.

(111) S. 379—*Theft—Possession in law.*

Where the tenant is accused of theft of paddy, reaped and stored up, his and the landlord's share not having been divided, a conviction for theft is bad, because until the delivery by the tenant to the landlord of the latter's share of the crop, the possession of the whole crop was with the tenant. **Annamalai Odayar v. Emperor**, (1914) M.W.N. 106=15 Cr. L.J. 186=22 Ind. Cas. 762.

OLDFIELD, J.

Reference :—26 M. 481, *ff*.

Penal Code—(Continued).

(112) S. 379—*Theft of grass—Dispute as to ownership of land—Compensation under S. 545, Crim. Pro. Code. Ship Das v. The Crown, 40 P.W.R. 1918 (Cr.)=335 P.L.R. 1913=14 Cr. L.J. 659=21 Ind. Cas. 899. See Final Part, 1913, Col. 194.*

(112-a) S. 379. See Nos. 2, 4, 17 and 65, *supra*, and No. 150, *infra*.

(113) Ss. 379, 109—*Theft, abetment of—Claim of right set up by defence—Finding of absence of good faith without adjudication as to the existence or otherwise of right set up if sufficient for conviction.*

Where the petitioner was convicted of abetment of theft of wood from a forest, and the defence of the petitioner was that he had a right to take wood from the forest in question without a pass, but the Magistrate, without deciding whether the petitioner had such a right or not, found that the petitioner's claim to take wood without a pass could not possibly have been made in good faith, inasmuch as the petitioner had himself taken passes previously for the removal of wood from the forest.

Held—that, whatever the intention and knowledge of the petitioner was, he could not be convicted of theft or abetment thereof, when it was not found as a matter of fact that he was not entitled to take wood from the forest. **Harendra Narayan Doss v. Ramjan Khan**, 18 C.W.N. 397=15 Cr. L.J. 298=23 Ind. Cas. 506=41 C. 433

COXE and MULLICK, JJ.

(114) Ss. 379, 403, 424—*Theft—Possession of tenant—Exclusive or joint.*

When trees are in the possession of the accused, although the complainant is jointly interested, they must be considered to have been in the exclusive possession of the tenant accused and no offence of theft could be committed.

To convert the conviction for theft into one for offences under Ss. 403 or 424, I.P.C., in revision, is undesirable, as it is prejudicial to the accused. **Thoppulan v. Sankaranarayana Iyer**, (1914) M.W.N. 483=15 Cr. L.J. 440=24 Ind. Cas. 176.

TYABJI, J.

(115) Ss. 379, 411—*Crim. Pro. Code—Joint trial—Different offences—Different accused.*

When one of two persons is charged with theft and the other with receiving stolen property, they cannot be jointly tried. **Govindarajulu Mudali v. Emperor**, (1914) M.W.N. 352=23 Ind. Cas. 208=15 Cr. L.J. 256.

SADASIVA IYER, J.

Reference :—2 Cr. L.J. 37, *ff*.

(116) S. 395—*Dacoity—Circumstantial evidence—Pointing out place where stolen property found.*

Where the sole evidence against a person charged with an offence under S. 395, Penal Code, consisted of the fact that the accused had

Penal Code—(Continued).

pointed out the place where some remains of the stolen property were found ;

Held, that the above circumstantial evidence was not sufficient to show that the accused had committed the offence, inasmuch as it did not exclude other theories compatible with his innocence. *Surat Singh v. Emperger*, 15 Cr. L. J. 404 = 28 Ind. Cas. 1004.

LINDSAY, J.O.

Reference :—17 A. 576, R.

(117) *Ss. 397, 326—Robbery—Robbery not proved—Conviction for grievous hurt under S. 326. In re Adabala Muthiyalu*, 13 Cr. L. J. 739 = 17 Ind. Cas. 51 = 37 M. 236. See Final Part, 1912, Col. 159.

(118) *Ss. 399, 402—Nature of defence which accused can set up—Duty of Court—Prosecution evidence, deficiency in, defence not bound to fill up—Right of defence to comment on such deficiency—Case of fraud set up by defence—Prosecution, opportunity of explanation to—Verdict of assessors, in answer to questions by Judge, impropriety of—Ss. 399, 402, I.P.C.—Acquittal under S. 399, if involves acquittal under S. 402, I.P.C.—Repugnancy in judgment, conviction if can be set aside on such ground—Tenancy of modern legislation—Power of High Court to alter acquittal on one of two alternative charges into conviction—Distinction between Ss. 399 and 402, I.P.C.—Crim. Pro. Code, S. 47, meaning and scope of—S. 103, cl. (2)—Search—Right of "occupant" to be present at search—Denial of this right, effect of—"Occupant of the place," meaning of—Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings—Finding of incriminating articles in a house, presumption of law arising from.*

*Woodroffe, J. (Beachcroft, J., concurring).—*An accused person is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it.

It is no affair of the defence to supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it to say that the prosecution has not proved its case and to refer to such deficiencies in proof of the submission, or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If, however, the defence puts forward a case of fraud or if the evidence for the prosecution is not ambiguous, the defence should give notice of the point they intend to take so that the prosecution may have an opportunity of explanation. If any charge of fraudulent practice was going to be based on a circumstance which, standing by itself, was not necessarily suspicious, the defence should have cross-examined witnesses on the point.

Penal Code—(Continued).

Where the Sessions' Judge, in taking the verdict of the assessors, put a large number of questions to them and then recorded their opinion on those questions :

Held, that the Judge should have allowed the assessors in the first instance to have given their opinion in their own language and way, and then, when they had completed what they had to say, it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinion.

Where the charge against the accused was of two separate offences laid in an alternative form, viz., one under S. 399 and another under S. 402, I.P.C., but it appeared that the charges were treated not alternatively but as additional, and the Sessions Judge acquitted them of the charge under S. 399, I.P.C., and convicted them of the charge under S. 402, I.P.C.

Held, that the acquittal under S. 399, I.P.C., did not involve an acquittal under S. 402, Civ. Pro. Code, and the conviction under the latter section was not wrong and the judgment of the Sessions Judge was not vitiated by repugnancy.

That, even if there was any repugnancy, it was open to the High Court to alter the finding of acquittal under S. 399, I.P.C., into one of conviction maintaining the sentence.

That the offences of commission of dacoity, preparation for it and assemblage for the same purpose, have this in common, that they presume an intention or agreement to commit dacoity by five or more persons. A mere assembly without further preparation is not a preparation within the meaning of S. 399, I.P.C., for if it were, S. 402, I.P.C., would be redundant. S. 402, I.P.C., applies to the case of mere assembling without proof of other preparation. A person can thus be not guilty of dacoity yet guilty of preparation and not guilty of preparation yet guilty of an assembly.

*Beachcroft, J.—*The tendency of modern legislation in general and of the Crim. Pro. Code in particular is to avoid technicalities, and there is no provision in that Code which would justify interference with a conviction on the ground of repugnancy in the record.

*Woodroffe, J. (Beachcroft, J., concurring).—*Where the Police searched a hut on suspicion and incriminating evidence was found, and after the search was over the Additional District Magistrate came to the spot and saw what had been found, and a search-list was prepared which the Additional District Magistrate signed, and the accused were subsequently placed before another Magistrate who held an enquiry and committed the accused to the Court of Sessions for trial :

Held, that the fact that the Additional District Magistrate did not take cognizance of the case at once did not render the subsequent proceedings before another Magistrate bad, nor could such subsequent proceedings be held to be prejudicial to the accused.

Penal Code—(Continued).

That it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot.

Where the accused persons, who were inside the room searched by the Police, were, after the discovery in their presence of a gun and after search of their persons, sent out of the room and the search was continued :

Held that the Code of Criminal Procedure permits the occupants of the place searched to be present at the search, and there was therefore a violation of this rule which is one not merely of technicality but of substance, in that it is enacted to guarantee the reality of the search and the discoveries made thereat.

That this was an irregularity which the accused were entitled to ask the Court to consider and which made it incumbent on the Court to scrutinise the evidence carefully.

Beachcroft, J.—The spirit of S. 103, sub-S. 3, is that the occupant of the place searched shall be present and it means that he is to be given the option of being present and not that he is to be allowed to be present only if he demands it. But the right of presence given by S. 103 applies only to the occupant of the place searched or some person in his behalf, and the words "occupant of the place" are not intended to cover every person who may happen to be in the place at the time, but they refer back to the person mentioned in S. 102, *i. e.* a person residing in or being in charge of the place.

Woodroffe, J.—Where, after searching a hut, arms were found under a *machan* inside the hut and in the ceiling of the hut :

Held that knowledge of the existence of the arms would not without other evidence be imputable to any other than the lessee of the hut, nor would the presumption operate even against him if it were shown that the circumstances were such that arms might be in his place without his knowing it.

Beachcroft, J.—Where an article is found in a man's house, the ordinary presumption is that he as owner of the house is aware of its contents. This is subject to the qualification that no other person has access to that particular place. It follows that, if the house is in the occupation of more persons than one having access to the particular place, there is no presumption against them individually that they have put the article where it is found; though, if it be proved that an article has been for a considerable period of time in a place to which all have frequent access, it might reasonably be presumed that all were aware of its existence.

S. 47, Crim. Pro. Code, is not intended to restrict the powers of the Police to enter the place to be searched; on the contrary it is a provision compelling householders to afford the Police facilities in carrying out their duties, and S. 48 provides that if difficulties are placed in the way of a Police officer, he may use force

Penal Code—(Continued).

to obtain ingress. **Romesh Chandra Banerjee v. The Emperor**, 18 C.W.N. 498=41 C. 850=15 Cr. L.J. 885=23 Ind. Cas. 985.

WOODROFFE and BEACHCROFT, JJ.

(119) Ss. 401, 418—*Essentials of offence under S. 401—Position of the Agoo or receiver of the stolen property.*

To sustain a conviction on a charge under S. 401, Penal Code, it is necessary to prove—

- (1) That there existed a gang of persons ;
- (2) That those persons were associated for the purpose of committing theft or robbery ;
- (3) That theft or robbery was to be committed habitually ;
- (4) That the accused was a member of such gang.

The habitual commission of theft necessarily implies an aggregate of acts by some members of the gang or by all of them, but it is not necessary that each individual member of the gang should be proved to have habitually committed theft in company with the other members. Once it is established that a gang, however small in number, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft come within the purview of S. 401 (a).

The fact of association and that of the habitual commission of theft have however to be proved by evidence which would be admissible according to the Evidence Act, and therefore the fact that an accused person is of bad character or is reputed to be a thief or an habitual thief is no evidence against him for the purpose of a charge under S. 401, I.P.C. (b).

The *Agoo* who is the habitual receiver of the stolen property, though not himself the thief, is a principal member of the gang of thieves in whose interests he receives the stolen property, and his case therefore falls within the purview of S. 401, I.P.C. The position of the *Agoo* in the Karnal district, discussed. **Beja v. Emperor**, 19 P.R. 1914 (Cr.).

SHAH DIN, J.

References :—(a) 6 M.H.C.R. 120; 37 P.R. (Cr.) 1869; 9 P.R. (Cr.) 1480; (1886) 6 A.W.N. 15; 6 A.W.N. 16; 6 A.W.N. 65; 1 C.W.N. 146; 27 C. 139; 32 M. 179; 18 P.L.R. 1910; 10 Ind. Cas. 833; 36 P.W.R. 1912, R. (b) 1 C.W.N. 146; 27 C. 139; 32 M. 179, R.

(119-a) S. 402. See No. 118, *supra*.

(120) S. 403. See CRIM. PRO. CODE, No. 335, 28 P.W.R. 1914 (Cr.).

(120-a) S. 403. See Nos. 27 and 114, *supra*.

(121) Ss. 404, 424—*Scope of*.

Section 404, I.P.C., is intended only to punish servants and strangers who could possibly have no right to or interest in, the effects of a dead man, and who misappropriated such effects, but not to punish near relations who take possession

Penal Code—(Continued).

of and deal with the effects under a claim of independent ownership or as heir to the deceased. S. 424 is intended to punish fraudulent debtors and their accomplices and not persons who claim as heirs and deal with the property. *Karri Mangadu v. Emperor*, (1914) M.W.N. 791=15 Cr. L.J. 602=25 Ind. Cas. 514.

SADASIVA IYER, J.

(122) S. 405—*Criminal breach of trust—Money entrusted to broker—Broker to bear all loss—Ownership—Trustee—Agent.*

In pursuance of the following contract a Company advanced Rs. 4,500 to the petitioner who acted as the Company's broker.

"Whereas the broker.....has requested the Company to entrust to him with advances of money.....and.....acknowledges that he will receive all such advances.....and hold the same in trust for the company.....it is.....agreed that

(1) the broker is not the agent of the Company;

(2) the broker shall employ the money of the Company in and about the purchase and transport of paddy to the Company's mill.....;

(3) the property in the money and paddy purchased therewith shall be and remain in the Company;

(4) the broker shall.....upon arrival of the paddy.....tender the same to the company;

(5) the Company shall take delivery of the paddy and.....either pay or credit the broker with price of the same at the current market rate;

(6)

(7) the broker shall be responsible for the payment of the money or the supply of paddy to the value thereof, if either the money or the paddy shall be lost by any means, including the act of God, thieves or other causes over which the broker has no control; the broker shall indemnify the Company against all loss;

Held, (by the majority, Hartnoll, Offg. C. J., dissenting) that the money was not "entrusted" to the broker within the meaning of S. 405, Penal Code.

Per Twomey, J.—A man cannot commit criminal misappropriation of his own property.

The terms of cls. (5) and (7) of the agreement are incompatible with the view that the broker was employed as an agent at all. An agent would be required to exercise reasonable diligence but would not be responsible, as he is made responsible in this agreement, for loss in any event.

Per Ormond, J.—The question whether A entrusted property to B is one which depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust, or agree that, for the purposes of the Penal Code, the property in the money shall be deemed to remain in the original owner, or

Penal Code—(Continued).

agree that the party receiving the money shall be liable for criminal breach of trust if he applies the money to a purpose other than that agreed upon, would not bring the transaction within the scope of S. 405, Penal Code. The Penal Code cannot be altered by agreement of parties so as to make S. 405 applicable to a transaction which is in its real nature a loan. If A receives money from B for certain specified purposes, the money is not entrusted to A within the meaning of S. 405, Penal Code, if A is liable to return the money in any event. Therefore, the trust, if any, in this case is merely a technical or colorable trust.

Per Parlett, J.—The fact that the Company can under no circumstances bear the loss of the money implies that they are not the owners of it.

Per Robinson, J.—The agreement merely shows that the Company employs the services of the broker and gives him an advance but it declines to make him its servant or agent. This being so, the ownership in the money is transferred to the broker and no entrustment is created, that is to say, the agreement in question evidences a loan accompanied by a promise to use the money in a particular way.

Per Hartnoll, Offg. C. J.—Irrespective of whether a man is an agent or not he may be a trustee.

The agreement evidences more than a loan with a condition attached and more than an advance with an undertaking to use it in the purchase of paddy. The money was advanced for a specified purpose and in consequence of confidence reposed in the broker by the Company. The mere fact that the broker has contracted to bear any loss that may be incurred does not make him the less a trustee. *Nga Po Ywet v. Emperor*, 15 Cr.L.J. 452=24 Ind. Cas. 332=7 Bur. L.T. 209 (F.B.).

HARTNOLL, OFFG. C.J., ORMOND, TWOMEY, ROBINSON and PARLETT, JJ.

(123) S. 405—*Criminal breach of trust—Offence—Jurisdiction—Intention—Consequences not essential—Crim. Pro. Code, S. 179.*

The offence of criminal breach of trust is completed by the misappropriation or conversion of the property dishonestly, i.e., with the intention of causing wrongful gain or wrongful loss. It is only the intention that is essential. The wrongful gain or loss is only the consequence and is no essential part of the offence, and a person is not accused of the offence by reason of it. The offence would be committed where the dishonest use or disposal took place, not where the contract was made or should have been performed (a).

Where the accused living in the Bombay Presidency are charged before the Sub-Divisional Magistrate of Erode with committing criminal breach of trust in respect of the proceeds of certain hundis entrusted to them for encashment by the complainants, merchants

Penal Code—(Continued).

of Dharapuram, *held* that the Sub-Divisional Magistrate has no jurisdiction to try the case by virtue of S. 179 of the Crim. Pro. Code read with S. 405 of the Penal Code, as the offence must be taken to have been committed in Bombay. *Rambilas v. Emperor*, (1914) M.W.N. 894—16 M.L.T. 505—15 Cr. L.J. 638—26 Ind. Cas. 126.

AYLING and HANNAY, JJ.

References:—(a) (1914) M.W.N. 324, *Dist.*; 19 A. 111; 32 A. 397; 34 A. 487, *Diss.*

(124) Ss. 405, 406, 409—*Goods entrusted to auctioneer for sale—S. 405 not applicable to misappropriation of sale proceeds—Liability of auctioneer for criminal breach of trust—Dishonest intention—Accused charged with criminal breach of trust in respect of property but convicted of embezzlement of sale proceeds—Legality.*

S. 405, Penal Code, does not cover misappropriation by a person of the sale proceeds of property, i.e., furniture entrusted to him. But assuming that the word, 'property' in S. 405, I.P.C., includes furniture or the value thereof, even then it could not be said that the accused had disposed of the furniture or the value thereof, namely, the sale proceeds, in violation of his contract, dishonestly, unless it were shown that he had the intention of dishonestly appropriating the sale proceeds at the time of the sale.

An auctioneer cannot be said to be liable for criminal breach of trust if he does not punctually carry out every term in the agreement, e.g., if he did not hold the sale on the agreed date, or if there was delay in payment.

Where the charge against the accused is to the effect that he committed breach of trust in respect of some property which he took from the complainant and was therefore guilty of an offence punishable under S. 406, but at the trial he was convicted of embezzling not the property but the amount obtained by dealing with the property, *held*, the conviction was bad and must be set aside (a). *Balthasar v. Emperor*, 41 C. 844—15 Cr. L.J. 683—26 Ind. Cas. 181.

HOLMWOOD and SHARFUDDIN, JJ.

Reference:—(a) 12 C.W.N. 577, *F.*

(125) S. 406—*Criminal breach of trust.*

The complainant gave money to the accused on condition that he would purchase a motor-car and sell it and return her the money with half the profits. The accused applied the money to other purposes:

Held, that the accused was not guilty of criminal breach of trust. *William Cecil Keymer v. Emperor*, 15 Cr. L.J. 284—23 Ind. Cas. 492—12 A.L.J. 730.

TUDBALL, J.

(126) S. 406. See CRIM. PRO. CODE, No. 246, 18 C.W.N. 666.

(126-a) S. 406. See No. 124, *supra*.

Penal Code—(Continued).

(127) S. 408—*Hire-purchase agreement—Sale of article hired—Offence.* See HIRE PURCHASE AGREEMENT, No. 1, 15 Cr. L.J. 425.

(128) Ss. 408, 109—*Joint trial of principal and abettor—Legality.* See CRIM. PRO. CODE, No. 220, 19 C.W.N. 121.

(129) Ss. 408, 477-A—*District Magistrate—Power to order commitment.* See CRIM. PRO. CODE, No. 320, 16 Bom. L.R. 80.

(129-a) S. 409. See No. 124, *supra*.

(130) Ss. 409, 417, offences of criminal breach of trust and cheating punishable under—*Place where offences committed and completed—Jurisdiction to try the offences.* See JURISDICTION, No. 2, 12 A.L.J. 1022.

(131) Ss. 409, 477-A—*Joinder of charges—Three different defalcations—Falsification of accounts.* See CRIM. PRO. CODE, No. 206, 15 Cr. L.J. 153.

(132) Ss. 410 and 499—*Exceptions 8, 9—Defamation—Unadjudicated insolvent—Receiving property from him—Accusation of theft or of receiving stolen property—Not covered by Exception 8 or 9 of the section.*

Where the creditors of a person who had made an application to declare him an insolvent suspected that the complainant was carrying away the properties given by the insolvent to him and made a charge of theft or of having stolen property against the complainant to the police,

Held, that, because there was no adjudication of insolvency and therefore no vesting of the estate in the Receiver, the property was not stolen property, as it had not been transferred by theft or by robbery and could not be said to have been transferred either by criminal misappropriation or by breach of trust within the meaning of S. 410, I.P.C.

Held also that the imputation and accusations of theft made against the complainant cannot be said to have been made in good faith within the meaning of exceptions 8 or 9 of S. 499, I.P.C. *Bulchand Ramchand v. The Crown*, 8 S. L.R. 55—16 Cr. L.J. 675—25 Ind. Cas. 1008.

HAYWARD, J.C.

(133) S. 411—*Receiving stolen property—Accused found in possession of stolen property three years after it went out of owner's possession—Hasty trial improper—Revision—S. 439, Crim. Pro. Code—Concurrent finding of fact.*

Held, that where the property is alleged to have been stolen some three years before it is found in possession of a person, very clear evidence is required to show that he must have known it to be stolen.

Held, also, that an accused person should not be tried in a hasty manner and there should be an adjournment of reasonable duration for enabling him to produce the whole of the evidence in support of his defence.

Penal Code—(Continued).

In this case the concurrent finding of the Courts below was set aside on the ground that there was no evidence to substantiate the charge. *Lal Singh v. The Crown*, 18 P.W.R. 1914 (Cr.)=113 P.L.R. 1914=15 Cr. L.J. 521=24 Ind. Cas. 888.

JOHNSTONE, J.

(134) S. 411—*Receiving and disposing of stolen property—Guilty knowledge necessary—Concurrent finding—Revision—Crim. Pro. Code*, S. 439.

Held, that the mere fact that a person was in possession of a stolen animal and he sold it to another is not in itself sufficient for his conviction under S. 411, Penal Code, and his denial of having any connection with the animal does not prove his guilty knowledge, especially when there is some enmity between the alleged vendor and the vendee. *Allu v. The Crown*, 34 P.W.R. 1914 (Cr.)=229 P.L.R. 1914=15 Cr. L.J. 654=25 Ind. Cas. 982.

JOHNSTONE, J.

(135) S. 411—*Possession of stolen property—Gist. Kannappa Naiker v. Emperor*, (1913) M.W.N. 696=21 Ind. Cas. 383=14 Cr.L.J. 591. See Final Part, 1913, Col. 198.

(136) S. 411—*Pointing out stolen property—Evidence. Mehra v. The Crown*, 32 P.W.R. 1913 (Cr.)=315 P.L.R. 1913=14 Cr. L.J. 602=21 Ind. Cas. 474. See Final Part, 1913, Col. 198.

(137) S. 411—*Theft within British territory—Retention of stolen articles outside British territory—British Courts if have jurisdiction to try accused for such retention of stolen articles. See CRIM. PRO. CODE, No. 140, 18 C.W.N. 1178.*

(137-a) S. 411. See Nos. 2, 27, 65, 115, *supra*.

(138) Ss. 411, 414—*Dishonestly receiving stolen property—Assisting in the concealment of stolen property—Government currency note, received in the course of business—Jurisdiction—Code of Criminal Procedure, S. 180, ill. (b). Ram Chundra Saha v. Haji Meah Haji Abdullah*, 17 C.W.N. 1129=14 Cr. L.J. 571=21 Ind. Cas. 171. See Final Part, 1913, Col. 199.

(138-a) S. 413. See No. 119, *supra*.

(138-b) S. 414. See No. 133, *supra*.

(138-c) S. 415. See No. 3, *supra*.

(139) Ss. 415, 419—*Sale of mare at a fair—Inducing the muharrir to write wrong names in the certificate of sale—Offence—Two thumb marks exactly agreeing—Opinion of*

In this case, the accused A and L were *challaned* upon S. 419, I.P.C., for cheating one S, a muharrir at a fair, by persuading him, in the exercise of his duty, to write in a *parchi* or certificate of sale of a mare, that L was the purchaser and T the seller, and affixing his thumb mark. The Sessions Judge found that the mare was not proved to be stolen property,

Penal Code—(Continued).

but that it was come by in some doubtful fashion and that the muharrir was deceived.

Held that the absence of proof that the mare had actually been stolen is immaterial, and that, as the accused *did* deceive the muharrir and induce him to write a false certificate, they were guilty of cheating by personation (a).

The deliberate opinion of an expert that two thumb-marks exactly agree is on quite a different plan from an opinion as to handwriting. It is a reasonable deduction from experience that no two human beings have the same thumb-markings, and, if no differences whatever can, after the most careful examination, be found between one thumb mark and another, the conclusion is irresistible that the same thumb made both (b). *Ahmada and Lalu v. Crown*, 9 P.R. 1914 (Cr.).

JOHNSTONE, J.

References:—(a) 36 P.R. 1888 (Cr.); 20 P.R. 1889 (Cr.), F.; 17 C. 606; 12 C.W.N. 750, A. (b) 18 P.W.R. 1912; 1 C.L.J. 365; 32 C. 759, R.

(139-a) S. 417. See No. 130, *supra*.

(139-b) S. 419. See No. 139, *supra*.

(140) S. 420, *Cheating—Evidence—Previous and subsequent conduct of accused—Civil law principles when applicable to criminal cases—False pretence—Promise to do something in future—Evidence Act, Ss. 14, 15.*

In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him, or in which he was concerned, at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused, is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. Evidence merely to prove that the accused person's character is such that he is likely to commit the act with which he is charged is not admissible.

A principle of Civil law can equally apply to a criminal case, provided it is not in any way against any of the principles of Criminal law. *Per se* a promise to do something in the future may not amount to a false pretence or to cheating, but, it may, at the same time, in certain cases, involve a false pretence that the promisor has the power to do that thing for which false pretence the promisor may be indictable. *Girdhari Lal v. Emperor*, 269 P.L.R. 1914.

RATTIGAN, J.

(140-a) S. 420. See No. 5, *supra*.

(141) Ss. 420, 71—*Cheating—Gist of offence—Right of shareholders—Duty of auditors—Summing up of Sessions Judge to be read as a whole. G. S. Clifford v. King-Emperor*, 6 Bur.L.T. 201=15 Cr.L.J. 80=7 L.B.R. 148=22 Ind. Cas. 432. See Final Part, 1913, Col. 201.

Penal Code—(Continued).

(142) Ss. 420, 511—*Cheating—Attempt to—Definition of "Attempt" — Spurious trinkets — False representation — Untrue statement to support.*

A manufactured spurious trinkets, and took them to N saying that they were of gold, and that they were stolen property (which was also not true) and that he (A) does not like to sell them in bazaar and asked him to buy. N did not buy, but A was arrested.

It was argued that no attempt to cheat had been proved, because more had to be done by A, such as weighing the articles, &c., before wrongful loss would fall upon N.

Held, that the act of A amounted to an attempt of cheating punishable under Ss. 420, 511, I.P.C.

Held, also that, in cases of cheating, the essential thing is the deception of the victim, the dishonest causing to arise in the victim's mind of an impression, the reverse of truth, calculated to induce him to give up something which he would not otherwise give up, or to do or refrain from doing something which he would not otherwise do or refrain from doing, or to enter into a bargain which he would not enter into, if he knew the real facts.

"Attempt" is an act with intent to commit a crime and forming part of a series of acts which would constitute its actual commission if not interrupted.

Held, further that the definitions in such matters are dangerous things, and the only safe way of deciding in any particular case whether an "attempt" to commit a crime has been made or not, is to consider the facts of that particular case, and to decide in accordance with the dictates of common sense. *Abdullah v. The Crown*, 13 P.W.R. 1914 (Cr.) = 66 P.L.R. 1914 = 15 Cr. L.J. 265 = 23 Ind. Cas. 473 = 14 P.R. 1914 (Cr.).

JOHNSTONE and SHAH DIN, JJ.

References:—8 A. 304; 19 P.R. 1879 (Cr.); 19 P.R. 1881; 40 P.R. 1886 (Cr.); 25 P.R. 1902 (Cr.); 15 P.R. 1907 (Cr.) = 44 P.W.R. 1907; A.W.N. (1886) 290; 16 C. 310; 16 A. 409; 15 A. 178, R.

(143) S. 423—*False recital—Nature of—Sentence altered—Enhancement—Illegality. Mania Goundan v. Emperor*, (1911) 2 M.W.N. 413 = 10 M.L.T. 888 = 12 Ind. Cas. 528 = 12 Cr. L.J. 547 = 37 M. 47. See Final Part, 1911, Col. 166.

(144) S. 424—Penal provisions of Madras Estates Land Act whether exclusive. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 1, 15 Cr. L.J. 295.

(144-a) S. 424. See No. 114, *supra*.

(145) S. 426—*Mischief—Wrongful loss—Mortgagee cutting trees to repair house, whether guilty.*

A mortgagee openly cutting a few trees on the land mortgaged to him in order to repair another part of the mortgaged premises is not

Penal Code—(Continued).

guilty of mischief. *In re C. M. Ramasamier*, 15 Cr. L.J. 290 = 28 Ind. Cas. 498.

SADASIVA AIYAR, J.

(145-a) Ss. 426, 447—*Mischief—Trespass—Trespasser's entry, whether gives him juridical possession—Removal of obstruction, whether offence—Pathway—Obstruction.*

A mere trespasser cannot obtain what is known in law as possession by the act of entry, or by the continuance of that act, so long as the act is disputed and resisted.

Therefore, if a person takes possession of the site of a public road and builds upon it to the obstruction of the public, it is no offence for a member of the public to pull down that obstruction and exercise his right of way. *In re Dharmalinga Mudali*, 15 Cr. L.J. 728 = 26 Ind. Cas. 171.

SADASIVA AIYAR, J.

(146) S. 441—*Criminal trespass—Possession, meaning of. Kunji Lal v. Emperor*, 14 Cr. L.J. 638 = 21 Ind. Cas. 681 = 12 A.L.J. 151. See Final Part, 1913, Col. 203.

(146 a) S. 442. See No. 150, *infra*.

(147) S. 447—*Criminal trespass—Co-sharer building on the common land without permission of the other co-sharer—Permission asked for and refused.*

Where one of the co-sharers asked the permission of the other co-sharer to build upon the common land and the permission was refused and he built in spite of the refusal, **held** he could not be convicted of the offence of criminal trespass within the meaning of S. 447, Penal Code. The mere fact that a co-sharer asked the permission of the other co-sharer to his appropriating to his own use a portion of the common waste land, would not necessarily imply that the co-sharer whose consent was asked for, was admitted to be the sole owner of the land in question. *Ram Sarup v. King-Emperor*, 12 A.L.J. 790 = 36 A. 474 = 15 Cr. L.J. 584 = 25 Ind. Cas. 386.

PIGGOTT, J.

References:—2 A. 165; 26 B. 558, R.

(148) S. 447—*Complaint under—Application for possession under S. 542, Crim. Pro. Code—Lapse of time—Cause of delay explained—Legality of order under S. 522. See CRIM. PRO. CODE, No. 98, 15 P.W.R. 1914 (Cr.).*

(148-a) S. 447. See Nos. 33, 41 and 145 (a) *supra*.

(149) S. 451—*House-trespass with intent to commit adultery—Husband's possession of house essential—Connivance or consent of husband, effect of.*

If the entry in a house is made with the consent of the owner and possessor of the house, no offence under S. 451, Penal Code, can be deemed to have been committed.

Where, in a case under S. 451, Penal Code, the husband appeared neither as a complainant

Penal Code—(Continued).

nor as a witness, and there was nothing to show that the house was in his possession or that he had not consented to or connived at the entry of the accused: *Held*, that the charge under S. 451, Penal Code, could not be sustained. *Jagannath v. Emperor*, 15 Cr. L. J. 351=28 Ind. Cas. 703.

KANHAIYA LAL, A.J.C.

References :—19 A. 74, F. ; 23 A. 82, D.

(150) Ss. 457, 442, 379, 511—*Entering cattle enclosure—Cattle enclosure whether a 'building'—Attempt to commit theft—'Attempt' defined.*

Accused was charged with having committed lurking house trespass by night by entering into the cattle enclosure of the complainant with the intent to commit theft of his cattle and he was convicted for the same under S. 457, I.P.O. The cattle enclosure in question was not attached to any house, but was merely a piece of ground enclosed on one side by a wall and on the other three sides by a thorn hedge. *Held* that the mere surrounding of an open space of ground by a wall or fence of any kind cannot be deemed to convert the open space into a building, and that therefore the conviction under S. 457 cannot be maintained (a).

Held, however, that the accused was guilty of an attempt to commit theft under Ss. 379 and 511, I.P.O., because he really did make his way into the enclosure by making a hole in the hedge and his intention was to commit theft.

An 'attempt' to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case. *Kohmi v. Crown*, 24 P. R. 1914 (Cr.).

SCOTT-SMITH and SHADI LAL, JJ.

References :—(a) 35 P. R. 1879 (Cr.); 57 P. R. 1887 (Cr.); 28 P. R. 1905 (Cr.), R.

(150-a) S. 463. See No. 61, *supra*.

(150-b) S. 464. See No. 6, *supra*.

(150-c) S. 466. See No. 6, *supra*.

(151) Ss. 466, 468, 471—*Several offences whether forming the same transaction, substantial test to determine.*

The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts as to constitute one continuous action, irrespective of the persons by whom the same may have been committed. *Abbas Quli Khan v. King-Emperor*, 17 O.C. 276=15 Cr. L. J. 643=25 Ind. Cas. 843.

PANDIT KANHAIYA LAL, J.C.

(151-a) S. 468. See No. 151, *supra*.

(151-b) S. 469. See No. 90, *supra*.

Penal Code—(Continued).

(152) S. 471—*Using a forged document as genuine, what amounts to.* *Karim Dad v. Crown*, 25 P. R. 1913 (Cr.)=14 Cr. L. J. 667=21 Ind. Cas. 907. See Final Part, 1913, Col. 206.

(152-a) S. 471. See Nos. 30, 60, 151, *supra*.

(153) Ss. 471, 474—Ss. 195, 476, *Crim. Pro. Code*—*Using as genuine a forged document—Filing a forged document as coming from the custody of the person by whom it purported to be held, if constitutes 'user'—Offence committed by such act, sanction if necessary for prosecution for—Possession of forged document, knowing it to be forged and intending to use it as genuine, prosecution for, if lies without sanction—Stay of criminal proceedings pending determination of civil suit.*

Where, in a case under S. 474, I.P.O., the prosecution story was that the accused who was the plaintiff in a rent suit himself filed a *kabuliyat* and an *amalnama* which were forged and which purported to be filed by the complainant, the defendant in the rent suit.

Held, that the act constituted a user within the meaning of S. 471, I.P.O., and the offence committed was one under that section, and in respect of that offence sanction under S. 195 or an order under S. 476, *Crim. Pro. Code*, was necessary.

That no sanction is necessary for a prosecution under S. 474, I.P.O.

That the decision of the issues in the rent suit being largely dependent on the question whether the documents in question were or were not genuine, it was expedient that the criminal proceeding should be deferred pending the final disposal of the rent suit. *Arabuddin Sarkar v. Kalidayal Mullik*, 19 O.W.N. 125.

SHARFUDDIN and TEUNON, JJ.

(153-a) S. 474. See No. 153, *supra*.

(153-b) S. 477. See Nos. 6, 129, 131, *supra*.

(154) Ss. 478, 486—*Design or pattern covering whole goods—Not a trademark—Copying—No offence.* See *TRADEMARK*, No. 1, 8 S.L. R. 99.

(155) Ss. 482, 486—*Merchandise Marks Act (IV of 1889), Ss. 6, 7—Person—Limited Company—Liability of, to be convicted and punished—Words "he" and "whoever," meanings of—Mens rea—Innocence—Proof—Interpretation of Statutes—Ambiguous language—Penal Act.*

A body corporate can be lawfully prosecuted and on conviction punished for an offence under S. 482 or S. 486, Penal Code.

The word "he" in Ss. 6 and 7 of the Indian Merchandise Marks Act includes "she" and "it".

Per Hartnoll, Offg. C.J.—The word "whoever" in Ss. 482 and 486, Penal Code, does not refer only to a definite individual or definite individuals and can apply to a corporate body.

Penal Code—(Continued).

Where the language of a Statute is not clear, to ascertain the real meaning, the cause or necessity of the law being made should be considered.

Every clause of a Statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole Statute or series of Statutes relating to the subject-matter.

Under Ss. 482 and 486, Penal Code, the prosecution has not to prove the *mens rea*; and, as the burden of proving innocence is thrown on the accused under those sections, when once a *prima facie* case has been established, a Limited Company, when accused, can prove its innocence by the evidence of its agents or servants or otherwise as it thinks fit.

Per Ormond, J.—The word "whoever" with which Ss. 482 and 486 begin means the same thing as "every person who" in S. 2 (2) of the English Merchandise Marks Act and shows that the provisions of the sections apply to persons generally.

The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every person who" or with the word "whoever," unless the word "person" is defined so as to have a more restrictive or a more extended meaning than it in fact has. Limited Companies are not excluded from the operation of Ss. 482 and 486, Penal Code, and there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence either by showing that it acted without intent to defraud under S. 482, or under S. 486 in any of the ways prescribed in that section. *Seena M. Haniff & Co. v. Liptons, Limited*, 15 Cr. L.J. 337 = 23 Ind. Cas. 639 = 7 Bur. L. T. 116.

HARTNOLL, OFFG. C.J., and ORMOND, J.

References:—(1889) 24 Q.B.D. 90 = 59 L.J. M.C. 13 = 62 L.T. 73 = 38 W.R. 204 = 17 Cox C. C. 55 = 54 J.P. 436; (1898) 2 Q.B.D. 19 = 62 J.P. 439 = 67 L.J. Q.B. 601 = 78 L.T. 658 = 14 T.L.R. 395 = 46 W.R. 573 = 19 Cox C.C. 127; (1902) 2 K.B. 1 = 71 L.J.K.B. 656 = 66 J.P. 774 = 87 L.T. 51 = 18 T.L.R. 539 = 20 Cox C. C. 279, *F*.

(156) S. 486 — *Counterfeiting trade-mark — Merchandise Marks Act (IV of 1884), S. 14 — Costs of successful party — Costs in appeal.*

A person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting the trade-mark under S. 486, Penal Code, irrespective of the circumstance that the registered trade-mark of the one is quite different from the trade-mark of the other.

An appellate Court can award the costs of appeal, under S. 14 of the Merchandise Marks Act. *Emperor v. Ganpat Sitaram Mukadam*, 16 Bom. L.R. 78 = 2 Bom. Cr. Cas. 177 = 15 Cr. L.J. 522 = 24 Ind. Cas. 834.

HEATON and SHAH, JJ.

Penal Code—(Continued).

(156-a) S. 486. See Nos. 154, 155, *supra*.

(157) S. 498 — *Enticing away a married woman — Her detention — Defective charge when immaterial — Amount of punishment where woman is an abettor.*

Held, that a defective charge is of no consequence if the accused has not been prejudiced thereby.

Held, also, that, in a case under S. 498, Penal Code, a light sentence is sufficient to meet the ends of justice when the abducted woman is an active abettor.

Held, further, that, a finding of fact cannot be questioned in revision when there is some evidence to support it. *Lal Khan v. The Crown*, 20 P.W.R. 1914 (Cr.) = 123 P.L.R. 1914 = 15 Cr. L.J. 524 = 24 Ind. Cas. 836.

RATTIGAN, J.

(158) S. 488 — *Enticing away a married woman — Divorce — Khatiks — Low class Sudras.*

Held, that, as Khatiks are low class Sudras they do not follow strict Hindu Law, consequently there was no prohibition among them of divorcing a wife by a written deed. *Bholar v. The Crown*, 31 P.W.R. 1914 (Cr.) = 181 P.L.R. 1914 = 15 Cr. L.J. 539 = 24 Ind. Cas. 947.

JOHNSTONE, J.

(159) S. 498 — *Detention — Crim. Pro. Code, S. 439 — Finding of fact. Banai Lal v. The Crown*, 36 P.W.R. 1913 (Cr.) = 319 P.L.R. 1913 = 21 Ind. Cas. 467 = 14 Cr. L.J. 595. See Final Part, 1913, Col. 207.

(160) S. 498 — *Married woman — Marriage to be proved. Nazir Khan v. King-Emperor*, 11 A.L.J. 994 = 22 Ind. Cas. 430 = 15 Cr. L.J. 78 = 36 A. 1. See Final Part, 1913, Col. 203.

(161) S. 499 — *Defamation — Privileged — Imputation contained in petition to higher authorities for redress of grievances.*

A statement made by a villager casting imputation on the character of a co-villager in a complaint to the higher authorities is privileged *only* if the imputation is *substantially true* and made in good faith. *Parvataneni Kamayya v. Kasinaduni Tripurantakam*, 15 Cr. L.J. 281 = 23 Ind. Cas. 489.

SADASIVA IYER, J.

References:—3 A. 315 = 1 A.W.N. 81 = 16 Ind. Jur. 320, *F*.

(161-a) S. 499. See No. 132, *supra*.

(162) Ss. 499, *Exceptions 8 and 9, and 500 — Defamation — Good faith — Justification — Sentence. Kewala Nandgir v. The Crown*, 34 P.W.R. 1913 (Cr.) = 317 P.L.R. 1913 = 21 Ind. Cas. 478 = 14 Cr. L.J. 606. See Final Part, 1913, Col. 209.

(163) S. 499, *Exception 9 — Defamation — Pleader asking question in cross-examination making imputation under instructions from client — Liability of pleader — Presumption of good faith — How to rebut presumption. Nikunja*

Penal Code—(Continued).

Behari Sen v. Harendra Chandra Sinha, 14 Cr. L. J. 523—18 C. W. N. 424=20 Ind. Cas. 1008=41 C. 514. See Final Part, 1913, Col. 209.

(164) S. 499, Excep. 9, and S. 52—*Defamation—Magistrate, allegation against, of corruption and conspiracy, to save an accused under trial, by manipulating procedure—Magistrates' and Judges' public acts if above criticism—Press, if specially privileged in criticising such acts—Limits of legitimate comment—Libel, no plea of justification, yet truth of charges asserted by innuendo, propriety of—Defence of good faith—Matters relevant to the enquiry and proper to be placed before jury—Judge's right to state his own views, without withdrawing case from the jury—Charge to jury—Misdirection when sufficient for interference by Privy Council—Privy Council, practice of, in interfering with criminal trials—Libel published under mistake—Duty of apologising on discovery of mistake—Bail, discretion as to granting.*

No privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist; but, apart from statute law, his privilege is no other and no higher.

No privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment.

A, as District Magistrate, having declined to commit one M for trial on a charge of having abducted and committed rape upon a Malay girl of about 11 years of age, the appellant wrote an article in a newspaper charging A with being engaged with others in a corrupt plot to defeat justice in order to save M, with having bailed him out for a non-bailable offence and with having manoeuvred his procedure to that end. M had himself admitted that, being informed that the child was suffering from gonorrhoea, he had taken her to his house and himself had personally examined her—although there was a hospital 8 miles away. A, in declining to commit M, had further stated that in his opinion M's conduct was pure and philanthropic:

Held, that this declaration by the Magistrate with which the enquiry before him concluded, laid the whole trial open to searching and severe observations, and no blame could be attached to these. But it was not open to the appellant to make against the Magistrate charges of corruption and conspiracy, which were admitted to be untrue, and were grossly libellous, and the appellant could not justify them in a criminal proceeding for defamation, unless he was able to establish affirmatively that he believed them to be true and that on

Penal Code—(Continued).

reasonable grounds, as provided in the ninth exception to S. 499, Penal Code.

That the conduct of M referred to above and of the Magistrate at the enquiry were relevant for a consideration of the question of accused's *bona fides* and were properly submitted to the Jury in support of the defence.

That the Judicial Committee was not prepared to say that the granting of bail to M was an improper exercise of the Magistrate's discretion, but in any case it was a difficult and delicate point of law which could not have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel.

That the fact that every officer, judicial or administrative, except one, had agreed with the conclusion to which the Magistrate had arrived, and that an investigation in the department of a Lieutenant-Governor of great experience had, to the appellant's knowledge, resulted in exonerating the Magistrate from blame, and the attitude of the appellant who neither defended the articles as true nor gave any assistance on the subject of what were the actual things upon which he founded his own beliefs and what steps, if any he took to investigate the truth of the charges before giving them publicity, were also matters for consideration by the jury.

A charge to a jury must be read as a whole. If there are salient propositions of law, in it these will be subjects of separate analysis, but in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. In the region of fact, the Privy Council will not interfere, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred.

Where, in answer to a charge of defamation, the accused did not plead justification, but nevertheless the truth of the libels continued throughout the trial to be urged by way of repeated *innuendo*, the Judge was justified in stating his own view of the facts, in order to counteract the improper use which was being made of the procedure, provided he did not withdraw the case on facts from the jury.

When during the trial the accused was apprised from materials placed before the Court that certain serious charges against the complainant were quite without foundation, he should have at once acknowledged his mistake and should not have adhered to the libel.

The power of the Privy Council to review proceedings of a criminal nature, unless such power and authority have in any local area been parted with by Statute, is undoubted,

Penal Code—(Concluded).

But there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. Before they will interfere, it must be established demonstrably that justice itself in its very foundation has been subverted, and that it is therefore a matter of grave imperial concern that by way of an appeal to the King it be restored to its rightful position in that particular part of the Empire.

The authority of *Dillet's* case does not justify interference by the Privy Council in a criminal case wherever there has been misdirection, leaving it uncertain whether that misdirection did or did not affect the jury's mind. That would be to convert the Judicial Committee into a Court of Criminal Review or Appeal for the Indian and Colonial Empire.

The practice of the Committee in respect of criminal trials is to this effect; it is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of regular law, or within that pale there has been a violation of the natural principles of justice so demonstrably manifest as to convince their Lordships *first*, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, *secondly*, that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided. *Chaning Arnold v. The King-Emperor*, 18 C.W.N. 785=26 M.L.J. 621=15 Cr. L.J. 309=23 Ind. Cas. 661=16 M.L.T. 79=(1914) M.W.N. 506=12 A.L.J. 1042=20 O.L.J. 161=16 Bom. L.R. 544=2 Bom. Cr. Cas. 207=7 Bur. L.T. 167=41 C. 1023 (P.G.).

LORD SHAW, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE and MR. AMEER ALI.

References :—(1887) 12 A.C. 459, *considered*; (1894) A.C. 57; (1893) 40 I.A. 193=17 C.W.N. 1110; L.R. (1914) A.C. 221=18 C.W.N. 98; 40 I.A. 241=18 C.W.N. 374, R.; 1 Moo.P.C.N. S. 272 (1862); 1 Moo. P.C.N.S. 299, 312 (1863), F.

(165) S. 504. See No. 20, *supra*.

(166) S. 511. See Nos. 99, 142 and 150, *supra*.

Perjury.

(1) *Perjury—Two contradictory statements, basis of the charge—Reconciliation—Presumption in favour of.*

Where the two statements forming the basis of a charge of perjury cannot be said to be irreconcilable, the conviction on that charge must fail.

In cases where the charge is based on two contradictory statements, every possible presumption in favour of the reconciliation of the

Perjury—(Concluded).

two statements should be made. *The Crown v. Imambux wd. Khudabux*, 7 S.L.R. 96=15 Cr. L.J. 379=23 Ind. Cas. 747.

PRATT, J.C., and HAYWARD, A.J.C.

References :—7 A. 44; 10 B. 124, R.

(2) *Perjury—Sanction to prosecute—Two contradictory statements—Reconciliation of—Presumption in favour of—Penal Code, S. 193.*

In case of a prosecution in the alternative based on two contradictory statements, every possible presumption must be in favour of the reconciliation of the two statements. *The Crown v. Tikhram Lakhi*, 7 S.L.R. 108=15 Cr. L.J. 488=24 Ind. Cas. 576.

PRATT, J.C., and HAYWARD, A.J.C.

References :—7 S.L.R. 96; 7 A. 44, R.

Pleader.

(1) *Pleader—Application for enrolment—Concealment of conviction—Misconduct—Dismissal.*

A pleader who conceals his past conviction by intentionally omitting to recite it in his application for admission is liable to be dismissed. *In the matter of a Second Grade Pleader*, 15 Cr. L.J. 587=25 Ind. Cas. 389.

HARTNOLL and ORMOND, JJ.

(2) Whether Court can pass remarks in the judgment upon suggestion by accused's pleader. See ACT I OF 1878 (OPIMUM), No. 1, 15 Cr. L.J. 420.

(3) Pleader retaining in his service a man convicted of cheating and who was to be declared a tout etc., after his enrolment as a pleader's clerk was refused—Making false statement—Professional misconduct. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 3, 49 P.W.R. 1914 (Cr.).

Pleader and Client.

(1) *District to which pleader's license does not extend—Practising before Criminal Court in such district—Necessity of obtaining Court's permission previously—S. 4 (r), Crim.Pro. Code—Duty not to accept engagement or to inform client of his engagement being contingent on Court's permission—Refusal to extend sanad to Civil Court—Proper inference.*

A refusal to extend the sanad to the Civil Courts could not imply that the sanad had been extended to the Criminal Courts.

It is the duty of a pleader, who appears in a Criminal Court of a District to which his sanad does not apply, to inform the Magistrate that he cannot appear as of right, and to apply for permission under S. 4 (r), Crim. Pro. Code. The better course is not to accept a fee for an engagement until that permission has been recorded. But if the pleader accepts an engagement before attending the Magistrate's Court, he ought to explain to his client that

Pleader and Client—(Continued).

his appearance will be contingent on the Magistrate's permission. *Re Mr. C. H. Clements*, 7 S.L.R. 98 = 15 Or. L.J. 392 = 28 Ind. Cas. 750.

PRATT, J.C., KEMP and HAYWARD, A.J.C.S.

- (2) *Professional misconduct—Judgment and proceedings in Civil Court out of which charge arises—Admissible in evidence—Evidence Act, S. 11—Actionable claim—Purchase by pleader—Unprofessional—Position of pleader in administration of justice—Fee wholly not paid—Obligation to appear—Vakils when trading—Family trade—Legal Practitioners Act, S. 13, r. 27—Vakil both advocate and solicitor—Gross negligence of vakil—Disciplinary powers of Court—Reasons why vakil should not engage in trade.*

The judgment and the proceedings in a civil suit against a vakil, out of which a charge of professional misconduct is framed against him, are admissible in evidence in an enquiry into the latter charge under S. 11 of the Evidence Act, but the decision of Civil Court is not conclusive proof against him in such enquiry.

An actionable claim does not cease to be one because a suit is instituted for its enforcement.

An actionable claim should not be purchased by a pleader.

Benson, O.C.J.—A pleader holds a privileged position in connection with the administration of justice and the law imposes on him certain restrictions and disabilities by reason of the position or office which he holds, and in order to safeguard the interests of litigants and the pure administration of justice.

It is professional misconduct for a man to do that which the law expressly forbids him to do by reason of the profession which he exercises.

Sankaran Nair, J.—A vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

The purchaser of an actionable claim after suit offends against public policy more than the purchase of such a claim before suit.

It is not required by the conditions of the legal profession or the circumstances of this country that the High Court should declare that it is unprofessional for a pleader to follow any trade or business.

To grant permission to a vakil to trade under r. 27, the character of the person making the application, the nature of the trade or business, the time the pleader would have to devote to it will all be factors to be taken into account.

It is difficult to say that a pleader should not engage himself in a trade or business. A vakil is both an advocate and a solicitor, and he should not be debarred from performing those

Pleader and Client—(Concluded).

functions which a solicitor is, and a barrister may not be, entitled to discharge.

The notion that no trade, however honestly carried on, is worthy of a vakil, is a relic of the times that have passed away.

Sundara Iyer, J.—In the absence of an agreement that the fee should be previously paid, whether non-payment of a portion of the fee would absolve the pleader from his duty to appear for the client?

A pleader, who is wilfully and grossly negligent in the discharge of his duties, can be punished for his misconduct, in the exercise of the Court's disciplinary powers.

Where a pleader was guilty not merely of a mere omission to do his duty but also repudiated the agreement he entered into with his client and did so deliberately and without justification, he is guilty of nothing less than fraudulent conduct.

Gross negligence of a vakil or any conduct which interfered with the responsible, orderly and pure conduct of proceedings in Court, would be punishable under the disciplinary jurisdiction of the Court.

A purchase of an actionable claim by a pleader is unprofessional conduct. The *onus* lies on the pleader to prove that it does not amount to gross misconduct.

A pleader, who belongs to a trading family, should not be regarded as trading, because other members carry on a trade, the benefit of which goes also to the pleader. But if all the members of a joint family enter into a partnership and carry on a family trade, all of them must be regarded as carrying on the trade.

A pleader cannot be held to be not guilty, of misconduct, if he is engaged in trade or other business without the permission of the Court, if his doing so is inconsistent with the profession of a pleader.

A pleader ought not to be engaged in trade, because it might prevent him from devoting that attention to the work as a pleader which his duty to his public and to the Court would require that he should, and because he should not be permitted to engage himself in a pursuit which is inconsistent with his status as a member of a learned and honourable profession. *Muni Reddi v. Venkata Row*, 28 M.L.J. 447 = (1912) M.W.N. 1029 = 12 M.L.T. 615 = 97 M. 288 = 13 Or. L.J. 800 = 17 Ind. Cas. 644.

BENSON, O.C.J., SANKARAN NAIR and SUNDARA IYER, JJ.

- (3) Counsel appearing as witness for his client—Evidence recorded—Duties of the Counsel—Admissibility and relevancy of evidence of Counsel. See EVIDENCE ACT, No. 26, 12 A.L.J. 285.

Police.

- (1) Statements made to police when reduced to writing are not admissible—Police officer can depose to the statements. See CRIM. PRO. CODE, No. 127, 16 Bom. L.R. 608.

Police—(Concluded).

(3) Station House Officer receiving information of commission of cognizable offence outside his station limits—Procedure. See CRIM. PRO. CODE, No. 122, (1914) M.W.N. 882.

(8) Who can withdraw from prosecution—Powers of Police officers—Discretion of Magistrate—Revision. See CRIM. PRO. CODE, No. 374, (1914) M.W.N. 776.

(4) Evidentiary value of police diaries. See CRIM. PRO. CODE, No. 181, 1 P.W.R. 1914 (N.W.F.P.) (Cr.).

(5) Police report submitted in non-cognizable case—Examination of police officer as if he was a complainant—Legality—Magistrate doubting correctness of report—Proper procedure. See CRIM. PRO. CODE, No. 124, U.B.R. (1914), 2nd Cr., 19 (Cr.).

(6) Police officers—Statements made by accused—Admissibility in evidence. See EVIDENCE ACT, No. 10, 41 C. 601.

(7) Information given by accused to Police officer, how far admissible in evidence—Admission by accused of his guilt before Sub-Inspector—Effect. See EVIDENCE ACT, No. 13, 15 Cr. L.J. 474.

Police Act (Calcutta).

See BEN. ACT IV OF 1866.

Police Act (Madras City).

See MAD. ACT III OF 1888.

Possession. *

(1) Party in possession—Attempt to dispossess—Use of force—Death caused—Liability of party in possession—Right of private defence. See PENAL CODE, No. 22, 15 Cr. L.J. 447.

(2) Maintenance of existing peaceful possession with or without title—Enforcement of right by person out of possession—Unlawful assembly. See PENAL CODE, No. 32, 17 O.C. 21.

Practice.

Reply, right of—Documentary evidence adduced by accused during cross-examination of prosecution witnesses—Prosecutor not entitled to reply. See CRIM. PRO. CODE, No. 258, 7 L.B.R. 84.

Presidency Towns Insolvency Act.

See ACT III OF 1909.

Press.

Press if specially privileged in criticising public acts of Magistrate and Judges—Limits of legitimate comment. See PENAL CODE, No. 164, 18 C.W.N. 785.

Press Act.

See ACT XXV OF 1867.

See ACT I OF 1910.

Prevention of Cruelty to Animals Act.

See ACT XI OF 1890.

Principal and Agent.

(1) Parties in the position of—Proceedings under S. 145, Crim. Pro. Code, whether can be taken. See CRIM. PRO. CODE, No. 100-a, 15 Cr. L.J. 708.

Prisons Act.

See ACT IX OF 1894.

Private Defence.

(1) Wrongful possession for 14 hours—Trespass—Rioting—Right of private defence. See PENAL CODE, No. 24, 18 C.W.N. 275.

(2) Of person and property—Right when arises. See PENAL CODE, No. 22, 15 Cr. L.J. 447.

(3) Private defence, Right of—Illegal search by police—Police beaten—Whether right of private defence can be claimed. See PENAL CODE, No. 93, 8 S.L.R. 1.

(4) Right of—Plea need not be set up when shown by circumstances—Right when to be exercised—Persons aiding in such defence whether commit offence. See PENAL CODE, No. 21-b, 15 Cr. L.J. 710.

Procedure.

Power of Court to invent rules of procedure. See CRIM. PRO. CODE, No. 97, 16 M.L.T. 248.

Prosecution.

(1) Small Cause Court directing prosecution of a person under S. 476, Crim. Pro. Code—Revision—Order of prosecution—Procedure to be adopted. See CRIM. PRO. CODE, No. 355, 17 O.C. 25.

(2) Explanation consistent with innocence of accused—Duty of prosecution. See PENAL CODE, No. 56, 1 P.R. 1914 (Cr.).

(3) Duty of prosecution to call all available eye-witnesses—Duty of Public Prosecutor. See PENAL CODE, No. 31, 19 C.W.N. 28.

(4) Prosecution when not bound to produce all witnesses. See PENAL CODE, No. 109, 42 P.W.R. 1914 (Cr.).

(5) Distinction between private prosecutions and those ordered or sanctioned by Government or Court officers. See STAY OF PROCEEDINGS, No. 2, 7 Bur. L.T. 73.

Provident Insurance Societies Act.

See ACT V OF 1912.

Provincial Insolvency Act.

See ACT III OF 1907.

Public Prosecutor.

Duty of a—. See PENAL CODE, No. 31, 19 C.W.N. 28.

Public Road.

(1) Obstruction to—Removal of obstruction whether an offence. See PENAL CODE, No. 145-a, 15 Cr. L.J. 723.

Public Servant.

Magistrate's and Judge's public acts if above criticism—Press if specially privileged in criticising such acts—Limits of legitimate comment. See PENAL CODE, No. 164, 18 C.W.N. 785.

Punjab Courts Act.

See PUN. ACT XVIII OF 1884.

Railway.

(1) Pay-sheets drawn up in Railway offices whether a 'record'. See CONFESSION, No. 1, 15 Cr. L.J. 502.

(2) Bhatinda Railway Station—Offence committed in, proper Court to try—Appellate Court. See JURISDICTION, No. 1, 7 P.R. 1914 (Cr.).

Railways Act.

See ACT IX OF 1890.

Receiver.

Obstruction of receiver in discharge of duty—Duty of stranger in possession—Costs against person obstructing Receiver. See CONTEMPT OF COURT, No. 1, 15 Cr. L.J. 65.

Record-of-rights.

Order under S. 145, Crim. Pro. Code—Omission of Magistrate to give effect to presumption arising from recently published record-of-rights—Effect. See CRIM. PRO. CODE, No. 100, 19 C.W.N. 123.

Reference.

Sentence passed by Sessions Court—District Magistrate's power to refer case to High Court with a view to enhance the sentence. See CRIM. PRO. CODE, No. 329, 12 A.L.J. 519.

Registrar.

(1) District Registrar whether a 'Court'. See CRIM. PRO. CODE, No. 352, 16 Bom. L.R. 946.

Registration.

Registration, if necessary, of Company with its share capital divided into shares. See ACT V OF 1912 (PROVIDENT INSURANCE SOCIETIES), No. 1, 18 C.W.N. 1182.

Regulation III of 1892 (Sind Frontier).

Ss. 20, 21, 23—Bond for good behaviour—Circumstances entailing forfeiture—Order of forfeiture—Open to revision—Crim. Pro. Code, Ss. 435, 121.

S. 23 of the Sind Frontier Regulation states in clear terms what amounts to a breach of a bond given under S. 20 and under what circumstances the District Magistrate may declare a bond taken under S. 21 forfeited, and S. 23 must be accepted as containing a comprehensive statement of what amounts to breach of the one bond and what involves forfeiture of the other.

An application under S. 435, Crim. Pro. Code, lies to revise an order of the District Magistrate declaring forfeited a bond entered into by the applicant under Ss. 20, 21 of the

Regulation III of 1892 (Sind Frontier)—(Old.) Sind Frontier Regulation. Crown t. Imam-bux Rowal Khan, 7 S.L.R. 194=15 Cr. L.J. 544=24 Ind. Cas. 952.

CROUCH and BOYD, A.J.OS.

Reference:—5 S.L.R. 105, R.

Remand.

Remand by Appellate Court for additional evidence and fresh finding—Legality. See RIM. PRO. CODE, No. 315, (1914) M.W.N. 778.

Re-trial.

(1) Practice—Re-trial ordered by High Court on certain finding of fact—Re-trial Court, whether competent to go behind that finding—Crim. Pro. Code, S. 439.

When a case is directed to be re-tried, the Judge re-trying it cannot go behind the findings of fact which were accepted by all the Courts and which were the basis on which a re-trial was ordered. Subbaraya Pillai v. Krishnaswami Pillai, 15 Cr. L.J. 619=25 Ind. Cas. 627.

KUMARASWAMY SASTRI, J.

(2) Sessions trial for murder—Application by defence counsel for postponement of cross-examination till next day—Refusal by Sessions Court—Effect—Accused prejudiced—Re-trial by another Sessions Court ordered. See CROSS-EXAMINATION, No. 1, 41 C. O. 299.

(3) Misjoinder of charges—Joint trial—Objection taken for the first time in the High Court whether can be allowed—Re-trial when to be ordered. See MISJOINDER, No. 1, 19 C.L.J. 638.

Revision.

(1) Acquittal—Interference in revision. See ACT IX OF 1890 (RAILWAYS), No. 1, (1914) M.W.N. 124.

(2) Application to Presidency Magistrate by counter-petitioner to declare that the inclusion of the petitioner as a candidate for the Municipal election by the President of the Madras Corporation was illegal—Order of Presidency Magistrate allowing the application—Revision whether lies. See ACT III OF 1904 (MADRAS CITY MUNICIPAL), No. 2, 16 M.L.T. 128.

(3) Nature of remedy by revision—Refusal to interfere—Whether Letters Patent appeal lies. See CRIM. PRO. CODE, No. 120, 16 M.L.T. 230.

(4) Power of High Court in revision to allow case to be compromised. See CRIM. PRO. CODE, No. 276, 17 O.O. 92.

(5) Revisional powers of the High Court—How to be exercised—Sanction to prosecute—Lower Court's order upheld by Sessions Judge—No revision against Sessions Judge's order. See CRIM. PRO. CODE, No. 176, 12 A.L.J. 511.

(6) Misappreciation of evidence—Whether ground for interference in. See CRIM. PRO. CODE, No. 336, 15 Cr. L.J. 285.

Revision—(Concluded).

(7) Proceedings under S. 145, Crim. Pro. Code—Omission to record preliminary order before summoning opposite party—Omission to affix copy on the property in dispute—Revision—Revision whether lies where other remedy open to applicant—Parties to revision—Omission to make joint owner a party—Effect. See CRIM. PRO. CODE, No. 98, 15 P.W.R. 1914 (Cr.).

(8) Small Cause Court directing prosecution of a person under S. 476, Crim. Pro. Code—Revision—Power of High Court acting as a Criminal Court in revision. See CRIM. PRO. CODE, No. 355, 17 O.C. 25.

(9) Fighting in the course of which one person was killed—Accused charged under S. 335, I.P.C.—Compounding of the offence by the relations of the deceased—Order of acquittal—Interference in revision on report of District Magistrate—Re-trial. See CRIM. PRO. CODE, No. 280, 7 S.L.R. 200.

(10) Order of acquittal set aside by High Court in revision on merits on the application of the complainant. See CRIM. PRO. CODE, No. 249, 18 C.W.N. 1244.

(11) Magistrate attaching land under S. 146 (2), Crim. Pro. Code—Refusal to deliver property to successful party after Civil Court determined the rights of the contending parties—*Ultra vires* order of Magistrate—Revision. See CRIM. PRO. CODE, No. 117, 15 Cr. L.J. 500.

(12) Technical mistake in adjective law—No presumption of injustice—High Court's powers of revision. See CRIM. PRO. CODE, No. 236, 8 S.L.R. 25.

(13) Setting aside of acquittal in revision on application of complainant—Powers of High Court. See CRIM. PRO. CODE, No. 243, 19 C. W.N. 184.

(14) Finding of fact not to be questioned in revision when there is some evidence to support it. See PENAL CODE, No. 157, 20 P.W.R. 1914 (Cr.).

(15) Receiving lottery prize by false pretence—Order in revision to refund—Mode of recovery. See PENAL CODE, No. 5r15 Cr. L.J. 555.

(16) Revision—Order refusing stay of criminal proceedings pending civil appeal—Not to be interfered with. See STAY OF CRIMINAL PROCEEDINGS, No. 1, 8 S.L.R. 20.

(17) High Court's power in revision—Effect of wrong admission of case—Questions of fact when to be considered in revision. See CRIM. PRO. CODE, No. 34, 15 Cr. L.J. 721.

Roads.

District Board Roads—Right to the soil in whom vests. See ACT III OF 1885 (BENGAL LOCAL SELF-GOVERNMENT), No. 2, 15 Cr. L.J. 187.

Rule.

Consideration of new ground at hearing of rule. See CRIM. PRO. CODE, No. 186, 18 C. W.N. 999.

Sanad.

Pleader—*Sanad*—Refusal to extend to Civil Courts of a District—Permission to practise in Criminal Courts not to be inferred. See PLEADER AND OLIENT, No. 1, 7 S.L.R. 98.

Sanction to Prosecute.

(1) *Practice of Calcutta High Court in sanction cases*—Sanction at first granted on verbal application—Effect—Subsequent written application for sanction—Jurisdiction to order sanction thereon—Application to revoke sanction granted by Judge on the original side of the High Court must be made to an appellate Bench—S. 195, Crim. Pro. Code. *Thaddeus v. Janaki Nath Saha*, 40 C. 423=21 Ind. Cas. 172=14 Cr. L.J. 572. See Final Part, 1913, Col. 215.

(2) Sanction granted in appeal—Further appeal to third Court not allowed. See CRIM. PRO. CODE, No. 171, 12 A.L.J. 821.

(3) Sanction for false complaint—Necessity for sanction in case of fresh complaint. See CRIM. PRO. CODE, No. 250, 17 O.C. 18.

(4) Forged document—Production in proceeding—Person not party to proceeding—Prosecution of—No sanction necessary. See CRIM. PRO. CODE, No. 158, 26 M.L.J. 220.

(5) Sanction for prosecution—Confirmation by appellate Court—Six months time how to be calculated—Sanction by District Magistrate—Appeal to High Court instead of to the Sessions Court—High Court confirming the sanction—Legality. See CRIM. PRO. CODE, No. 177, 26 M.L.J. 511.

(6) No application under S. 195, Crim. Pro. Code—Order purporting to be made under S. 195—Irregularity—Proper course—Prejudice—Right to object by way of appeal in case of conviction—Revision. See CRIM. PRO. CODE, No. 180, 8 S.L.R. 21.

(7) Execution of process by bailiff—Obstruction—Prosecution of obstructor—Necessity for sanction. See CRIM. PRO. CODE, No. 423, 8 S.L.R. 41.

(8) Application for revocation of sanction—Notice to other party whether necessary. See CRIM. PRO. CODE, No. 173, 7 Bur. L.T. 205.

(9) Delay in applying for—Effect. See CRIM. PRO. CODE, No. 161, 15 Cr. L.J. 577.

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(1) Police search—Place beyond the limits of the station of the Police officer conducting search—Illegality. See PENAL CODE, No. 93, 8 S.L.R. 1.

(2) Right of occupant to be present at search—Denial of this right, effect of—Meaning of 'occupant'—Finding of incriminating articles in a house—Presumption. See PENAL CODE, No. 118, 18 C.W.N. 498.

Sentence.

(1) *Practice—Sentence—Enhancement.*

Enhancement of sentence is a very serious proceeding. A proposal to that effect must be supported by the Government Pleader under

Sentence—(Continued).

instructions which would enable him to put before the Court cogent reasons why there should be an enhancement of the sentence. **Emperor v. Shamji Ramachandra Gujar**, 16 Bom. L.R. 202=15 Cr. L.J. 365=23 Ind. Cas. 733=2 Bom. Cr. Cas. 192.

HEATON and SHAH, JJ.

(2) Practice—Sentence—Deterrent sentence.

In cases where it is desired by the authorities that an example should be made or that a specially deterrent sentence should be imposed, it is their duty to bring that desire to the notice of the trying Court and to inform the trying Court of the reasons which they put forward in support of the suggestion. **Emperor v. Ragha Jaga**, 16 Bom. L.R. 200=15 Cr. L.J. 362=23 Ind. Cas. 730=2 Bom. Cr. Cas. 190.

HEATON and SHAH, JJ.

(8) Sentence—Enhancement—Practice.

It is very undesirable to trust exclusively to the powers of the High Court of correcting sentences of the lower Courts where the sentences ought to be deterrent. In a case of that kind, where the prosecuting authorities think that a sentence ought to be deterrent, they ought to put before the trying Court those circumstances on which they rely and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served. **Emperor v. Shinvar Birsha**, 16 Bom. L.R. 203=15 Cr. L.J. 367=23 Ind. Cas. 735=2 Bom. Cr. Cas. 193.

HEATON and SHAH, JJ.

(4) Jurisdiction—Imprisonment—Legality.

A Magistrate is not competent to impose sentence of imprisonment to take effect in continuation of a period which the accused is undergoing in default of sufficient security. *In re Gandella Ramudu*, (1914) M.W.N. 500.

AYLING, J.

(5) Enhancement—Discretion of Chief Court. See ACT VI OF 1882 (COMPANIES), No. 8, 37 P.L.R. 1914.

(6) Sentence of whipping inadequate but carried out—Other punishment whether can be awarded. See ACT IV OF 1909 (WHIPPING), No. 3, 15 Cr. L.J. 538.

(7) Murder—Evidence purely circumstantial—Sentence of death or transportation for life—Legality—Age of accused also to be taken into account in imposing sentence. See CIRCUMSTANTIAL EVIDENCE, No. 1, 16 M.L.T. 535.

(8) Accused sentenced by Magistrate under two offences, one of which was exclusively triable by Court of Sessions—Sentence under each offence not specified—Objection as to irregularity and want of jurisdiction verbally taken for first time before High Court—Apportionment of aggregate sentence—Setting aside of conviction and sentence in respect of offence triable by Sessions Court. See CONFESSION, No. 1, 15 Cr. L.J. 502.

Sentence—(Concluded).

(9) Sentence altered—Period of imprisonment reduced—Amount of fine increased—Whether amounts to enhancement of the sentence. See CRIM. PRO. CODE, No. 310, 12 A.L.J. 827.

(10) Sentence passed by Sessions Court—District Magistrate's power to refer case to High Court with a view to enhancement of the—See CRIM. PRO. CODE, No. 329, 12 A.L.J. 519.

(11) Rioting over disputed possession of chur—Sentence—Finding of Settlement Officer pronounced after issue of Rule considered by High Court in revising sentence. See CRIM. PRO. CODE, No. 334, 18 C.W.N. 646.

(12) Offence of murder—Baluch custom sanctioning killing for unchastity—No ground for mitigating the sentence. See PENAL CODE, No. 75, 7 S.L.R. 118.

(13) Only technical offence committed—Nominal sentence to be awarded. See PENAL CODE, No. 106, 24 P.W.R. 1914 (Cr.).

(14) Offences under Ss. 147, 149 and 324, I.P.C.—Separate terms of imprisonment—Legality. See PENAL CODE, No. 38, 17 O.C. 184.

Sessions Case.

(1) Accused sentenced by Magistrate for offence exclusively triable by Court of Sessions—Effect. See CONFESSION, No. 1, 15 Cr. L.J. 502.

(2) Case exclusively triable by Court of Sessions—Discharge by Magistrate—Commitment by District Magistrate—Revision—Power of High Court. See CRIM. PRO. CODE, No. 199, 15 Cr.L.J. 373.

(3) Sessions—Commitment to Court of—Magistrate competent to try an offence—Reasons for commitment—Necessity to record. See CRIM. PRO. CODE, No. 195, 8 S.L.R. 23.

Sind Criminal Circulars.

Ch. VI, r. 26 of the—Commitment to Sessions—Duty of Magistrate. See CRIM. PRO. CODE, No. 195, 8 S.L.R. 23.

Sind Frontier.

See REG. III OF 1892.

Small Cause Court..

Small Cause Court directing prosecution under S. 476, Crim. Pro. Code—Revision—Powers of High Court. See CRIM. PRO. CODE, No. 355, 17 O.C. 25.

Small Cause Court (Presidency).

Enquiry by Registrar of the, as to proper service of summons if judicial proceedings—Sanction to prosecute for false personation in service of summons. See CRIM. PRO. CODE, No. 159, 18 C.W.N. 1328.

St. 53 and 54 Vic. Ch. 37.

See FOREIGN JURISDICTION ACT (1890).

Stay of Proceedings.

- (1) *Criminal proceedings—Prosecution under S. 193, I. P. C.—Statements made in a civil suit—Appeal—Stay pending disposal of civil appeal—Refusal—Not open to revision—Proper course.*

Where a Magistrate refused to stay proceedings against the applicant taken under S. 193, I.P.C., pending the disposal of an appeal preferred against the decision in a civil suit during the trial of which the applicant was alleged to have made certain false statements.

Held, that the order of the Magistrate could not be set aside in revision (a).

The Judicial Commissioners were, however, of opinion that in this particular case it would be desirable that the criminal proceedings should be adjourned until the appeal has been disposed of, unless it be found that, for special reasons, such as the probability of a witness not being available at a later date, it is desirable to hasten the hearing. *Mathradas Dharamdas v. The Crown*, 8 S.L.R. 20 = 15 Cr.L.J. 661 = 25 Ind. Cas. 989.

CROUCH and BOYD, A.J.CS.

Reference :—(a) 26 B. 785, F.

- (2) *Stay of Criminal suit during pendency of a civil suit involving the same issues—Distinction between private prosecutions and those ordered or sanctioned by Government or Court officers—Magistrate's discretion.*

Where an application for stay was made by the accused in a criminal case on the ground that the same issues were being tried in a civil suit before District Judge, *held*, that the Magistrate would exercise his discretion properly if he would adjourn the criminal proceedings until the decision of the civil suit. *Kallima Bibi v. Maabul Ahmed*, 7 Bur.L.T. 73 = 15 Cr. L.J. 488 = 24 Ind.Cas. 576.

SAUNDERS, J.C.

- (3) *Stay of criminal trial—Charge answer to civil suit—Proceedings may be stayed for reasonable time.*

Where the charge in a criminal case is a defence to a civil suit, criminal proceedings should be stayed only if there is a likelihood of civil proceedings ending soon. *Chapalamadugu Peddah Balliah v. Muthiyalu Venkatasami*, 15 Cr. L. J. 568 = 24 Ind. Cas. 976.

MILLER, J.

- (4) *Rent suit—Use of forged documents—Offences under Ss. 471, 474, I.P.C.—Sanction for prosecution—Stay of criminal proceedings pending determination of civil suit.* See PENAL CODE, No. 153, 19 C.W.N. 125.

"Striking off."

Order saying that the case was struck off—Legality of order. See CRIM. PRO. CODE, No. 250, 17 O.C. 18.

Summary Trial.

Award of compensation—Failure to record complainant's objections—Effect—Revision. See CRIM. PRO. CODE, No. 236, 8 S.L.R. 25.

Summons.

Enquiry by Registrar of the Presidency Small Cause Court as to proper service of summons if judicial proceedings—Sanction to prosecute for false personation in service of summons. See CRIM. PRO. CODE, No. 159, 18 C.W.N. 1828.

Summons Case.

Hearing of, when concludes—Non-appearance of complainant on date fixed for argument and consequent acquittal of accused, if proper. See CRIM. PRO. CODE, No. 230, 18 C.W.N. 584.

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Temple resorted to by pilgrims on festive occasions—Duty of person in charge to ensure safety of pilgrims attending by license and invitation. See PENAL CODE, No. 94, 18 C.W.N. 1176.

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Track.

Tracks compared several days after the occurrence—Value of evidence. See EVIDENCE ACT, No. 15, 9 P.W.R. 1914 (Cr.).

Trade-Mark.

- (1) *Trade-mark—Design or pattern covering the whole body of goods—Copying of—No offence—Not a trade mark within S. 478, I.P.C.—Nor a trade description within Ss. 2 (2) and 4 of Merchandise Marks Act, 1889—Nor 'a design' within S. 2 (5), Inventions and Designs Act, 1911—No offence under S. 486, I.P.C., or S.7 of Merchandise Marks Act.*

Where the design or pattern covers the whole body of the goods and appears to be part and parcel of the goods, *held* that it is not a trade mark within the meaning of S. 478, I.P.C., nor a trade description within the terms of S. 2 (2) or S. 4 of the Merchandise Marks Act, nor a 'design' within the meaning of S. 2 (5) of the Inventions and Designs Act.

Held, also that the copying of such design or pattern did not amount to an offence either under S. 486, I.P.C., or under S. 7 of the Merchandise Marks Act. *Messrs. Narumal Khemchand v. The Bombay Company, Ltd.*, 8 S.L.R. 89 = 15 Cr. L.J. 676 = 25 Ind. Cas. 998.

HAYWARD, J.C., and BOYD, A.J.C.

- (2) *Counterfeiting trade mark, what amounts to.* See PENAL CODE, No. 156, 16 Bom. L.R. 78.

Tramways Act.

See ACT XI OF 1886.

Transaction.

Several offences whether forming the same transaction—Test. See PENAL CODE, No. 151, 17 O.O. 276.

Transfer of Case.

Transfer to the Court of Sub-Divisional Magistrate—Latter's power of transfer. See CRIM. PRO. CODE, No. 152, 12 A.L.J. 225.

Transfer of Property Act.

Sec. 3, 136—Actionable claim—Purchase by pleader—Professional misconduct. See PLEADER AND CLIENT, No. 2, 37 M. 238.

Treasure Trove Act.

See ACT VI OF 1879.

Trespass.

(1) Distinction between civil and criminal trespass—Cutting across another's land to save himself and family from flood if criminal trespass. See CRIM. PRO. CODE, No. 265, 18 O. W.N. 668.

(2) Trespasser's entry whether gives him juridical possession. See PENAL CODE, No. 145-a, 15 Crim. L.J. 723.

Trial.

- (1) *Criminal trial—Initiation of prosecution at Assistant Collector's instance—Examination of witnesses for prosecution—Recalling and re-examining them under Assistant Collector's orders—Illegality—Trial invalid—Want of jurisdiction.*

Where a Magistrate, who tried a tapedar for misappropriating monies paid to him for Government assessment, recalled and re-examined, under the directions of the Assistant Collector, two witnesses who had already given evidence for the prosecution.

Held that, in so doing, the Magistrate virtually abdicated his magisterial function and became a mere delegate of the Assistant Collector who had initiated the prosecution, and that the trial was without jurisdiction, as a Magistrate cannot be both Judge and a delegate of the prosecutor. *Imperator v. Nabibux wd. Umerkhan*, 7 S.L.R. 82=15 Cr.L.J. 375=23 Ind. Cas. 743.

PRATT, J.C.

(2) Hasty trial improper—Reasonable adjournment to be granted to accused to substantiate his defence. See PENAL CODE, No. 133, 18 P.W.R. 1914 (Cr.).

(3) Purpose of criminal trial. See PENAL CODE, No. 31, 19 O.W.N. 28.

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Money entrusted to broker—Broker to bear all loss—Broker whether liable for criminal breach of trust. See PENAL CODE, No. 122, 15 Cr. L.J. 452.

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Warrant.

(1) Recalling of warrant after acquittal of co-accused—Jurisdiction of District Magistrate to issue first warrant on same materials. See PENAL CODE, No. 10, 18 O.W.N. 580.

(2) Civil warrant not addressed to bailiff by name—Arrest—Legality. See PENAL CODE, No. 68, 15 Cr.L.J. 499.

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Meaning of 'enquiry' and 'trial' in a warrant case. See CRIM. PRO. CODE, No. 237, 16 M.L.T. 303.

Water.

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Water Works Act (U.P.).

See N.W.P. ACT I OF 1891

Way.

(1) Highway—District Board road—Right of user by public—Hanging verandah if invades right of user of public. See ACT III OF 1885 (BENGAL LOCAL SELF-GOVERNMENT), No. 2, 15 Cr.L.J. 187.

(2) Obstruction to public road—Removal of obstruction whether an offence. See PENAL CODE, No. 145-a, 15 Cr.L.J. 723.

Weights and Measures Act.

See ACT XXXI OF 1871.

Whipping Act.

See ACT IV OF 1909.

Withdrawal of Prosecution.

Who can withdraw from prosecution—Powers of police officers—Discretion of Magistrate in giving his consent to the withdrawal—Interference in revision. See CRIM. PRO. CODE, No. 374, (1914) M.W.N. 776.

Witnesses.

- (1) *Practice—Witness for prosecution—District Magistrate—Order to turn the witness into a co-accused in the trial.*

In a criminal trial, two persons were examined as witnesses for the prosecution. At the end of their examination, the accused applied to the Magistrate to turn those witnesses into co-accused with them. The Magistrate declined to do so, but the District Magistrate, on appeal, ordered that a complaint should be laid against the witnesses and they should be tried jointly with the accused. The witnesses having applied to the High Court:—

Held that the order passed by the District Magistrate should be set aside as it was not warranted by any provisions of the Crim. Pro. Code.

Witnesses—(Continued).

A Magistrate trying a case should, unless there be something very unusual, be left, to try it in his own way, and should not be interfered with during the course of the trial. If it transpires in the course of the case that criminal proceedings ought to be taken against any who have given evidence, those proceedings ought ordinarily to await the conclusion of the case: and they ought to be instituted ordinarily by the order of or on application to, the Magistrate who has tried the case and who is conversant with all the circumstances. *Emperor v. Umed Raja*, 16 Bom.L.R. 259=2 Bom. Cr. Cas. 195=15 Cr. L.J. 428=24 Ind. Cas. 164.

HEATON and SHAH, JJ.

(2) Prosecution against one of two accused withdrawn—Such accused if competent witness. See CRIM. PRO. CODE, No. 372, 18 C.W.N. 1218.

(3) Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and prosecution for perjury if can be made thereon. See CRIM. PRO. CODE, No. 291, 18 C.W.N. 1242.

(4) Magistrate's duty to call witnesses—Number of witnesses—Expenses of witnesses to be realised before issuing summons. See CRIM. PRO. CODE, No. 49, 12 A L.J. 262.

Witnesses—(Concluded).

(5) Credibility of—Grounds for believing testimony of witness against some of the accused—Revision. See CRIM. PRO. CODE, No. 344, 21 P.L.R. 1914.

(6) Right of counsel to demand in cross-examination repetition of story told in examination-in-chief. See EVIDENCE, No. 2, 89 P.L.R. 1914.

(7) Witness not found—Absence not accounted for—Previous deposition of such witness—Admissibility. See EVIDENCE ACT, No. 10, 41 C. 601.

(8) Murder—Practice—Witness improving on his former statement not to be relied upon. See MURDER, No. 2, 43 P.W.R. 1914 (Cr.).

(9) Impropriety of taking proceedings against a witness while the case is still pending. See PENAL CODE, No. 56, 18 C.W.N. 1342.

(10) Transfer of Magistrate pending trial—Expenses of prosecution witnesses recalled, whether to be paid by accused, See CRIM. PRO. CODE, No. 289, 15 Cr. L.J. 687.

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Temple resorted to by pilgrims on festive occasions—Duty of person in charge to ensure safety of pilgrims attending by license and invitation. See PENAL CODE, No. 94, 18 C.W.N. 1176.

SUPPLEMENT.

Section I—Criminal.

Imperial Act.

Act IX of 1875 (Majority).

(1) S. 3—Minority when ceases—See PENAL CODE, No. 1, 37 M. 567.

Crim. Pro. Code.

(1) Ss. 4 (m), 195, 476—*Proceedings in execution whether 'judicial proceedings'—Action under S. 195 or S. 476 when may be taken.*

Proceedings in execution are judicial proceedings within the meaning of Crim. Pro. Code till they are finally disposed of by the Court (a).

If a Court acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then the High Court would probably interfere in revision and hold that there had been no such action as S. 476, Crim. Pro. Code, contemplates. The opinion spoken of by S. 476 is a judicial opinion founded on evidence. If such an opinion has been formed, then the High Court ought not in revision to interfere merely on the ground that it disagrees with it (b).

The principle which should guide the Courts in taking action under S. 195 or S. 476 is that no sanction should be granted unless there is a reasonable probability of conviction (c). *Emperor v. Shiohankarpuri*, 10 N.L.R. 177.

HALLIFAX, OFFG. A. J. C.

References:—(a) 10 C.W.N. 55; 37 C. 642, F.; 32 C. 367; 35 C. 133, Diss.; 12 B. 36, R. (b) 23 A. 249, F. (c) 37 C. 250, F.

(2) S. 164—*Statement of witness taken behind the back of the accused, admissibility of.*

Where the statements of certain prosecution witnesses were taken by a Tahsildar-Magistrate under S. 164 of the Code of Criminal Procedure behind the back of the accused and in respect of which the accused had no opportunity of cross-examining, *held*, that they could not be used as evidence against the prisoner. They were admissible only for the purpose of contradicting the statements made by the witnesses in Court and were not admissible for any other purpose. *Puttu v. King-Emperor*, 17 O.O. 363.

LINDSAY, J. C.

(3) S. 195—*Sanction to prosecute for giving false evidence—Discretion of Court—Duty of Court—Prosecution when not desirable.*

In this case the accused was a girl of 15 years and the perjury alleged was in her having made contradictory statements about her mother having wordy quarrels with the man who was keeping the witness.

Crim. Pro. Code—(Concluded).

Held, that the materiality of the statements was only remote as suggesting a motive for the offence, and the interests of justice did not call for a prosecution for perjury in this case.

Courts should exercise their discretion in giving sanction to prosecute for giving false evidence. They should not merely see that there is a good prospect of conviction but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests. *Re Nattaya Parankusam*, 37 M. 564.

BENSON and SUNDARA IYER, JJ.

(4) S. 488—Child—Prostitution not to be considered. *A. Krishnasamy Iyer v. Chandrayadhana*, (1918) M.W.N. 695—14 M.L.T. 224 = 25 M.L.J. 349 = 14 Cr. L.J. 525 = 20 Ind. Cas. 1005 = 37 M. 565. See Final Part, 1918, Col. 123.

Evidence.

Statement of witness taken behind the back of the accused—Admissibility and weight of. See CRIM. PRO. CODE, No. 2, 17 O.O. 368.

Execution Proceedings.

Whether 'Judicial proceedings'. See CRIM. PRO. CODE, No. 1, 10 N.L.R. 177.

Judicial Proceedings.

Execution proceedings whether. See CRIM. PRO. CODE, No. 1, 10 N.L.R. 177.

Mahomedan Law (Guardianship).

(1) Minority of Mahomedan girl when determines. See PENAL CODE, No. 1, 37 M. 567.

Penal Code.

(2) S. 363—*Minority of Mahomedan girl when determines, under Mahomedan Law and under this section—S. 3, Act IX of 1875 (Majority)—Question at what stage offence was committed is one of fact—Revision.*

According to Mahomedan Law, the occurrence of puberty determines minority and the mother's right to custody. But for the purposes of S. 363, I.P.C., regard must be had only to the definition of minority in S. 3, Act IX of 1875 (a).

The question at what stage the offence was completed is one of fact and cannot be raised in revision for the first time. *Re Mutha Ibrahim*, 37 M. 567.

OLDFIELD, J.

Reference:—(a) 5 B.L.R. 557, D.

Sanction to Prosecute.

(1) Sanction to prosecute for giving false evidence—Discretion of Court—Duty of Court—Prosecution when not desirable. See CRIM. PRO. CODE, No. 3, 37 M. 564.

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.*
A.L.J.	...	...	...	Allahabad Law Journal.*
A.W.N.	...	...	...	Allahabad Weekly Notes.
B.	...	...	...	Indian Law Reports, Bombay Series.*
B.H.C.	...	...	...	Bombay High Court Reports.
B.L.R.	...	...	...	Bengal Law Reports.
Bom. L.R.	...	...	...	Bombay Law Reporter.*
Bur. L.R.	...	...	...	Burma Law Reports.
C.	...	...	...	Indian Law Reports, Calcutta Series.*
C.L.J.	...	...	...	Calcutta Law Journal.*
C.L.R.	...	...	...	Calcutta Law Reports.
C.W.N.	...	...	...	Calcutta Weekly Notes.*
C.P.L.R.	...	...	...	Central Provinces Law Reports.
Cr. L.J.	...	...	...	Criminal Law Journal of India.*
I.A.	...	...	...	Law Reports, Indian Appeals.*
Ind. Cas.	...	...	...	Indian Cases.*
L.B.R.	...	...	...	Lower Burma Rulings.*
M.	...	...	...	Indian Law Reports, Madras Series.*
M.H.C.	...	...	...	Madras High Court Reports.
M.L.J.	...	...	...	Madras Law Journal.*
M.L.T.	...	...	...	Madras Law Times.*
M.I.A.	...	...	...	Moore's Indian Appeals.
N.L.R.	...	...	...	Nagpur Law Reports.*
N.W.P.H.C.	...	...	...	North-West Provinces High Court Reports.
O.C.	...	...	...	Oudh Cases.*
P.R.	...	...	...	Punjab Record.*
P.L.R.	...	...	...	Punjab Law Reporter.*
P.W.R.	...	...	...	Punjab Weekly Reporter.*
S.L.R.	...	...	...	Sind Law Reporter.*
T.L.R.	...	...	...	Travancore Law Reports.
U.B.R.	...	...	...	Upper Burma Rulings.*
W.R.	...	...	...	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	...	...	Applied.
Appr.	...	...	...	Approved.
D. or Distd.	...	...	...	Distinguished.
Disc.	...	...	...	Discussed.
Diss.	...	...	...	Dissented from.
Exp.	...	...	...	Explained.
F.	...	...	...	Followed.
(F.B.)	...	...	...	Full Bench.
Obs.	...	...	...	Observed.
(P.C.)	...	...	...	Privy Council.
R. or Refd. to	...	...	...	Referred to.
(S.B.)	...	...	...	Special Bench.

(N.B.)—(1) This publication embodies Cases from the Reports marked above with asterisks.

(2) In the Punjab Record and the Punjab Law Reporter, the cases are known by their numbers and not by the pages where they are printed; (e.g.) 4 P.R. 1911 would mean Case No. 4, in the Punjab Record of 1911. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

(3) For Cases from Reports other than those published in India, the volumes and pages are printed exactly in the manner they are to be found in the original cases wherein they are referred to.

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36 A.—		36 A.—		36 A.—	
8	74	277	418	500	489
11	1052	280	828	505	414
17	630	282	551	507	240
19	409	284	775	510	412
21	48	289	824	514	936
33	1004	308	1066	516	1081
36	895	312	1046	529	587
40	492	318	321	532	289
46	412	322	493	537	566
48	166	325	334	549	75
51	1043	327	884	551	890
55	170	329	163	555	792
58	337	331	162	558	821
60	930	333	826	560	356
63	930	336	247	*564	301
65	72	350	776	567	807
69	402	354	346	573	936
77	370	365	425		
81	911	370	215		
93	1115	376	175	I.L.R. Bombay Series.	
101	1106	380	42	38 B.—	
123	852	383	858	1	543
126	1045	387	603	10	596
137	1052	398	935	15	134
139	1080	406	354	18	16
141	549	408	772	24	872
155	163	412	26	32	814
158	621	416	28	37	67
161	551	423	43	41	337
172	283	424	292	47	789
176	968	426	455	53	744
181	380	431	832	60	249
183	168	439	814	77	458
187	672	441	169	94	782
195	775	446	993	105	407
201	1073	451	934	116	901
212	1017	456	933	120	855
217	590	458	820	125	10
220	404	461	653	153	786
231	170	464	934	177	789
235	778	466	828	183	821
248	727	469	1018	190	36
250	71	471	936	194	377
256	332	476	936	200	80
259	565	478	860	204	908
264	359	482	814	219	279
268	1054	488	831	224	684
272	882	492	805		

* It is wrongly printed as 39 A 564.

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38 B.—		41 C —		41 C.—	
227	802	92	954	1092	88
240	545	108	932	1108	731
249	460	113=14 Cr L J 305=19 Ind		1125	120
255	466	Cas 993	244		
272	128	130	93	I.L.R. Madras Series.	
293	266	137	458	37 M.—	
309	562	148	745	1	222, 745, 920 & 1067
331	331	160	289	17	494
337	67	168	94	22	588
340	333	173	442	25	222
344	455	271	760	29	578
359	80	276	85	38	47
369	1082	286	919	49	138
372	1074	308	900	51	381
377	360	313	248	55	69
381	408	323	763	70	296
392	289	342	567	113	284
399	1110	347	551	146	788
416	419	384	547	163	593
421	762	394	926	175	800
427	563	418	288	181	836
438	665	436	479	184	328
444	359	446	1018	186	768
449	722	493	566	199	637
552	901	518	839	227	240
565	56	556	489	228	20
576	904	576	57	231	578
597	133	581	706	270	699
604	132	590	585	273	633
613	221	632	1118	275	659
615	10	637	946	281	755
618	1089	642	1107	283	147
631	280	654	773	286	669
638	613	670	1026	293	663, 926
653	767	683	976	298	1047
656	768	703	267	304	1104
659	954	727	403	314	579
662	306	734	762	319	536
665	416	746	418	322	139
667	321	749	327	373	1092
673	393	771	196	381	795
679	126	793	672	385	444, 1000
687	423	809	413	387	1044
697	1112	812	492	390	446
703	967	819	945	393	446
709	130	825	357	396	650
716	1086	852	1037	403	1044
724	618	866	305	406	1
		870	676	408	434
I.L.R. Calcutta Series.		876	84	412	459
41 C.—		887	262	418	1080
1	347	915	83	420	895
6	972	926	106	423	895
19	1092	943	831	432	157
35	459	956	367	435	629
50	1057	963	484	440	568
52	121	967	66	443	142
57	658	972	961	455	565
69	994	990	595	458	633
80	8	1000	105	462	308
		1007	688		

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37 M.—		12 A.L.J.—		12 A.L.J.—	
477	713	211	1026	524	43
480	1012	219	968	525	42
483	706	230	1031	527	933
514	820	235	283	529	346
527	25	239	564	537	247
529	546, 619	243	976	552	268
533	37	251	168	596	775
535	607	259	380	603	992
538	39	267	258	606	169
540	746	271	36	611	933
545	873	274	590	613	624
548	145	278	1017	619	993
555	79	283	404	624	776
		290	1073	629	425
		299	778	635	215
		303	170	641	624
		315	1103	643	292
		331	452	645	405
		334	35	650	1088
		339	59	653	106
		347	700	667	26
		351	1054	672	482
		355	71	674	772
		361	565	681	934
		367	163	684	231
		370	727	685	542
		374	359	690	934
		378	332	692	934
		382	418	693	543
		385	551	696	652
		387	375	701	993
		392	828	707	820
		394	882	709	487
		408	1046	711	672
		411	1066	717	603
		415	542	725	934
		417	824	732	935
		437	321	742	1110
		441	346	751	295
		445	163	757	423
		447	840	763	28
		449	170	769	889
		451	334	772	828
		452	826	774	961
		455	544	785	814
		457	884	788	43
		459	163	790	483
		460	341	792	68
		463	942	794	641
		470	857	798	936
		473	775	800	936
		481	498	805	718
		485	162	806	860
		488	731	810	805
		492	883	813	831
		495	672	817	455
		503	175	821	1013
		507	565	825	376
		509	354	830	814
		513	431	833	362
		521	315	837	779
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12 A.L.J.—					
4	1090				
9	930				
12	317				
18	930				
19	1099				
21	337				
23	478				
24	72				
29	170				
31	309				
36	163				
38	270				
41	852				
44	716				
48	818				
52	640				
53	291				
57	402				
66	1045				
69	489				
79	640				
82	773				
88	940				
93	199				
98	167				
102	885				
109	36				
111	1030				
113	1052				
115	911				
123	549				
125	1115				
132	823				
136	163				
139	621				
156	585				
175	726				
179	551				
185	353				
188	1106				
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*842	936	1113	286	147	911
844	489	1114	564	156	585
853	297	1119	162	164	128
855	1081	1126	175	178	1052
868	892	1131	166	189	419
876	289	1133	867	195	762
881	1019	1137	951	204	612
883	412	1139	1083	206	289
886	240	1141	821	211	10
889	75	1145	322	213	908
892	414	1148	386	224	519
894	926	1150	805	233	321
896	302	1153	205	236	964
897	861	1155	47	252	593
899	345	1166	540	263	652
902	169	1173	853	283	665
906	821	1176	1025	288	408
908	587	1185	1009	298	1026
911	292	1193	711	306	1106
913	964	1217	668	323	976
919	968	1231	164	328	1109
921	1071	1233	205	344	775
925	74	1252	166	352	672
927	890	1256	797	360	775
931	461	1265	167	366	1110
933	168	1270	369	377	262
941	779	1273	74	395	776
945	570	1277	355	400	961
949	174	1279	522	413	247
952	792	1281	639	425	672
955	301	1316	963	434	257
959	356	1319	60	441	767
963	543	1322	166	444	768
966	936			454	359
969	566	Bombay Law Reporter.		459	563
982	807			467	953
989	718	16 Bom. L. R.—		508	29
993	964	5	562	511	132
995	997	20	789	516	221
998	401	26	1082	517	613
1003	496	30	377	520	280
1006	817	35	1074	525	954
1011	994	39	360	527	306
1017	171	42	566	529	133
1020	400	55	64	534	1089
1026	264	57	615	566	409
1032	1031	62	460	571	126
1034	1072	67	331	577	1112
1039	651	72	67	582	967
1065	997	75	333	586	130
1074	297	89	773	593	1098
1080	164	95	489	595	1086
1085	1088	101	640	612	815
1088	863	104	66	616	293
1094	304	111	802	620	713
1098	1069	121	266	625	47
1102	162	132	545	637	393
1105	77	141	1115	641	416

* At Col. 936, read 12 A. L. J. 842 for 12 A. L. J. 642.

† At Col. 868, read 12 A. L. J. 1173 for 12 A. L. J. 473.

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[illegible]

* Read 19 C.L.J. 153 for 19 C.L.J. 122.

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260	246	541	280	307	1111
263	799	545	280	310	998
265	1026	549	120	312	980
272	976	568	1110	315	657
277	1106	574	775	319	616
292	84	581	314	328	100
294	83	590	859	331	97
300	124	595	5	332	115
305	700	601	831	337	579
308	1021	610	93	341	310
310	112	614	95	348	688
313	106	620	672	353	540
316	354	626	776	360	1025
318	693			368	1003
321	743	20 C.L.J.—		375	142
324	118	1	974	385	711
327	854	11	90	407	1061
330	282	15	574	424	19
333	99	18	216	426	344
335	24	23	678	433	312
342	492	32	913	441	479
346	288	39	400	445	18
348	744	40	91	448	739
352	965	44	15	455	1084
358	586	52	903	469	587
360	972	91	51	476	290
369	1109	97	541	481	576
385	230	103	978	485	315
388	90	107	397	492	476
400	902	112	978	494	38
402	3	113	956	501	1113
406	92	123	967	512	577
408	304	129	308	516	552
414	264	131	375	518	836
418	491	133	443	527	605
420	1037	138	94	538	845
428	551	140	95	548	742
430	77	148	1111	551	758
432	909	153	104	555	704
434	59	183	499	563	85
437	403	196	474	571	240
441	275	200	474	573	639
448	754	205	475		
451	103	210	978	Calcutta Weekly Notes.	
455	275	213	54	18 C.W.N.—	
457	595	220	977	185	77
462	729	227	113	259	952
464	963	231	1034	263	470
469	672	253	47	266	121
477	775	264	262	268	109
484	961	282	858	271	977
494	247	285	681	282	911
505	731	291	818	289	441
518	923	295	734	297	606
525	461	295	102	313	585
529	1117	298	53	320	194
532	926	300	734	325	900
535	367	302	556	327	462
539	231	304	604		

* Read 19 C.L.J. 532 for 18 C.L.J. 532.

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18 C.W.N.—		18 C.W.N.—		18 C.W.N.—	
328	481	626	249	947	388
333	976	629	972	949	102
338	972	631	196	954	275
341	1044	644	565	963	776
343	347	649	672	968	858
345	773	654	744	971	903
349	118	657	965	994	1034
353	121	659	492	1011	483
358	744	662	84	1013	292
360	1107	672	89	1016	114
366	74	673	672	1025	916
369	975	681	595	1029	1024
378	538	689	1036	1036	535
380	36	692	76	1050	71
381	244	693	820	1052	73
401	1106	695	393	1055	92
420	752	697	6	1058	704
426	245	718	673	†1066	783
428	640	735	918	1071	87
430	839	738	98	1076	93
445	1060	740	775	1078	480
447	595	747	106	1089	47
450	240	755	247	1121	262
457	1026	766	123	1133	450
464	911	770	792	1136	1111
466	109	772	351	1138	755
470	409	775	368	1140	82
473	927	778	460	1154	639
475	250	782	124	1185	443
477	639	804	120	1189	521
480	796	814	254	1194	524
490	86	817	961	1198	49
492	319	828	731	1204	432
494	24	836	42	1206	5
521	1115	841	240	1217	711
527	1105	844	1110	1249	668
531	64	853	828	1260	948
533	957	858	1085	1264	328
537	411	860	1065	1266	310
539	579	867	246	1281	85
542	952	873	688	1288	574
545	699	882	106	1290	904
546	954	884	66	1294	903
552	114	888	992	1296	541
554	1109	890	831	1299	286
568	1006	896	107	1303	681
575	83	898	1061	1308	474
586	775	904	638	1311	389
592	567	907	1021	1313	1009
596	*1046	910	311	1323	1019
598	103	913	743	1325	349
*601	106	916	105	1329	818
604	368	929	677	1331	596
605	556	933	540	1335	15
609	482	938	110	1340	326
612	305	940	676	19 C.W.N.—	
617	270	942	103	1	1063
622	473	944	93		

* Read 18 C W N 601 for 18 C W N 609.

† At Col. 783, Read 18 C W N 1066 for 18 C W N 1006.

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18	117	94	•896	•435	721
25	391	96	336	442	672
33	832	99	209	449	383
35	107	113	437	460	276
37	123	115	832	467	340
43	742	121	911	473	240
45	411	127	1003	474	775
52	1114	140	852	479	692
54	1102	151	968	482	658
56	757	153	1115	494	23
62	57	166	793	499	281
64	359	169	848	508	661
65	272	183	145	509	790
76	832	185	306, 929	514	856
79	89	189	308	517	243
80	671	205	637	518	1039
84	54	210	140	523	146
89	1037	215	243	528	623
95	57	217	728	532	662
97	142	218	1035	537	330
102	723	221	915	549	496
112	96	224	948	567	613, 764
117	102	225	36	573	34
118	371	227	1031	575	155
120	1042	238	141	576	623
129	125	243	773	585	151
136	743	248	640	597	254
138	33	251	976	600	153
140	264	255	856	604	621
143	740	257	947	612	449
149	740	258	148	616	690
152	278	260	478	647	1110
157	76	267	573	653	688
162	910	269	155		
165	420	275	388	27 M.L.J.—	
170	4	283	804	1	775
174	743	285	156	4	106
178	285	291	1106	13	910
		307	969	17	776
		310	1050	20	1061
		312	194	24	679
		315	984	25	318
		331	398	30	47
	373	343	402	41	262
9	669	348	146	57	696
10	949	356	484	58	372
19	778	363	997	60	212
23	566	364	325	66	79
25	159	365	1056	74	443
36	409	366	525	76	274
37	698	368	361	80	961
39	1073	373	157	89	880
47	489	*375	406	93	1009
56	147	377	773	100	1024
60	462	385	540	106	61
66	921	406	322	110	268
72	896	411	1109	112	278
74	579	429	764	117	540
88	952	433	816	123	672
86	585				
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Madras Law Journal.					
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128	245	447	273	87	489
132	680	451	142	92	1041
134	240	459	1034	95	648
138	607	475	867	98	387
147	779	480	398	100	571
149	677	482	1010	102	353
150	704	483	890	103	355
156	850	485	629	107	478
167	369	486	603	112	852
171	412	490	149	121	1016
172	350	494	1078	125	1115
173	433	497	1070	130	911
175	834	501	470	137	585
176	536	517	804	†143	306, 929
177	208	520	1048	146	610
179	696	529	138	148	303
181	247	535	299	149	145
192	916	567	149	151	388
195	811	569	812	156	1031
213	864	573	41	160	146
231	143	580	569	162	921
233	149	582	1091	163	959
236	732	595	949	169	1106
238	160	597	159	182	976
239	381	600	202	186	623
241	8	605	350	192	753
244	397	618	697	193	1026
249	448	621	643	198	883
253	931	631	900	201	834
266	328	634	1049	203	1053
270	1120	638	619	205	947
272	636	640	324	206	398
276	632	645	303	214	36
278	142	654	900	216	823
284	144	656	650	217	361
285	636	665	156	220	753
291	649	670	298	221	795
295	139	674	1	224	320
299	203	677	348, 661	226	773
302	390	681	691	232	855
305	649	686	882	233	969
306	618	690	835	235	406
329	690	691	835	237	966
333	639	694	615	240	1007
353	667	718	154	243	4
365	85	728	19	245	1117
373	668	734	161	246	856
388	284	740	414	247	540
396	433	746 = 16 M L T 569	457	263	484
397	904			268	209
400	13			276	834
405	846	Madras Law Times.		277	1029
409	628	15 M.L.T.—		285	1109
414	140	1	609	299	156
415	140	62	773	304	305
416	444	66	640	305	816
419	711	68	566	307	655
445	546	78	621	323	674

* Read 27 M L J 302 for 27 M L J 301.

† At Col. 306, read 15 M L T 143 for 13 M L T 143.

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331	240	196	202	508	569
337	572	199	783	509	324
338	376	204	540	513	1091
339	425	210	1025	516	34
340	159	217	688	517	890
342	23	226	139	521	916
345	825	229	897	529	819
352	641	231	13	530	206
356	146	239	12	532	742
361	602	241	782	538	430
372	632	244	148	544	274
374	1079	246	74	547	396
377	373	247	149	551	683
380	106	250	1092	569	457
389	775	251	791, 628	576	154
395	672	253	398	587	664
401	152	254	635	592	654
405	687	262	142	596	605
411	613, 764	270	667	597	1103
415	284	279	643	610	654
418	661	286	240	612	684
		290	85	614	798
		297	663		
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1	775	300	384	(1914) M.W.N.—	
6	961	301	416		
17	850	310	1048	1	566
26	680	317	1079	13	489
35	247	319	711	16	629
44	776	338	1009	24	1055
48	201	344	1070	26	1055
58	704	347	697	27	437
59	1110	349	424	28	669
68	672	353	704	38	773
76	623	362	149	42	640
98	143	365	867	45	704
100	779	370	1041	46	388
101	590	375	463	52	299, 237
102	536	382	668	53	147
103	575	393	636	55	159, 1069
104	1091	397	804	57	1070
105	1034	399	319	58	949
122	454	407	957	61	398
123	642	413	618	62	387
125	433	423	985	63	361
131	1080	430	349	64	336
142	262	432	138	66	463
156	341	435	812	67	758
158	293	438	342	75	832
163	642, 890	440	159	79	360, 378
165	47, 1120	442	736	81	1073
175	858	444	1072	85	379
178	328	447	639	88	921
181	628	473	707	90	409, 985
184	459	479	299	92	431
185	949	489	645	95	339
186	397	502	37	97	308
190	1043	503	981	98	336
192	904	504	372	99	463
194	448	505	790		

* At Col. 704, read 16 M L T 58 for 16 M L T 85.

* At Col. 788 Final 1913, read (1914) M W N 67 for (1913) M W N 67.

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107	353	333	213	636	1025
109	434	339	1035	642	13
112	911	340	155	648	139
118	585	344	369	654	711
131	896	345	152	671	1055
137	1115	346	376	672	667
142	421	347	1017	679	1009
144	913	348	793	684	643
147	387	354	319	689	782
149	834	356	623	692	328
152	309	367	718	695	142
153	704	368	340	703	1091
154	465	372	572	705	949
155	1117	373	599	706	448
157	579	374	637	708	202
159	571	376	1007	711	203
160	146	379	658	713	148
162	338	385	985	714	347
163	1026	387	635	715	273
170	235	388	1027	717	546
171	143	397	106	728	734
174	309	405	672	733	642
175	976	411	775	735	681
178	968	417	852	738	1000
179	745	426	158	740	846
184	1106	430	672	742	278
197	1045	437	775	745	697
198	894	441	1110	747	704
200	355	449	262	754	240
205	308	462	961	757	85
216	1031	472	247	763	149
220	921	481	542	766	160
221	145	485	776	767	34
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240	558	499	860	785	921
247	80	501	372, 860	788	1101
250	947	502	615	792	790
251	405, 834	521	540	794	149
253	361	537	848	795	416
256	398	563	816	796	282
264	796, 800	565	1034	797	628
270	1072		609	798	155
278	478	581	330	803	465
282	651	585	47	807	668
286	984	593	858	817	41
299	1109	595	598	822	981
309	282	606	783	831	74
310	484	610	142	832	398
314	360	614	341	833	384
316	406	616	632	834	1092
317	305	618	862	835	639
318	148	619	779	864	416
319	795	620	616	865	249
322	948	622	856	870	148
323	804, 1055	623	403	871	390
327	966	624	688	873	385
329	402	631	540	874	552

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883	924	37	503	98	50
889	1114	38	915	99	501
891	1072	39	452	100	491
896	578	40	515	101	472
897	283	41	512	102	891
899	71	42	526	103	938
900	650	43	931	104	516
903	771	44	186	105	822
906	882	45	482	106	1065
909	981	46	191	107	457
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912	1049	49	190	1	187
915	736	50	841	2	184
916	871	51	833	3	264
919	620, 985	52	7	4	185
921	197	53	702	5	188
931	556	54	33	6	183
936	605	55	501	Punjab Law Reporter.	
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1	548	61	476	7	1049
2	512	62	362	8	512
3	514	63	456	9	778
4	359	64	63	10	1097
5	519	65	590	11	456
6	940	66	4	12	185
7	189	67	861	13	805
8	418	68	31	14	422
9	502	69	31	15	394
10	347	70	606	16	502
11	509	71	492	17	514
12	988	72	508	18	991
13	516	73	426	19	989
14	192	74	504	20	55
15	165	75	52	22	513
16	503	76	506	23	489
17	516	77	666	24	188
18	509	78	507	25	218
19	509	79	413	26	726
20	434	80	365	27	229
21	513	81	198	28	181
22	185	82	560	29	518
23	505	83	786	30	726
24	505	84	383	31	421
25	1000	85	415	32	947
26	190	86	13	35	990
27	513	87	302	39	291
28	422	88	377	40	503
29	809	89	511	42	503
30	421	90	501	43	971
31	39	91	681	44	183
32	188	92	639	45	31
33	728	93	48	46	422
34	805	94	888	47	560
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51	512	131	504	206	510
52	931	132	516	207	182
54	452	133	501	208	63
55	191	134	962	209	681
56	514	135	189	212	433
58	192	137	513	213	891
59	338	140	799	215	627
60	648	143	932	216	862
67	44	144	390	217	527
69	246	145	829	218	192
70	213	146	37	219	891
71	1034	147	932	220	516
72	400	148	506	221	516
73		149	451	222	395
74	253	150	303	223	1100
75	590	151	506	224	639
76	183	152	190	225	515
77	3	153	189	226	296
78	198	156	809	228	719
79	504	157	1000	230	190
80	915	158	932	231	628
81	795	159	188	232	861
82	183	160	182	233	508
83	356	162	415	234	526
84	781	163	767	235	186
85	514	165	31	236	1010
86	464	166	857	237	495
87	4	167	766	238	33
88	797	169	546	239	829
90	971	171	551	240	204
92	504	173	37	241	492
93	417	174	230	242	433
94	923	175	42	243	25
95	702	176	571	244	63
99	510	177	515	246	370
100	31	178	789	247	944
101	833	179	700	248	381
102	383	180	61	249	52
103	419	183	358	251	841
104	52	184	507	252	190
105	492	185	453	253	384
106	728	186	508	254	186
107	787	187	935	255	362
108	549	188	508	256	879
109	422	189	880	257	756
110	509	190	185	258	453
111	230	191	413	259	777
114	245	192	507	260	806
116	883	193	500	265	365
117	289	194	364	267	476
118	548	195	505	268	413
119	809	196	505	270	1045
120	185	197	419	272	512
121	509	198	718	275	517
122	7	199	525	276	405
124		200	859	277	560
127	1059	201	28	279	426
128	191	202	557	280	386
129	180	203	198	281	819
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2	218	62	932	123	395
3	229	63	923	124	689
4	181	64	451	125	515
5	726	65	303	126	1100
6	726	66	188	127	527
7	502	67	797	128	296
8	947	68	857	129	358
9	1059	69	198	130	182
10	518	70	37	131	506
11	421	71	515	132	190
12	55	72	809	133	628
13	245	73	42	134	433
14	1049	74	571	135	891
15	512	75	52	136	192
16	394	76	230	137	569
17	990	77	789	138	510
18	514	78	766	139	433
19	991	79	526	140	25
20	422	80	700	141	504
21	1097	81	61	142	931
22	456	82	507	143	336
23	778	83	191	144	829
24	805	84	453	145	384
25	347	85	971	146	756
26	7	86	508	147	182
27	246	87	450	148	501
28	213	88	508	149	63
29	503	89	183	150	681
30	44	90	180	151	819
31	230	91	880	152	1010
32	549	92	185	153	33
33	338	93	192	154	186
34	512	94	500	155	492
35	728	95	888	156	186
36	787	96	718	157	291
37	417	97	551	158	63
38	509	98	525	159	52, 944
39	4	99	767	160	190
40	590	100	859	161	362
41	888	101	962	162	381
42	464	102	28	163	841
43	356	103	191	164	517
44	514	104	198	165	806
45	400	105	505	166	370
46	799	106	810	167	365
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52	932	112	719	2	518
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54	37	114	504	4	519
55	422	115	935	5	869
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9	897	138	76	129	1003
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21	136	150	935	138	803
24	665	153	406	252	467
28	332	157	807	257	78, 924
32	214	169	576	260	323
35	200	173	1067	262	1008
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91	682	256	576	11	733
93	725	267	72	13	70
98	26	284	62	16	407
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111	649	294	203		
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137	846	309	577	90	54
139	784	313	894	92	338
144	911	318	691	103	693
146	905	327	537	104	520
150	868	331	529	113	237
159	137	336	982	117	60
161	44	339	177	120	1091
166	1077	343	179	129	327
170	869	347	870	138	821
173	884	354	528	141	455
185	871	369	606	163	466
188	1043	374	578	169	129
		377	939	184	72
		379	939	186	344
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33	245	88	1043		
38	855	90	219		
47	1078	93	21		
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55	178	97	781		
60	824	101	948		
68	1106	103	235		
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86	131	60	931	219	994
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71	340	77	704	249	541
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359	1017	79	871	253	882
360	1017	81	564	254	454
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4	16	104	106	283	320
5	80	107	619	287	939
7	414	111	62	288	284
8	670	113	766	293	70
13	646	115	353	297	21
15	994	117	124	298	249
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23	346	121	1105	306	780
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34	619	177	579	315	804
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37	109	182	354	319	552
38	169	183	1115	320	67
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45	546	194	1092	334	152
46	390	197	726	335	806
47	744	199	947	337	337
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49	698	201	179	343	466
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52	35	207	460	350	782
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* At Col. 1008 Final 1918 read 21 Ind Cas 287 for 1 Ind Cas 287.

† At Col. 824 Final 1913, read 21 Ind Cas 350 for 20 Ind Cas 350.

‡ At Col. 821 Final 1913, read 21 Ind Cas 365 for 22 Ind Cas 365.

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367	121	528	1041	631	512
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387	289, 1065	532	148	638	334
388	41	536	403	639	435
389	390	537	332	643	971
393	1102	538	110	645	536
394	787	540	354	648	502
397	251	541	19	650	23
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404	489	543	446	655	163
405	1087	544	744	656	629
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419	118	561	905	689	1066
420	366, 952	562	659	691	894
421	1092	563	965	694	74
425	235	564	772	698	836
426	792	566	552	700	901
427	235, 550	568	812	701	622
428	58	570	817	702	786
429	1044	573	446	703	80, 684
430	235	575	163	705	472
431	121	576	1041	712	1004
432	213, 669	577	29	713	549
437	1057	581	1077	714	512
438	300	583	745	716	492
442	485	585	289	719	651
443	758	587	159	720	872
444	780	590	655	721	619
445	949	592	1015	722	1012
448	59	593	853	723	178
449	170	595	160	724	483
451	8	597	658	734	382
455	743	598	655	737	566
457	374, 897	599	945	740	834
458	566	600	1020	744	330
460	169	601	522, 1052	746	684
461	382	602	1067	748	465
462	967	604	911	750	159
463	567	605	894	755	744
464	693	607	744	756	199
481	606	608	872	757	417
498	488	609	805, 579	759	434
499	56	611	924	762	778
502	493	612	572	763	487
509	394	614	361	765	801, 853
510	913	615	121	767	391
513	522	617	338	768	
514	131	618	556	770	
516	222	619	971	771	
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779	837	943	419	70	895
781	1000	944	502	71	364
782	579	948	98	73	379
783	338	950	73	75	1052
789	609	951	394	76	571
880	629	953	86	77	80
831	1004	955	727	78	65
832	86	957	745	86	596
833	745	958	112	89	255
836	706	960	745	90	725
840	147	961	773	94	872
841	558	964	832	95	123
842	386	967	726	98	10
843	185	969	70	99	388
845	512	970	57	103	1115
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OF

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FINAL PART.

SECTION II—(CIVIL CASES).

Abadi.

(1) House of tenant in abadi—Partition—House assigned to one mahal and cultivatory holding to the other—Right of residence in the house. See LANDLORD AND TENANT, No. 16, 12 A.L.J. 498.

(2) Suit for possession of—Jurisdiction. See LIMITATION ACT (1908), No. 134, 106 P.W.R. 1914.

Abatement.

(1) *Suit by minor plaintiff for declaration that a will of joint family property by his deceased father was void and for possession—Death of plaintiff—Suit whether abates.*

The 1st plaintiff, a minor, sued the 1st defendant by his guardian for possession of the suit property as his by survivorship, and for a declaration that the will purporting to have been made by his deceased father, on which the 1st defendant relied, was null and void. This will vested the joint family property in the 1st defendant in trust for the 1st plaintiff in case he should attain majority, and in trust for a temple in case of his failure to do so. 1st plaintiff died a minor. *Held*, the cause of action did not abate, and the representatives of the plaintiff could continue the suit. *Narayana Reddi v. Kamakshi Ammal*, 27 M.L.J. 674.

OLDFIELD and TYABJI, JJ.

(2) *Abatement—Suit to declare invalidity of relinquishment deed as against stone's reversionary rights—Death of plaintiff—Cause of action—Whether survives in favour of legal representatives.* *Kommeneni Chinna Yeerayya v. Kommeneni Lakshminarasamma*, 11 M.L.T. 184—32 M.L.J. 375—(1913) M.W.N. 442—15 Ind. Cas. 218—87 M. 406. See Final Part, 1912, Col. 2.

(3) *Appeal against order demanding security from guardian of female ward—Death of person*

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(4) *Suit against trustee and alienee from trustee—Appeal by alienee—Death of trustee pending appeal—Appeal whether abates—Test.* See CIV. PRO. CODE (1908), No. 129, 26 M.L.J. 597.

(5) *Civil revision petition against order refusing to review order of arrest—Death of petitioner—Effect—No right survives to legal representatives.* See CIV. PRO. CODE (1908), No. 99, 15 M.L.T. 224.

(6) *Death of defendant during pendency of appeal—Application for substitution of heirs barred—Ignorance of law no excuse—Abatement of appeal.* See CIV. PRO. CODE (1908), No. 373, 15 P.L.R. 1914.

(7) *Decree against defendants on ground common to all—Appeal by all the defendants—Death of one of the appellants—Failure to bring his representative on record within 6 months—Partial abatement—Effect on surviving appellants.* See CIV. PRO. CODE (1908), No. 314, 88 P.R. 1914.

(8) *Setting aside of order as to abatement of appeal—Weight of plea as to ignorance of death of respondent—Saving of limitation—Duty of appellant to keep himself informed of respondent's death.* See CIV. PRO. CODE (1908), No. 377, 24 Ind. Cas. 275.

(9) *Application to set aside abatement—Limitation—Effect of delay.* See CIV. PRO. CODE (1903), No. 378, 16 M.L.T. 547.

(10) *Order directing abatement of suit—Not a decree—No appeal lies.* See CIV. PRO. CODE (1908), No. 2, 12 A.L.J. 1118.

(11) *Suit by next friend—Abatement—Subsequent suit by minor—Not barred.* See MINOR, No. 1, (1914) M.W.N. 740.

Abwabs.

Abwab—Rent, consolidated—Husks, value of—Cesses—Plaintiff's conduct.

In a *kabuliat* it was stated that there was an annual *nakdi* rent at Rs. 4-4-0 per bigha, making in all the specified amount of Rs. 42-8-0 that over and above this, they (the tenants) would pay a cart-load of husk year after year till the period of the potta was at an end, and in case they failed to do the same they would pay Rs. 6 as the value thereof; and that if they did not pay the said rent annually they should be held liable for interest at the rate specified. In the schedule to the *kabuliat*, the following was stated: "Area of land, 10 bighas, rate per bigha, Rs. 4-4-0 total rent Rs. 42-8-0 value of husk, Rs. 6, annual jumma, Rs. 48-8-0."

Held, that the husk was not really a part of the rent and was therefore an *abwab*, as the plaintiffs in their plaint did not treat the husk as part of the rent in totalising Rs. 48-8-0 for they made a claim in excess of that, and as the cesses were not claimed or paid on the basis of the husks being part of the rent. **Kalar Singh v. Mathura Prasad**, 19 C.L.J. 402.

JENKINS, C.J. and MOOKERJEE, J.

References :—16 C.L.J. 296=40 C. 806, F.

Accounts.

(1) *Evidence—Books of accounts tampered with—Presumption against owner of books.*

When it is found that the account books of a party to the suit have been deliberately tampered with while in his possession, at places where the Court should naturally expect to find relevant entries, the very strongest presumption arises that the fabrication has been effected in order to destroy evidence which would tell in favour of the opposite party and against the owner of the books. **Pokhar Das v. Uttam Chand**, 77 P.L.R. 1914=49 P.W.R. 1914=22 Ind. Cas. 560.

RATTIGAN and BEADON, JJ.

(2) *Accounts, re-opening of—Balance struck—Bhul chuk (errors and omissions excepted).*

The defendant, member of a partnership, at the time of the winding-up of the business, had before him a very clear and simple account, signed the balance, after having fully understood the contents, promised to pay in four instalments within a year, promised interest, and agreed that the debts and outstandings of the business were to be paid and realized respectively by himself and another defendant. A sort of deed of release was also executed by each party in favour of the other on the same day. The defendant never made any attempt thereafter to have those accounts overhauled or corrected.

Held, that, notwithstanding the fact that, in striking and admitting the balance, the phrase *bhul chuk* (errors and omissions excepted) had been used, the defendant could not be allowed to go behind the settlement of accounts made.

Accounts—(Continued).

Daya Ram v. Chunder Bhan, 87 P. L. R. 1914=89 P.W.R. 1914=22 Ind. Cas. 647=66 P.R. 1914.

JOHNSTONE and CHEVIS, JJ.

References :—28 B. 358; 10 Bom. L.R. 281, R.

(3) *Accounts, settlement of—Certain sum found due—Payment of portion—Promissory note for balance—Invalidity of the note for want of proper stamp—Suit on original cause of action—Maintainability—Inference of agreement to pay.*

A and B were partners. On a settlement of accounts between them, it was found that a certain sum of money was due from B to A. B paid a portion of the sum found due and executed in favour of A, a promissory note for the balance due. The promissory note becoming invalid for want of proper stamp, A sued to recover the amount due from B on the original cause of action.

Held, that the suit is maintainable upon the original cause of action independent of the invalid promissory note (a).

The previous settlement and the payment of a certain sum of money in pursuance of the settlement can be used for inferring an agreement to pay the balance and that the promissory note was simply evidence of that agreement to pay. **Saminatha Pathan v. Radhakrishna Pathan**, 15 M.L.T. 249=23 Ind. Cas. 85.

SESHAGIRI AIYAR, J.

References :—(a) 21 M. L. J. 462, D.; 26 M. L. J. 19 (22), R.

(4) *Account stated—Stated account found to be forgery—If suit may be altered to one on account stated in previous year—Limitation—Acknowledgment of liability—Letter saying that writer will sign after looking into account—Limitation Act, 1908, S. 19.*

Where a suit was brought on an account stated in a particular year and not on an open account, and it was found that the account stated was a forgery, the suit could not be altered to one on the account stated in the previous year.

Where a letter merely says that the writer after looking into the account will sign it;

(1) It is not an acknowledgment of liability on an account stated (a).

(2) assuming that it is an acknowledgment of liability to pay whatever may be found due when accounts have been properly taken between the parties, it is not an acknowledgment of liability to pay the amount stated to be due in the *hatchitta* of a particular year. **Bhairo Prashad v. Gajadhar Prashad**, 23 Ind. Cas. 587=19 C.W.N. 170.

COXE and IMAM, JJ.

References :—(a) 33 O. 1047=8 Bom. L. R. 501=1 M.L.T. 199=2 N.L.R. 130=4 C.L.J. 94=10 C.W.N. 874=3 A.L.J. 595=16 M.L.J. 300=33 I.A. 165 (P.C.) D.

Accounts—(Concluded).

(5) Findings in an account suit—Preliminary decree—Final decree passed after completion of accounts—Appeal—Practice. See CIV. PRO. CODE (1908), No. 8, 16 Bom. L.R. 206.

(6) Mere entry in books of account—Insufficiency to prove liability. See EVIDENCE ACT, No. 24, 82 P.R. 1914.

(7) Entries in account books—Vague statement of plaintiff in support of entry not sufficient. See EVIDENCE ACT, No. 23, 47 P.L.R. 1914.

(8) Entries in account books—Relevancy and weight to be attached to them. See EVIDENCE ACT, No. 17, (1914) M.W.N. 240.

(9) Meaning and scope of the terms 'books,' 'books of account'—Difference between private diary and book of account. See EVIDENCE ACT, No. 26, 10 N.L.R. 44.

(10) Mutual, open and current account, what constitutes. See LIMITATION ACT (1908), No. 97, 24 Ind. Cas. 128.

(11) Suit for money—Accounts to be examined in order to ascertain the amount due—Jurisdiction of Small Cause Court. See SMALL CAUSE SUIT, No. 1, 12 A.L.J. 230.

Accretion.

- (1) *Accretion—Rent-free tenure—Tenure-holder, if liable to pay rent for accreted land—Settlement of alluvial land by trespasser—Raiyat bona fide taking settlement—Effectment.*

A rent-free tenure-holder is liable to pay rent in respect of accreted land (a).

The principle that a tenant, who enters upon a land and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as a raiyat, although the *de facto* proprietor subsequently turns out to be not the real owner, is applicable quite as much to farm land as to alluvial accretions. *Rajendra Nath Roy v. Nanda Lal Guha Sircar*, 19 C.L.J. 595 = 18 C.W.N. 1206.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 8 C.L.J. 541, D.; 7 C. 479; 11 C. 696, R.

(2) Alluvial accretion—Settlement with one of the proprietors—Pre-existing contract how far binds the settlement-holder—Fair rent. See ACT VIII of 1885 (BENGAL TENANCY), No. 2, 19 C. L. J. 614.

Acknowledgment.

- (1) *Unstamped acknowledgment received in evidence, if can be rejected—Stamp Act, s. 86—Civ. Pro. Code, 1908, O. XXVI, r. 10 (2)—Application by one of the parties to examine Commissioner—Court, when can refuse.*

A statement of account ran as follows: "Rs. 2,115—Baki dena miti Kartic Sudi ekam Sambat 1965. Bakalam G."

Held, that this was an acknowledgment that Rs. 2,115 was due at the date when the

Acknowledgment—(Continued).

statement was signed. Such document should be stamped under the provisions of the Stamp Act.

An unstamped document, if accepted in evidence by the primary Court, should not, at a subsequent stage of the proceeding, be rejected by the Court. It should be treated as part of the evidence against the person making the statement.

A Court cannot arbitrarily withhold permission to examine a Commissioner for accounts asked for by one of the parties to the suit.

The object of the Legislature in enacting r. 10 (2) of O. XXVI, Civ. Pro. Code, is to afford protection to the Commissioner who is a *quasi* judicial officer. Such protection is afforded on grounds of public policy, so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination. *Sitaram v. Ramprosad Ram*, 19 C.L.J. 87 = 18 C.W.N. 697 = 22 Ind. Cas. 859.

MOOKERJEE and BEACHCROFT, JJ.

(2) Letter saying that writer will sign after looking into account—Whether an. See ACCOUNTS, No. 4, 23 Ind. Cas. 587.

(3) Receiver appointed in partition or administration suit—Power to acknowledge debt—Effect of acknowledgment. See HINDU LAW (JOINT FAMILY), No. 11, 16 M.L.T. 489.

(4) Essentials of—Acknowledgment whether necessary to be addressed to person entitled to right. See LIMITATION ACT (1877), No. 3, 22 Ind. Cas. 650.

(5) Reference to mortgage debt in subsequent pro-note by mortgagor—Whether an acknowledgment. See LIMITATION ACT (1908), No. 53, 16 Bom. L.R. 20.

(6) Application for execution of decree—Acknowledgment of liability by one of several judgment-debtors whether gives fresh start against all. See LIMITATION ACT (1908), No. 44, 22 Ind. Cas. 709.

(7) Promissory note by two promisors—Acknowledgment by one when binding upon both—Series of endorsements—Effect. See LIMITATION ACT (1908), No. 61, (1914) M.W.N. 792.

(8) Admission of barred debt is not an acknowledgment of the debt. See LIMITATION ACT (1903), No. 4, 24 Ind. Cas. 507.

(9) Acknowledgments of decrees debts are not acknowledgments and have not the effect of initiating a new period of limitation. See LIMITATION ACT (1908), No. 45, (1914) M.W.N. 875.

(10) Statement by mortgagee recorded at settlement proceedings that mortgage was redeemable—Whether an acknowledgment. See MORTGAGE (GENERAL), No. 42, 5 P.W.R. 1914 (N.W.F.P.).

(11) *Nattukkottai chetties*—Practice of signing letters with the name of their family deity

Acknowledgment—(Concluded).

—Effect—Such signature whether an 'acknowledgment' under S. 19, Limitation Act—Acknowledgment by member of a family firm who is also the Manager of the family—Whether binds the firm. See **NATTUKKOTTAI CHETTIES**, No. 1, 26 M.L.J. 681.

Acquiescence.

Suit when may be barred by. See **LIMITATION ACT** (1908), No. 130, 29 P.R. 1914.

Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—BURMA ACTS.
- 5.—C. P. ACTS.
- 6.—MADRAS ACTS.
- 7.—N. W. P. ACTS.
- 8.—OUDH ACTS.
- 9.—PUNJAB ACTS.

1.—Imperial Acts.**Act XIII of 1855 (Fatal Accidents).**

Compensation, apportionment of—Adopted son, whether is entitled to share—Widow, right of—Child—Refund of price of the ornaments presented by deceased's father to widow.

Held, (1) that a son adopted after the death of the deceased is not a "child" of the deceased for the purposes of Act XIII of 1855.

(2) Act XIII of 1855 was intended to compensate families for loss occasioned by death, through actionable wrong, of a member of the family. Therefore, no part of the compensation was equitably claimable by the deceased's grandmother, i.e., father's mother, the father being alive. The relief is granted to specified relations of the deceased and not to the joint family to which he belonged.

(3) That the funeral expenses and the costs of recovering the compensation money should also be rateably borne by the claimants.

(4) That inasmuch as the widow was the person most severely affected by her husband's death, and having regard to other considerations, the widow was entitled to get 2/3 of the compensation money.

But she was made to refund the price of the ornaments presented to her by her father-in-law on the death of her husband. **Shi Gopal v. Musammatt Amba Devi**, 26 P.W.R. 1914 = 192 P.L.R. 1914 = 52 P.R. 1914 = 22 Ind. Cas. 846.

RATTIGAN and SCOTT-SMITH, JJ.

Act XXXV of 1858 (Lunacy).

(1) S. 12—Natural guardian appointed guardian under the Act—Power to mortgage without leave of Court. **Marimuthu Udayan v. Ramalingar**, (1913) M.W.N. 989 = 14 M.L.T. 489 = 21 Ind. Cas. 879. See Final Part, 1913, Col. 10.

1.—Imperial Acts—(Continued).**Act XXXV of 1858 (Lunacy)—(Concluded).**

(2) Scope of enquiry under—Suit relating to lunatics, property how to be brought. See **CIV. PRO. CODE** (1908), No. 434, 19 C.W.N. 45.

Act VIII of 1859.

See **CIV. PRO. CODE**.

Act XIV of 1859.

See **LIMITATION ACT**.

Act XLV of 1860.

See **PENAL CODE**.

Act XX of 1863 (Religious Endowments).

(1) S. 10—Temple Committee—Vacancy—Not filled for over three months—District Judge ordering remaining members of the committee to fill up by election—Holding of election—Appointment of successful candidate—Order of District Judge approving such filling up—Illegality—Revision—Object of S. 10. **Yasudeva Aiyar v. The Devasthanam Committee of Negapatam**, 14 M.L.T. 354 = 25 M.L.J. 536 = (1913) M.W.N. 842 = 21 Ind. Cas. 451. See Final Part, 1913, Col. 14.

(2) S. 18—Leave to sue—Sanction given to two—Suit by one alone—Maintainability.

Where, under S. 18 of Act XX of 1863, the District Judge gave sanction to two individuals to sue for the removal of certain trustees. *Held* that one of them cannot sue alone. **Yenka-tesha Mailla v. Bammampalli Ramayya Hegade**, 27 M.L.J. 241.

SANKARAN NAIR and SPENCER, JJ.

References:—10 M. 98; 11 M. 148; 34 C. 587 and 21 B. 257, R.

Act III of 1865 (Carriers).

(1) Ss. 3, 4, 8—Mutka silk of over Rs. 100 in value sent by steamer—Loss owing to negligence—Merchandise sent as "luggage" and value and description not declared and excess charge not paid—Carrier if liable in damages—Burden of proof of negligence. **The Indian General Navigation and Ry. Co., Ltd. v. Gopal Chandra Guin**, 17 C.W.N. 970 = 19 Ind. Cas. 756 = 41 C. 90. See Final Part, 1913, Col. 15.

(2) S. 4. See No. 1, *supra*.

(3) S. 8. See No. 1, *supra*.

Act X of 1865 (Succession).

(1) Not applicable to Chinese Buddhists in Burma. See **BUDDHIST LAW (INHERITANCE)**, No. 5, 7 Bur. L.T. 246.

(2) S. 4—Suit by husband for dissolution of marriage—Security for wife's costs when may be ordered. See **COSTS**, No. 3, 41 C. 963.

(3) Ss. 35, 37—Gift to mistress and her sons by unmarried person—Provision that property "shall be no concern of mine"—Illegitimate sons, whether meant—"Intimation to the contrary"—Man, whether father of illegitimate children.

1.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Continued).**

One T who was unmarried gave certain property to his mistress S and to her sons, by him in these terms: "The property is given to S for her life and after her death, the sons and heirs of me shall come in possession of the said property. It shall be no concern of mine."

Held, that (1) under S. 87 of the Succession Act, there must be an intimation that the illegitimate sons were meant, and that such an intimation existed in the provision that the property was to be no concern of T; (2) the intention of T was that, after the death of his mistress, the property should go to her illegitimate sons; and (3) the English view that a man is not the father of his illegitimate children applies also under the Succession Act. **Udit Singh v. Amar Kuar**, 23 Ind. Cas. 348.

COXE and D. CHATTERJEE, JJ.

References:—30 B. 500=8 Bom. L.R. 322, *Rel.*

(4) S. 46—Testamentary capacity—Burden of proof. See **WILL**, No. 11, 20 C.L.J. 501.

(6) S. 57—Will—Revocation when may be presumed. See **WILL**, No. 1, 21 Ind. Cas. 121.

(6) S. 87. See No. 8, *supra*.

(7) S. 91. See No. 13, *infra*.

(8) S. 107, illustrations—Estate on a future contingent event—Validity. See **WILL**, No. 3, 18 O.W.N. 360.

(9) S. 111—Rule of construction in—Legacy with power to sell, makes a gift, etc., in respect of properties bequeathed if absolute gift to legatee. See **WILL**, No. 12, 19 O.W.N. 52.

(10) Ss. 111, 116—Bequest—Gift over if minor legatee do not attain full age, whether valid—Failure of prior bequest not as contemplated—Validity of gift. See **WILL**, No. 10, 23 Ind. Cas. 597.

(11) S. 116. See No. 10, *supra*.

(12) S. 187—Will of which probate has not been taken whether can be proved—Proper representation of testator's estate where no probate taken. See **WILL**, No. 7, 18 O.W.N. 1136.

(13) Ss. 187, 91—Will—Legacy—Assent—Acceptance—Necessary to complete vesting of title—Will not proved—Whether bars setting up juster title in defence—Joint family—Dancing girls—Holding property jointly—Character of joint acquisition. **Lakshamma v. Ratsamma**, 25 M.L.J. 556=21 Ind. Cas. 698. See **Final Part**, 1913, Col. 18.

(14) S. 189—Letters of administration without copy of Will—Court if has jurisdiction to decide as to inaccurately drawing up of letters of administration. See **WILL**, No. 6, 20 C.L.J. 148.

(15) Ss. 281, 283—Civ. Pro. Code (1908), S. 2—Decree—Order—Appeal—Order refusing

1.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Concluded).**

grant of letters of administration with will annexed—Court fee—Court Fees Act, Sch. II, Art. 17 (vi).

An order of a District Judge refusing to grant letters of administration with a copy of the will annexed is a decree and as such is appealable.

The Court-fee payable on such an appeal is Rs. 10 under Art. 17 (vi), Sch. II of the Court Fees Act, as it is impossible to estimate the subject-matter in dispute at a money value. **Miss Eva Mountstephens v. Mr. Hunter Garnett Orme**, 22 Ind. Cas. 98.

TUDBALL and RAFIQUE, JJ.

(16) S. 268. See No. 15, *supra*.

(17) S. 277. Nature of inventory—Period of six months how to be calculated. See **COURT FEES ACT**, No. 16, (1914) M.W.N. 13.

(18) Ss. 331, 332—Intestate professing the Hindu religion though he was of mixed parentage—Grant of letters of administration. See **ACT V of 1881 (PROBATE AND ADMINISTRATION)**, No. 4, 7 Bur. L.T. 133.

(19) S. 332. See No. 18, *supra*.

Act XV of 1865 (Parsi Marriage and Divorce).

(1) S. 31—Parsis—Suit for maintenance—Suit for judicial separation—Jurisdiction—Suit for maintenance does not lie on the Original Side of the High Court.

The High Court on its Original Side has no jurisdiction in a suit between a Parsi husband and a Parsi wife to make an order for permanent alimony unaccompanied by any order for judicial separation, which lies within the jurisdiction of the Parsi Chief Matrimonial Court at Bombay. **Bai Gulbai Behramsha D. Harver v. Behramsha D. Harver**, 16 Bom. L.R. 211=23 Ind. Cas. 441=38 B. 615.

MACLEOD, J.

Act IV of 1869 (Divorce).

(1) S. 2, cls. 2, 3, 4, Ss. 4, 10, 21—Suit for restitution of conjugal rights—Jurisdiction—Suit does not lie if the respondent is not residing within the jurisdiction or is not a Christian—The High Courts Act (24 and 25 Vic., c 104), S. 9—The Amended Letters Patent, cl. 35 **Nasser wanji Pestonji Wadia v. Eleonora Wadia**, 15 Bom. L. R. 593=20 Ind. Cas. 492=38 B. 125. See **Final Part**, 1913, Col. 19.

(2) S. 4. See No. 1, *supra*.

(3) Ss. 7, 45—'Principles and Rules,' meaning of—Civ. Pro. Code, 1908, O. XVIII, r. 1—Restitution of conjugal rights, suit for—Marriage ceremony, admitted—Coercion and non-consent, pleaded—Right to begin.

The words "principles and rules" used in S. 7 of the Indian Divorce Act refer to rules of quasi, substantive rather than of mere adjective law (a).

I.—Imperial Acts—(Continued).**Act IV of 1839 (Divorce)—(Concluded).**

Where, in a suit for the restitution of conjugal rights by a husband, the wife admitted the marriage ceremony but pleaded coercion and non-consent:

Held, that, having regard to the words "principles and rules" in S. 7, Divorce Act, and to S. 45 of the same Act, and the O. XVIII, r. 1 of the Code of Civil Procedure, the right party to begin the case was the defendant ^(b). **Tuvuriammal v. Santiago**, 23 Ind. Cas. 242 = 7 Bur. L. T. 129.

HARTNOLL, OFFG. C. J., and **TWOMEY**, J.

References:—(a) 22 B. 612, *F.* (b) 2 S. W. and Tr. 544 = 31 L.J. Mat. 56 = 5 L.T. 771, *F.*

- (4) S. 10—*Suit for dissolution of marriage—District Judge—Reference to the Assistant Judge for trial—Bombay Civil Courts Act (XIV of 1869)*, S. 16.

A District Judge cannot, under S. 16 of the Bombay Civil Courts Act, transfer to the Assistant Judge for trial a suit for dissolution of marriage under the provisions of the Indian Divorce Act. **Thomas G. G. French v. Julia French**, 16 Bom. L. R. 754.

SCOTT, C.J., **DAVAR** and **BEAMAN**, JJ.

- (5) S. 10—*Desertion—Divorce—Condition of two years not fulfilled—Application premature*. **Eveline Moment v. Joseph Moment**, 7 L.B.R. 37 = 21 Ind. Cas. 230 = 6 Bur. L.T. 177. See Final Part, 1918, Col. 20.

(6) S. 10. See No. 1, *supra*.

(7) S. 21. See No. 1, *supra*.

(8) S. 45. See No. 3, *supra*.

Act VII of 1870.

See COURT FEES ACT.

Act XXI of 1870 (Hindu Wills).

- (1) S. 2—*Letters of administration without copy of will—Court if has jurisdiction to decide as to inaccurately drawing up of letters of administration*. See **WILL**, No. 6, 20 C.L.J. 148.

(2) S. 3. See **HINDU LAW (WILL)**, No. 2, 26 M.L.J. 653.

Act IX of 1871.

See LIMITATION ACT.

Act XXIII of 1871 (Pensions).

- (1) S. 4—*Land granted as Desai inam to Manager of undivided family—Presumption—Suit for partition—Maintainability without certificate under Pensions Act—Jurisdiction of Civil Courts whether ousted*. See **INAM**, No. 7, 27 M.L.J. 618.

(2) S. 6—*Inam—Grant to manager of joint Hindu family—Acquisition on behalf of the family—Presumption—Suit for partition among members of the family—No certificate under the Act necessary—Civil Courts—Jurisdiction not ousted*.

I.—Imperial Acts—(Continued).**Act XXIII of 1871 (Pensions)—(Continued).**

Where the grantee of an inam land was, at the time of the devolution, the manager of an undivided Hindu family, he must be deemed to have taken the property for and on behalf of the joint family (a).

In cases of partition of the land granted as inam among the members of the grantee's family, the pre-requisite of filing a certificate under the Pensions Act has no application and the jurisdiction of the Civil Courts is not ousted by the Act (b). **Desarji alias Allamraju Nunjundayya v. Desarji alias Allamraju Venkatasubbiah**, 16 M.L.T. 239.

SESHAGIRI IYER and **KUMARASAWMY SASTRI**, JJ.

References:—(a) 26 M. 339, *F.* (b) 7 M. 191; 12 M.L.T. 541 = 23 M.L.J. 697; 36 M. 559; 1 B. 523 and 33 A. 58, *F.*; 12 M. 98, *D.*

(3) S. 11. See **CIV. PRO. CODE (1908)**, No. 105, 12 A.L.J. 437.

- (4) Ss. 11, 12—*Applicability to alienations of jaghirs made before the Act—Assignment of land revenue whether a 'pension'—Canon of construction of Statutes*.

It is now a well recognised canon of the interpretation of Statutes that a legislative enactment is prospective and not retrospective in its operation. This rule admits of two exceptions (1) when the Act only affects the procedure of the Court, and (2) when it appears clearly that the intention of the Legislature was to give a retrospective effect.

If the alienation took place before the date on which the Pensions Act came into force, it cannot be rendered invalid by invoking the aid of an enactment passed subsequent to the transaction.

S. 12 of the Pensions Act which avoids an assignment of a pension does not contain a rule of procedure and the section does not take away vested rights.

The Pensions Act has not a retrospective operation (a).

An assignment of a grant of land revenue is not prohibited by S. 12 unless such grant comes within the meaning of the word 'pension' and is made for the consideration specified in S. 11 (b).

A mere assignment of land revenue as such does not come within the protection given by Ss. 11 and 12, unless it fulfils other requirements of those sections.

Ordinarily speaking "pension" involves the idea of a fixed periodical allowance or stipend and if it is granted on political considerations or for past services or as a compassionate allowance, it cannot be assigned. But a grant by Government does not cease to be a pension because it takes the form of an assignment of land revenue.

An assignment of land revenue by Government may or may not be a pension within the

1.—Imperial Acts—(Continued).

Act XXIII of 1871 (Pensions)—(Concluded).

meaning of Ss. 11 and 12, and the answer to the question must depend upon the facts of each case (c).

Held, in this case, that the grant was of a fixed sum payable by the assignment, of land revenue and was clearly made for political services, and the grant of the land revenue is a political pension and comes within the protection afforded by S. 12. **Karar Hassan v. Mustafa Hassan**, 86 P.R. 1914.

SCOTT SMITH and SHADI LAL, JJ.

References:—(a) 7 A. 886; 2 B. 294; 19 B. 250, R.; 6 A. 630, *Diss.* (b) 27 P.R. 1878; 57 P. R. 1884; 133 P.R. 1888, R. (c) 137 P.R. 1890; 95 P.R. 1906; 96 P.R. 1906, R.

(5) S. 12. See No. 4, *supra*.

Act I of 1872.

See EVIDENCE ACT.

Act IX of 1872.

See CONTRACT ACT.

Act VIII of 1873 (Canals).

Ss. 19, 20, 32 (e)—*Agreement to sell water—Seller's right to sue for rent or compensation for use of watercourse—Public policy.* **Mohammad Nasir Khan v. Farid**, 8 P.R. 1913 (Rev.)—22 Ind. Cas. 398. See Final Part, 1913, Col. 22.

Act X of 1873 (Oaths).

S. 13—Omission to record deposition as on solemn oath or affirmation—Effect. See SANCTION TO PROSECUTE, No. 7, 18 C.W.N. 1323.

Act II of 1874 (Administrator-General's).

(1) Ss. 17, 18, 33—*Administrator-General—Powers of—When administration complete—Sale by him for commission after the party attaining majority.*

The Administrator-General as administrator has power to deal with everything that is covered by the grant without obtaining the special leave of the Court.

Letters of administration apply equally to real property as much as to personalty. The administration cannot be treated as closed until every act necessary for its completion has been done.

Where an estate was administered by the Administrator-General, and the party attained majority, and subsequently the Administrator-General sold some immoveable property for his commission, *held* that the sale was valid and was within his powers as Administrator-General. **P. Alwar Chetty v. P. Chidambaram Mudallar**, 16 M.L.T. 231=(1914) M.W.N. 642=27 M.L.J. 400.

SANKARAN NAIR and SPENCER, JJ.

(2) S. 13. See No. 1, *supra*.

(3) Ss. 28, 34, 35—*Presidency Towns Insolvency Act (III of 1909), Ss. 108, 109, 110, 112—Civ. Pro. Code (1908), O. XX, r. 18*

1.—Imperial Acts—(Continued).

Act II of 1874 (Administrator-General's)—(Continued).

—*Administrator-General appointed to administer estate of insolvent—Insolvency law inapplicable—Provisions of Administrator-General's Act apply—Agreement to pay money out of cheques coming into possession at a future date—Creates a valid equitable assignment—Words essential to create a charge.*

O. XX, r. 13, Civ. Pro. Code, which provides for the administration by a Court of the property of a deceased person, does not apply where the Administrator-General has obtained letters of administration in respect of the estate of a deceased insolvent.

There is no machinery in the law of insolvency under which an insolvent estate, in respect of which letters of administration have been granted to the Administrator-General, can be administered under that law.

Where the estate of an insolvent vests in the Administrator-General under the Succession Act, he can claim no higher than the deceased himself, and the Administrator-General has not the rights of either the trustee or Official Assignee in insolvency.

Where an agreement used the following terms:

"I pay you soon after I receive cheques from M.R. Co. for works done and in case I fail to remit your money after I receive from M.R. Co. . . . I am liable."

Held, that these words clearly indicated an intention to pay "out of a specified fund" and not when "funds shall come" and were operative to create a valid equitable assignment of the funds when available and not a mere assignment of an uncertain future chose-in-action (a).

The words "you should have a lien or charge over cheques or moneys received, for works done with your capital" are sufficiently specific and definite to create a charge on such funds when they come into existence (b). **Navajee v. Administrator-General of Madras**, 22 Ind. Cas. 566.

WHITE, C. J., and OLDFIELD, J.

References:—(a) 51 L. J. Ch. 14=19 Ch. D. 342=45 L.T. 567=30 W. R. 70; 58 L.J. Q.B. 75=13 A.C. 523=60 L. T. 162=37 W.R. 513; 10 A. 133=A.W.N. (1888) 35, F.; L.B. 4 C. P. 660, D. (b) 22 Ch. D. 782=52 L.J. Ch. 635=48 L.T. 492=31 W.R. 661; 14 Q. B. 810; 9 A. 158=A.W.N. (1887) 15, F.

(4) S. 33. See No. 1, *supra*.

(5) S. 34. See No. 3, *supra*.

(6) S. 35. See No. 3, *supra*.

(7) Ss. 36, 40—*Limitation—Certificate issued by Administrator-General—Claims covered by certificate, if may be considered as barred.*

Although there is no provision in the Limitation Act that time should cease to run upon a

1.—Imperial Acts—(Continued).**Act II of 1874 (Administrator-General's)—(Concluded).**

claim being filed or a certificate being issued by the Administrator-General, yet time should not run against claimants who, in faith of the representation made to them by the Administrator-General, do not take legal remedies against the estate for the recovery of their dues.

Therefore, claims which are covered by a certificate issued by the Administrator-General, containing a memorandum that all debts will be paid as soon as possible, are not to be considered as barred.

The holders of such claims are entitled to share in the distribution of assets. *In the goods of Thomas Leckie*, 22 Ind. Cas. 362.

CHOWDHURI, J.

(8) S. 40. See No 7, *supra*.

Act III of 1874 (Married Women's Property).

Ss. 2, 6—Insurance Policy—Life policy effected by a Hindu for the benefit of wife and children—Policy, if can be availed of by assured's creditor—'Children.'

Per Curiam.—S. 6 of the Married Women's Property Act is not applicable to a policy of assurance effected by a Hindu for the benefit of his wife and children, and hence a sum payable under or by virtue of the policy is available for the payment of the debts of the assured (a).

Per Richardson, J.—The extent to which Hindus, Mahomedans and Buddhists are affected or excluded, depends on the special clauses relating to them and not on the power given to the Governor-General in Council by S. 2 of the Married Women's Property Act in regard to other communities.

The reference to children in S. 6 of the Married Women's Property Act is incidental and the only children contemplated by that section are children born of marriage of the kind to which the rest of the Act relates. *Ishani Dasi v. Gopal Chandra Dey*, 20 C.L.J. 44 = 18 C.W.N. 1385.

FLETCHER and RICHARDSON, JJ.

References.—(a) 37 B. 471, F.; 25 M.L.J. 66, *Not approved*.

Act VI of 1874 (Privy Council Appeals).

See LIMITATION ACT (1908), No. 30, 18 C.W.N. 1066.

Act XII of 1874 (Scheduled Districts).

If applied to Sonthal Parganas. See SONTHAL PARGANAS, No. 1, 18 C.W.N. 994.

Act IX of 1875 (Majority).

(1) Civil Judge in Berar invested with unlimited original jurisdiction under the Hyderabad Assigned Districts Courts Law—Not competent to hear applications under Guardians and Wards Act—Appointment of guardian by such a Civil Judge *ultra vires*—Minority of ward not extended to 21 years—Meaning of 'Court

1.—Imperial Acts—(Continued).**Act IX of 1875 (Majority)—(Concluded).**

of Justice' in the Majority Act. See ACT VIII OF 1890, (GUARDIANS AND WARDS), No. 2, 10 N.L.R. 161.

(2) S. 8—Power of High Court to declare infant ward of Court for extending minority. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.

Act X of 1876 (Bombay Revenue Jurisdiction).

S. 5 (c)—Suit for sum payable by inferior holder to superior holder—Jurisdiction of Small Cause Courts. See ACT IX OF 1897 (PROVINCIAL SMALL CAUSE COURTS), No. 15, 16 Bom.L.R. 746.

Act I of 1877.

See SPECIFIC RELIEF ACT.

Act III of 1877.

See REGISTRATION ACT.

Act XV of 1877.

See LIMITATION ACT.

Act XVII of 1879 (Dekkhan Agriculturists' Relief).

(1) *Ss. 2, 10-A—Agriculturist—Definition—Status at the time liability was incurred must be under the Act—S. 10-A not applicable to persons not agriculturists, as defined—S. 92, Evidence Act. Sawantrava Fakirappa Ballurwad v. Giralappa Fakirappa Mudraddi*, 15 Bom. L.R. 778 = 21 Ind. Cas. 4 = 38 B. 18 (F.B.). See Final Part, 1913, Col. 25.

(2) *Ss. 3 (w), 10, 53—Suit for money spent on behalf of another—Appeal—Revision—District Judge alone can entertain application for revision—First Class Subordinate Judge has no jurisdiction to hear appeal or revisional application.*

The plaintiff brought a suit in the Court of a Second Class Subordinate Judge to recover the sum of Rs. 60 which he had spent on behalf of the defendant, who was an agriculturist. The suit was dismissed. On appeal the First Class Subordinate Judge with appellate powers reversed the decree and remanded the suit for trial. The defendant having appealed against the order of remand.

Held, (1) that, as the suit fell under S. 3 (w) of the Dekkhan Agriculturists' Relief Act, no appeal lay from the decision of the first Court, under S. 10 of the Act.

(2) That the First Class Subordinate Judge was not authorised to pass any order in revision under S. 53 of the Act, which could only be passed by the District Judge. *Sitaram Morappa Nawale v. Shri Khandoba*, 16 Bom. L.R. 766.

SCOTT, C.J., and HAYWARD, J.

(3) S. 10. See No. 2, *supra*.

(4) S. 10 A. See No. 1, *supra*.

(5) *Ss. 12, 13—Enquiry under—Consideration—Proof—Oath on the o*

On an enquiry under *Ss. 12 and 1* Agriculturists' Relief Act, the J

1.—Imperial Acts—(Continued).**Act XVII of 1879 (Dekkhān Agriculturists' Relief)—(Continued).**

examining the facts of a particular case, is at liberty to place the onus on the creditor. *Bikhchand v. Vishomal*, 8 S.L.R. 57.

HAYWARD, J.C., and BOYD, A.J.C.

Reference :—9 B. 520, R.

(6) S. 13. See No. 5, *supra*.

(7) Ss. 15-D, 16—*Suit for account—Account of mortgage transaction cannot be mixed up with account of monetary dealings.*

There were certain mortgage transactions between the parties; and later on further monetary dealings took place between them. The defendant sued on the latter. The plaintiff, an agriculturist, also instituted a suit for general account under the Dekkhan Agriculturists' Relief Act and for redemption of the mortgaged property. The two suits were heard together. The trial Judge in taking the account made up one general account of the mortgage transactions and the money dealings; and finding that both the mortgage-debt and the monetary debt had been fully satisfied out of the profits recovered by the defendant, ordered the defendant to reconvey it to plaintiff free from mortgage. The defendant having appealed :

Held, reversing the decree and ordering the two accounts to be taken separately, that the plaintiff was not entitled to combine his claim for an account of the mortgage transactions with his claim for an account of the monetary dealings and to import the relief to which he was entitled by way of redemption under S. 15-D of the Dekkhan Agriculturists' Relief Act into his claim for an account under S. 16.

A suit for account, under S. 15-D of the Dekkhan Agriculturists' Relief Act, may be filed by a mortgagor agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption. This section relates purely and exclusively to mortgage transactions.

Section 16 of the Act enables the plaintiff to sue for a general account of money dealings between him and the lender; and it enables him to sue for a bare declaration of the amount due without any relief being claimed. *Laxmandas Harakchand v. Baban Bhikari*, 16 Bom. L.R. 671.

SCOTT, C.J. and BEAMAN, J.

(8) S. 16. See No 7, *supra*.

(9) S. 48—*Conciliator's certificate—Exclusion of time in obtaining the certificate—Mode of computation.*

The plaintiff's suit for possession of certain land under the Mamladar's Courts Act (Bom. Act II of 1906) was dismissed on the 28th September 1906. He applied to a conciliator

1.—Imperial Acts—(Continued).**Act XVII of 1879 (Dekkhān Agriculturists' Relief)—(Concluded).**

for a certificate under Chap. VI of the Dekkhan Agriculturists' Relief Act, on the 24th September 1909, and obtained it on the 24th August 1910. He filed the present suit to recover possession of the land on the 29th August 1910. A question arose whether the suit was filed in time :

Held, that reckoning the period to be excluded under S. 48 of the Dekkhan Agriculturists' Relief Act by days, the suit was filed out of time by three days. *Appaji Bharmappa Umrao v. Thalegauda Satyappa Umrao*, 16 Bom. L.R. 661.

SCOTT, C.J. and BEAMAN, J.

(10) S. 48—*Abolition of the conciliation system—Time taken up in conciliation—Exclusion of time.* See LIMITATION, Nos. 5 and 6, 16 Bom. L.R. 441 and 441.

(11) S. 53. See No. 2, *supra*.

Act XVIII of 1879 (Legal Practitioners).

(1) S. 14—*Practitioner having no license to practise in a revenue office—Misconduct—Commissioner of a Division, whether can report to High Court.*

D, a mukhtear, was authorized to practise in the Courts of Munsifs and in all Criminal Courts of first instance, and had no license to practise in any revenue office. He was charged to have committed a misconduct not in his capacity as a mukhtear practising in a revenue office, but as a private individual, and it came to light in the course of the hearing of a Land Registration appeal before the Commissioner of a Division in a case in which he was not a party but only a witness :

Held, that the reference or report to the High Court, under S. 14 of the Legal Practitioners Act, by the Commissioner of the Division, was *ultra vires*. *In the matter of Dinesh Chandra Bhattacharjee*, 19 C.L.J. 110=15 Cr. L.J. 378=23 Ind. Cas. 746.

CHITTY and TEUNON, JJ.

(2) Ss. 26, 28—*Pleader and client—Suit for money due for fees and litigation expenses—Oral agreement.*

A pleader sued to enforce an alleged oral agreement with his client for payment of his fees and incidental expenses for the conduct of his cases :

Held, that the agreement was not valid under S. 28 of the Legal Practitioners Act and could not consequently be enforced. *Ishan Chandra v. Ram Charan Pal*, 20 C.L.J. 445.

MOOKERJEE and BEACHROFT, JJ.

References :—15 C.L.J. 690 ; 15 C.L.J. 660, Appr. : (1912) 1 M.W.N. 524, R.

(3) S. 28—*Pro-note for money spent by Vakil on client's behalf for commissioner's fees, outfees, etc.—Pro-note not filed in Court—Maintainability of suit thereon—Power to*

I.—Imperial Acts—(Continued).**Act XVIII of 1879 (Legal Practitioners)—(Concluded).**

pass decrees for sum actually due to Vakil—Pro-note whether operates as an acknowledgment of liability—Plea of limitation involving mixed question of law and fact not to be raised for the first time in revision.

Suit upon a pro-note executed by defendant in favour of a Vakil. It was found that it was executed for the amount of commissioner's fees, outfees, etc., paid by the Vakil on the client's behalf. The note, however, was not filed in Court as required by S. 28 of the Legal Practitioner's Act.

Held, the fact that the note was not filed in Court and therefore cannot be sued on would not deter the plaintiff from getting a decree in respect of the sums actually spent by him and would not prevent the Court from decreeing the sum which was reasonably due for fees (a), and there is nothing to prevent the promissory note from operating as an acknowledgment of liability even though it may not be sued upon.

A plea of limitation, which was not raised in the lower Court and would involve a mixed question of law and fact, will not be allowed to be raised for the first time in revision. **Natesa Mooppan v. K. R. Ramachandra Aiyar**, 27 M.L.J. 728.

KUMARASAMI SASTRI, J.

References:—(a) 14 M. 63; 26 M. 278; 27 M. 512, R.

(4) S. 28—*Contract Act*, S. 70—*Suit by Pleader to recover fees from client—Contract between parties. Mohendra Lal Biswas v. Akhil Chandra Pakrashi*, 20 Ind. Cas. 47=20 Q.L.J. 424. See Final Part, 1913, Col. 30.

(5) S. 28. See No. 2, *supra*.

(6) *Rule 31—Declaration—Expectant interest—Pleader's fee—Discretionary with Court. Talupula Chenna Subbayya v. Talupula Pichamma*, (1913) M.W.N. 867=21 Ind. Cas. 541. See Final Part, 1913, Col. 30.

Act XII of 1880 (Khazi).

Ss. 2, 4—Rights of Khazi—Exclusive right to officiate as Khazi—Suit to restrain defendant from officiating at marriages and for recovering nikka fees received by defendant.

The plaintiff, who was a Khazi of a certain place appointed by Government, instituted a suit against the defendant to restrain him from officiating at marriages celebrated in that place and for the recovery of a sum which the defendant had received as fees for *nikkas* performed by him in violation of plaintiff's rights. *Held* the suit was not maintainable.

S. 4 of the Khazi's Act shows that an appointment under the Act does not confer on the appointee any exclusive franchise or any exclusive right to officiate at marriages. And the

I.—Imperial Acts—(Continued).**Act XII of 1880 (Khazi)—(Concluded).**

plaintiff has no right to restrain any person from discharging any of the functions of a Khazi.*

An office which requires the holder to perform duties in connection with an institution would ordinarily carry with it rights of an exclusive character, and does not interfere with the right possessed by all persons to exercise any profession or calling they might choose to adopt. The object of the Khazi's Act of 1880 was merely to appoint a person whose duty it would be to render certain services to such Muhammadans as may choose to resort to him for certain purposes, and does not confer on him any exclusive right to perform the functions which his office requires him to discharge.

A judicial or administrative office created by the Sovereign confers rights and privileges of an exclusive character, but Act XII of 1880 expressly says that a Khazi appointed under the Act is to have no judicial or administrative powers.

The office of Khazi is not one created by the community of Muhammadans but by the Sovereign whose administrative power is the source of the Khazi's rights. **Katil Shaik Ummar Saheb v. Khazi Budan Khan Saheb**, 37 M. 228.

SUNDARA AYYAR and SPENCER, JJ.

References:—1 B. H. C. Appx. 18; 13 B. 429; 17 M.L.J. 421; (1859) N.W.P.S.D.A. 127; (1835) 6 Ben. S.D.A. 31, *Cons.*

Act V of 1881 (Probate and Administration).

(1) S. 4—*Executor applying for probate—Effect. See CIV. PRO. CODE (1908), No. 378, 16 M.L.T. 547.*

(2) S. 4—*Executor's right to sue when begins—Probate not obtained before suit—Effect. See LIMITATION ACT (1908), No. 93, 37 M. 175.*

(3) Ss. 4, 83—*Probate proceedings—Refusal of probate—Suit—Res judicata. See EVIDENCE ACT, No. 27, 16 Bom. L.R. 5.*

(4) Ss. 23, 41 and 150—*Succession Act, Ss. 381 and 392—Hindu.*

Where the intestate professed the Hindu religion, though he was of a mixed parentage, *held* that letters of administration should issue under the Probate and Administration Act and not under the Succession Act.

Though under S. 23 of the Probate and Administration Act, letters of administration should ordinarily be issued only to an heir or heirs, S. 41 allows exceptions to be made in special cases. Where the intestate made a large settlement and appointed his wife and daughter to be his trustees and not his eldest son, and where the other heirs desired that their mother and sister rather than their eldest brother should administer the estate, the Court *held* that letters were rightly granted to the wife and

1.—Imperial Acts—(Continued).

**Act V of 1881 (Probate and Administration)
—(Continued).**

daughter of the deceased rather than to the eldest son. **Maung Chit Maung v. Mayalt**, 7 Bur. L.T. 188=24 Ind. Cas. 688.

OFFG, C J., and YOUNG, J.

(5) S. 24—Will—Revocation when may be presumed. See WILL, No. 1, 21 Ind. Cas. 121.

(6) Ss. 24, 25—Letters of Administration without copy of will—Court if has jurisdiction to decide as to inaccurately drawing up of letters of administration. See WILL, No. 6, 20 O.L.J. 148.

(7) S. 25. See No. 6, *supra*.

(8) S. 41. See No. 4, *supra*.

(9) Ss. 50, 83—Citing person in probate proceeding whether makes him defendant. See PROBATE, No. 1, 24 Ind. Cas. 27.

(10) S. 59—Grant of probate by District Court—Grant secured by fraud of executor—Application by caveator to revoke the grant dismissed—Executor suing in Subordinate Court to recover portion of testator's property from tenant—Tenant and caveator pleading forgery of will and fraud in the grant—Defences not permissible. See EVIDENCE ACT, No. 30, 16 Bom. L.R. 459.

(11) S. 79—Bond—Assignment of—Essentials to constitute—Nature of suit under S. 79—Necessary prayers. **Mi Saw Me v. Nga Nyan Hlaing and Nga Po Paying**, U.B.R. 1913, 2nd Qr., 174=21 Ind. Cas. 297. See Final Part, 1913, Col. 82.

(12) S. 83. See Nos. 3 and 9, *supra*.

(13) S. 90—'Person interested in the property'—Creditor—Whether he is such a person—Unauthorised sale by administrator—Right to avoid—Reasonable time—Resale—Bona fide purchaser—Effect.

A creditor of the estate is a 'person interested in the property' and has the right, if he applies within a reasonable time, to avoid an unauthorised sale of a part of it by an administrator (a).

The fact that the purchaser has resold will not, in itself, defeat the creditor's right, unless he has lost his right by unreasonable delay in taking action, and the law makes no exception in favour of a bona fide purchaser for value. **Ma Ne v. On Hnit**, 7 L.B.R. 93=22 Ind. Cas. 926.

YOUNG, J.

Reference:—(a) 23 O. 446, D.

(14) S. 90, Cl. 4—Person interested in the property—Are creditors interested in property?

Held that a creditor has no interest in the immoveable property of his deceased debtor unless he has charge on that property. He has no locus standi to come and object to a grant of probate or letters, unless he objects to the grant on the ground that the will is set up in fraud

1.—Imperial Acts—(Continued).

**Act V of 1881 (Probate and Administration)
—(Concluded).**

of the creditors. **Ma E Me v. Ma E**, 7 Bur. L.T. 245=7 L.B.R. 293.

ORMOND and TWOMEY, JJ.

(15) S. 98—Nature of inventory—Period of six months how to be calculated. See COURT-FEES ACT, No. 16, (1914) M.W.N. 13.

(16) S. 150. See No. 4, *supra*.

Act XXVI of 1881 (Neg. Instruments).

(1) Master and servant—Condition of service to work on holidays—Failure to work on Sunday—Summary dismissal and forfeiture of wages—Legality—Applicability of the. See MASTER AND SERVANT, No. 1, 50 P.R. 1914.

(2) Ss. 9, 43, 118 (g)—Hundi—Endorsee of payee—Presumption of holder in due course—Want of consideration between payee and the drawer.

The plaintiff sued as an endorsee of a Hundi drawn by defendant in favour of M. The lower Court dismissed the suit holding that there had been no consideration as between the defendant and M. The plaintiff having applied to the High Court under extraordinary jurisdiction:

Held, that the plaintiff's suit as endorsee from M. was not necessarily barred by the fact that there had been no consideration as between defendant and M.

An endorsee from the payee of a Hundi must be presumed, until the contrary is proved, to have been a holder in due course, that is to say, a holder for consideration from the payee within the meaning of S. 9 by reason of S. 118 (g) of the Negotiable Instruments Act. He is, unless the contrary is proved, unaffected by the failure of consideration as between the drawer and the payee. **Sakharam v. Gulabchand**, 16 Bom.L.R. 743.

BEAMAN and HAYWARD, JJ.

(3) Ss. 13, 118—Pro-note payable to specified person—Onus of proving consideration. See PROMISSORY NOTE, No. 1, 8 P.W.R. 1914.

(4) S. 22—Days of grace—Exclusion of such days by agreement of parties—Validity—Suit filed by two plaintiffs—Plaint signed by only one of them—Return of plaint—Period of limitation—Representation of plaint with the other's signature after expiry of—Suit barred by limitation.

Where a suit was instituted by two plaintiffs but the plaint was signed only by the second plaintiff, claiming to be the agent of the first plaintiff, and where the plaint was returned by the Court on the ground that it was not signed by the first plaintiff and the plaint was represented with the latter's signature after the period of limitation for the institution of the suit was over:

Held, per Seshagiri Aiyar, J. (*Sadasiva Aiyar, J., concurring*), that the second plaintiff had no authority prior to the institution of the

1.—Imperial Acts—(Continued).

Act XXVI of 1881 (Neg. Instruments)—(Ctd.).

suit to file the plaint on behalf of the first plaintiff and that the suit was therefore barred by limitation.

Per Seshagiri Aiyar, J.—It is open to the parties to enter into a contract that the provisions of S. 22, Negotiable Instruments Act, relating to the days of grace shall not apply to them; and it is not open to the promisee to insist that the defendant should be compelled to take advantage of the days of grace in order that the starting point of limitation for him may commence on their expiry (a).

Per Sadasiva Aiyar, J. (contra).—As S. 22 of the Negotiable Instruments Act omits in a marked manner the provision in S. 14 of the English Bills of Exchange Act, allowing the parties to contract that the bill shall come to maturity on the date fixed in it without the addition of days of grace, a promissory note governed by the Negotiable Instruments Act cannot dispense with the days of grace (b). *P.M.A. Yallappa Chetty v. S.N. Subramanian Chetty*, 26 M.L.J. 494=15 M.L.T. 842=28 Ind. Cas. 431.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

References:—(a) 7 Moo. P.C. 85=13 E. R. 811=14 Jur. 258; 5 C.P.D. 194=135 R.R. 739=49 L.J.C.P. 443=28 W.R. 584; 14 O.B.N.S. 376=8 L.T. (N.S.) 277, F.; 13 Moo. and W. 452 (458)=14 L.J. Ex. 54=2 Dowl and L. 410=67 R.R. 671, R. (b) 7 Moo. P.C. 85, D.

(5) S. 28—*Promissory note—Exequant—Description as agent in the body of document—Signature unqualified—Personal liability—Suit on promissory note—Prayer in plaint for decree against principal or agent in alternative—Subsequent prayer for decree against latter personally as maker—Conversion of suit—Amendment—Whether allowable.* *R.P. Koneti Naicker v. Jatu Gopala Aiyar*, 25 M.L.J. 425=14 M.L.T. 414=21 Ind. Cas. 417 (F. B.). See Final Part, 1913, Col. 35.

(6) S. 28—*Liability of maker—Construction of Indian and English documents—Decisions of Full Benches and the power of a Division Bench.* *Sri Yerruganti Chinna Venkatanarayana v. Kota Giri Venkatanarasimha*, (1913) M.W.N. 1005=14 M.L.T. 502=21 Ind. Cas. 650. See Final Part, 1913, Col. 35.

(7) Ss. 37, 43—*Hundi—Contract Act—Ss. 135, 62—Merger—Novation.* *J.E. Loader v. The Chartered Bank of India, Australia and China*, 6 Bur. L.T. 171=21 Ind. Cas. 222. See Final Part, 1913, Col. 36.

(8) S. 43. See Nos. 2 and 7, *supra*.

(9) S. 43—*Transfer of Property Act, Ss. 128, 130, 137—Promissory note, making over of, without endorsement, if constitutes valid transfer or gift—Chose-in-action, transfer of—Negotiable Instruments Act, scope of.*

The defendant executed a promissory note in favour of one X who handed over this note

1.—Imperial Acts—(Continued).

Act XXVI of 1881 (Neg. Instruments)—(Ctd.).

without any endorsement to an idol through its *pujari*, and having done so, died. The plaintiff, the *Shabari* of the idol, thereupon sued the petitioner for the amount due on the note.

Held, that, although a promissory note to order may be transferred otherwise than by endorsement and delivery as contemplated by S. 48 of the Negotiable Instruments Act, there was no legal transfer of the promissory note to the plaintiff or the deity whom the plaintiff represented either as a negotiable instrument or as a chose-in-action under S. 130 of the Transfer of Property Act, nor was there a valid gift of the promissory note under S. 123 of the Transfer of Property Act.

That, even assuming that there was a valid transfer, the plaintiff was not entitled to sue in his own name.

It may be generally true that a valid assignment of a negotiable instrument as an actionable claim gives the assignee the rights of the holder subject to equities, but this broad proposition must be subject at any rate to the qualification that it is true only so far as it is not inconsistent with the special provisions of the Negotiable Instruments Act.

Per Richardson, J.—The object and purpose of the Negotiable Instruments Act is to legalise a system under which claims arising upon certain instruments of a mercantile character can be treated like ordinary goods which pass by delivery from hand to hand. But except within the prescribed limits such claims cannot be so treated. *Akhoy Kumar Pal v. Haridas Bysack*, 18 C.W.N. 494=19 C.L.J. 335=22 Ind. Cas. 500.

CARNDUFF and RICHARDSON, JJ.

(10) S. 78—What constitutes endorsement for collection. See PROMISSORY NOTE, No. 3, 28 Ind. Cas. 545.

(11) S. 80—Pro-note silent about interest—Oral agreement as to interest if provable—Defendant admitting lower rate of interest than that claimed by plaintiff—Effect. See PROMISSORY NOTE, No. 7, 18 C.W.N. 1260.

(12) Ss. 93, 94, 105, and 107—*Hundi—Its notice of dishonour necessary within reasonable time—Indorsers—Delay of six months—Drawer to be co defendant—O. I, r. 6, Civ. Pro. Code (1908).*

The provisions of Ss. 93, 94, 105, 106 and 107 of Act XXVI of 1881, show that the holder of a Bill of Exchange or *Hundi* is bound to give notice of its dishonour at the earliest opportunity to all the parties whom he desires to make liable thereon. Consequently his neglecting to give such notice within reasonable time from the date of dishonour exonerates the indorsers and others concerned especially where they are most likely to suffer damage from such neglect, as, for instance, where the drawer becomes insolvent or otherwise unable to pay the amount due (a).

1.—Imperial Acts—(Continued).**Act XXVI of 1881 (Neg. Instruments)—(Old.).**

Drawer is a necessary party to the case based on a *Hundi* (b). *Jaggan Nath Nathu Mal v. Ram Das Brij Das*, 140 P.W.R. 1914=243 P.L.R. 1914.

RATTIGAN, J.

References:—(a) 159 P.R. 1882, F. (b) 2 A. 754, R.

(18) S. 94. See No. 12, *supra*.

(14) S. 105. See No. 13, *supra*.

(15) S. 107. See No. 12, *supra*.

(16) S. 118. See Nos. 2 and 9, *supra*.

* (17) S. 120—Holder in due course whether includes payee of instrument payable to bearer. See ACT III OF 1905 (PAPER CURRENCY), No. 1, U.B.R. (1914), 1 Qr., p. 13.

Act II of 1882.

See TRUSTS ACT.

Act IV of 1882.

See TRANSFER OF PROPERTY ACT.

Act V of 1882.

See EASEMENTS ACT.

Act V of 1882 (Easements).

S. 15—*Right to support—Damages—Injunction—Actual damages not necessary.* *Ramakrishna Iyer v. Seetharama Iyer*, (1912) M. W.N. 1117=15 Ind. Cas. 294=37 M. 527. See Final Part, 1914, Col. 33.

Act VI of 1882 (Companies).

(1) *Appointment of a Director in contravention of the Articles of Association—Allotment of shares by irregularly constituted Board—Validity of—Objections as to unreasonable delay in allotment of shares—Failure to give notice of allotment.*

Where, in the Articles of Association of a Joint Stock Company, the least number of Directors required to form a *quorum* was three, and in case of an occasional vacancy among the Directors, the remaining Directors were authorized to appoint as Director, a properly qualified member of the Company, any appointment of a Director or Directors by only two of them is irregular.

An allotment of shares by an irregularly constituted Board of Directors is invalid, but if the Articles of Association of a Company validate an act done by a *de facto* Director in a *bona fide* manner, the Court will uphold his act. Where a person to whom shares in a Company were allotted by the Directors did not decline to accept them on the ground of unreasonable delay, he could not raise that objection against his being put on the list of contributories when the Company went into liquidation.

Where a notice of allotment was not served on a person to whom shares were allotted, he could not be put on the list of contributories

1.—Imperial Acts—(Continued).**Act VI of 1882 (Companies)—(Continued).**

when the Company went into liquidation. *Changa Mul v. Provincial Bank, Ltd.*, 12 A.L.J. 667=36 A. 412.

RAFIQ and PIGGOTT, JJ.

References:—49 Law Times, 291; 23 Ch. D. (1883) 413; 1 Ch. D. (1898) 6; 2 Ch. D. (1903) 439, R.

(3) *Shares applied for on certain conditions—Condition precedent—Condition not fulfilled—Applicant neither member nor contributory but creditor.* *Manendra Gopal Mukerji v. Lachhman Prasad*, 11 A.L.J. 924=35 A. 538=21 Ind. Cas. 915. See Final Part, 1913, Col. 38.

(3) S. 4—*Combination of eighteen firms—Not registered—Prevention of competition—Object—Profits to be brought into a pool and distributed to subscribers—Whether falls within S. 4—Suit on bond in favour of secretary of the combination—Maintainability—Companies Act, 1913, S. 2 (13).*

Where eighteen companies or firms carrying on dealings in cotton and possessing ginning factories, comprised of more than 20 persons, entered into a coalition or syndicate with the object of working the ginning factories of its members jointly for the benefit of all, so as to prevent competition between them, and agreed that the net profits should be thrown into a pool or general fund and be distributed rateably among the subscribers.

Held, that the association is essentially within the purview of S. 4 of the Companies Act, 1882, and that, that being so, no suit can be maintained on a bond given by one of the members of the Association to the Secretary of the Association.

The word 'persons' in S. 4, Act VI of 1882, denotes individuals and does not include bodies of individuals whether corporations or not, since any such extended definition would be repugnant to the subject and context of the section.

Held, also that the combination or association in the present case was one which worked for gain (a). *Akola Gin Combination v. Northcote Ginning Factory*, 10 N.L.R. 98.

STANYON, A.J.C.

References:—(a) L.R. 8 Eq. 176; 1 Ch. D. 699; 2 Ch. D. 763; 15 Ch. D. 247; 11 Ch. D. 170; L.R. 10 Ch. D. 542; 9 Q.B.D. 255; 20 Ch. D. 137; 11 Q.B.D. 563; 14 Q.B.D. 879; 83 W. R. 330; 29 Ch. D. 1; 45 L.T.N.S. 619; (1901) 1 Ch. 102; 17 C. 786; 19 M. 81; 19 M. 200; 20 M. 48; 29 M. 477; 13 C.W.N. 638, R.

(4) S. 28—*Agreement not to pay price of shares in cash—When valid—Payment in cash—What it is—Contract to purchase shares—Its effect if it is not rescinded before winding up—Fraud, etc., in purchasing shares when can successfully be pleaded.*

1.—Imperial Acts—(Continued).**Act V of 1882 (Companies)—(Continued).**

A company agreed to give an advance of two lakhs to L who purchased 500 shares of the Company.

On 16th December, 1901, L applied for 500 shares and obtained an advance in the promissory notes for Rs. 1,92,500, payable in different times, and by a set-off against his shares of a sum of Rs. 7,500. On 22nd December, 1908, the shares were allotted to him. At a subsequent meeting of the Directors held on 28th January, 1909, the advance to L was confirmed to the extent of Rs. 1,40,000 (one lakh and forty thousands) and promissory notes for Rs. 60,000 (sixty thousands) were handed back and cancelled, and the following resolution was passed by the Directors.

"In consideration of Rai Laohhman Singh meeting our wishes regarding extension of the lease and the return of *Hundies* for Rs. 60,000 (sixty thousands) out of Rs. 2,00,000 (two lakhs) advanced to him as a loan, the Directors agree to meet the calls in his 500 shares debiting him Rs. 7 per cent. for the accommodation in his general account."

But there was no written agreement between L, and the Company that the price of the shares will not be paid in cash and filed with the Registrar of the Joint Stock Companies as required by S. 28 of Act VI of 1882.

Held, that an agreement that a Registered Company's purchased shares are not to be paid in cash but were to be issued to the purchaser as fully paid up as part of an advance which the Company has undertaken to make, is illegal if it is not made in writing and filed with the Registrar of the Joint Stock Companies as laid down under S. 28 of Act VI of 1882.

The setting-off of a debt due against future calls on shares can only be considered payment in cash if the debt be due *in presenti*. But L's return of promissory notes on 26th January, 1909, is not equivalent to a payment in cash within the meaning of the said section (a).

Query.—Whether the above-mentioned resolution of the Company would debar them from suing L for moneys due on the shares.

A purchaser of shares is not allowed to avoid the contract on the ground of fraud or misrepresentation, if, after allotment, he keeps silence for a considerable time as about two years (b).

(*Obiters*).—If, before a contract to take shares is rescinded, a winding-up be commenced or a concern ceases to be a going concern, the shareholder can no longer be relieved but will be liable to be a contributory.

Where a section of an Indian Act is taken verbatim from an Act of Parliament, the English authorities thereon are applicable in India. *Rai Laohhman Singh v. The*

1.—Imperial Acts—(Continued).**Act VI of 1882 (Companies)—(Continued).**

Liquidators of the Industrial East Company, Ltd., 102 P.W.R. 1914—201 P.L.R. 1914.

SCOTT-SMITH and SHADI LAL, JJ.

References :—(a) L.R. 7 Ch. D. 533 ; 41 Ch. D. 159, D. (b) C.A. 1060 of 1912, F.

(5) S. 77—*Articles not valid—Power to borrow conferred on the managing agents—Ratification by the share-holders—Effect of ratification—Estoppel—Contract Act, S. 237.*

The respondent-Company registered its Memorandum of Association without the Articles. At a subsequent Meeting of the Company, Articles of Association were adopted giving the Managing Agents power to borrow money for the Company, but it turned out that they were not regular. The Company, however, treated them as regular and acted upon them and published them for the information of the general public. *Held*, that the said articles having neither been registered along with the Memorandum of Association, nor passed in the manner provided by law, could not take effect as the Articles of Association so as to replace the general provisions of the Act. But the share-holders, having acted upon them for a long time and having put them forward as embodying the rules and regulations of the Company, could not set up the invalidity of the said articles. *Kunj Kishor v. Porter*, 12 A.L.J. 763=36 A. 416=24 Ind. Cas. 29.

RAFIQ and PIGGOTT, JJ.

(6) S. 128—*Company—Compulsory winding up order—Petition by share-holders—Grounds on which petition should be based—Court's duty to entertain application—Discretion of the Court.*

In S. 128, Companies Act, 1882, the first four grounds (a) to (d) for winding up a Company are specific, and any other ground alleged under (e) must be of a like nature to those given under headings (a) to (d).

Where a petition for winding up a Company compulsorily makes allegation relating to the internal management or rather mismanagement of the Company's affairs, the matter is not one that would call for interference by the Court, but is one for the share-holders themselves to deal with.

There is no obligation whatever on the Court to admit a petition for winding up a Company merely because it is presented. In the first place, it must allege facts which, if proved, would justify an order for winding up a Company, and therefore perusal is necessary. But even if a petition does allege such facts, then the Judge has a discretion, since the admission of the petition must inevitably damage the credit of the Company concerned, to consider whether it really is a *bona fide* one.

A petition by a shareholder to wind up the Company stands on a different footing to a petition by a creditor. It should be more closely

1.—Imperial Acts—(Continued).**Act VI of 1892 (Companies)—(Continued).**

scrutinized on presentation. The usual ground for a creditor's petition would be that the respondent Company is unable to pay its debts and in such a case the Company must pay the debt or submit to a winding up order. A shareholder's petition must, as a general rule, allege one of the grounds under headings (a), (b), (c) and (d) or any grounds which the Court is satisfied is of a like nature to those in S. 128, and if any of those grounds are alleged, there is little doubt that the Court will, under ordinary circumstances, admit the petition. If any other grounds are alleged the petition does not satisfy the requirements of the Act.

There is nothing in the Indian Companies Act or rules framed thereunder, which deprives the Court of the discretion which it has in every case, so that the Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the Company concerned notice that a petition has been presented, so that it may take proceedings to restrain the petitioner from proceeding with his petition. *In re The Pioneer Bank, Ltd.*; *In re Chaimral Yeleram*, 16 Bom. L.R. 508.

MACLEOD, J.

(7) Ss. 128, 129 — Company — Compulsory winding up—Petition by creditor.

A creditor of a joint stock company by assignment demanded payment of his moneys. The Company declined to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The creditor thereupon applied to the Court to wind up the affairs of the Company. It was not alleged that the Company was not able to pay his claim in full. The lower Court having rejected his application, he appealed: *Held*, that the application was rightly dismissed, for the creditor's object seemed to be to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Court.

A Company can be wound up, on the petition of a creditor, only if it is unable to pay its just debts. The inability is indicated by its neglect to pay after proper demand made and the lapse of three weeks. Such neglect must be judged by the facts of each particular case. Where the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts. *Tulsidas Lallubhai v. The Bharatkhand Cotton Mills Co., Ltd.*, 16 Bom. L.R. 692.

BEAMAN and HAYWARD, JJ.

(8) Ss. 128, 131, 144, 145 and 169—*Petition by creditors to wind up the Bank—Appointment of provisional official liquidator.* *Peoples Bank v. Narain Das*, 206 P. W. R. 1913=337 P.L.R. 1913=31 P.R. 1914=21 Ind. Cas. 577. See Final Part, 1913, Col. 40.

1.—Imperial Acts—(Continued).**Act VI of 1892 (Companies)—(Continued).**

(9) S. 129. See No. 7, *supra*.

(10) S. 131. See No. 8, *supra*.

(11) S. 140. See No. 8, *supra*.

(12) S. 144. See No. 8, *supra*.

(13) S. 145. See No. 8, *supra*.

(14) S. 147—*Contributory—Shares—Liability of purchaser.*

The appellant admitted he had originally agreed to purchase 70 shares in the Company under liquidation, but objected to his name being included in the list of contributories on the grounds (1) that he was induced by false and fraudulent misrepresentation to purchase the said shares (i) inasmuch as the prospectus which had been sent to him contained the names of some highly respectable gentlemen as Directors of the Company, (ii) that in the notice which appeared in a newspaper calling for applications for a post of manager it was stated that the manager would have the control of a large body of men and that it was suggested that the company was on a good sound financial position, (2) that subsequently the Company had agreed to substitute 23 fully paid up shares in lieu of 70 shares above referred to, (3) that the applicant's shares had been pledged with the Company and therefore the Company and not the applicant must be regarded as the real owner of the shares and liable thereon and (4) that the persons primarily liable to the creditors of the Company were the late Directors, and that, until every effort had been made to recover from the latter, the share holders could not be held responsible.

Held, that the objections were untenable, for (1) it was not proved that the applicant took shares in the Company upon the faith of alleged representations made to him; that, even if the applicant had been deceived into taking the shares, he was not entitled in the circumstances of the present case to avoid the contract which he made with the Company, as even upon his own allegations he must have known very shortly after his appointment as manager of the Company that fraud had been practised upon him and he did nothing to repudiate his liability till the Company was ordered to be wound up;

(2) the applicant was not freed from liability on the ground that the Managing Director had written to him 'I will see what you have paid up and arrange to give you fully paid-up shares for the same and transfer your liabilities on the remaining shares,' as the promise contained was a purely personal one;

(3) that the legal owner of the shares being the applicant and not the Company, he was liable as a contributory;

(4) that the proposition No. 4 was startling in its novelty and no authority was cited in

1.—Imperial Acts—(Continued).**Act VI of 1882 (Companies)—(Continued).**

support of it. **Mr. Alister West v. Lala Beni Pershad**, 165 P.L.R. 1914=69 P.R. 1914=113 P.W.R. 1914=24 Ind. Cas. 236.

RATTIGAN and BEADON, JJ.

- (15) S. 159—*Liquidation—Costs of liquidation—Ground rent due under a lease which gave charge for arrears of rent on buildings to be erected on land—Rent forms charge on buildings—Rent to be paid up in priority of unsecured creditors.*

The promoters of a Company took a lease of a plot of land on condition that, if the lessees did not pay arrears of rent within one month, the landlords might recover the arrears with interest "from the building or buildings which may have been erected on the lands." The buildings were later on erected. No rent was paid under the lease from the 12th April 1910. An application was made on the 28th July 1911 to wind up the affairs of the Company. The Company was ordered to be wound up and the buildings and plant were sold on the 12th February 1913. The landlords claimed in the liquidation proceedings that the amount of rent due to them from 12th April 1910 to the 12th February 1913 should be paid out of the sale proceeds of the mill buildings in priority to the claims of unsecured creditors. The lower Court gave priority under S. 159, Companies Act, to the amount of rent which accrued due from the 28th July 1911 to the 12th February 1913; and ranked the claim as to the balance of rent which accrued due from the 12th April 1910 to the 28th July 1911 as an ordinary claim. The landlords having appealed:

Held, (1) that under the lease a charge was in equity created for unpaid rent upon the buildings when they came into existence;

(2) that in equity the charge gave a right of priority to the landlords over unsecured creditors of the Company in a winding-up proceeding. **Keshavlal Hiralal v. Girdharlal Uttamram Fatekh**, 16 Bom L.R. 643.

SCOTT, C.J. and BATCHELOR, J.

- (16) S. 169—*Three weeks' notice—Appellants' duty to be prompt.*

An appellant who desires to contest an order passed under the Companies Act must act with promptitude and satisfy the Court that he has himself done everything to comply with the strict provisions of S. 169 of the Act. **Dewan Jagan Nath v. Badhawa Singh**, 100 P.L.R. 1914=22 Ind. Cas. 795=68 P.R. 1914.

RATTIGAN and BEADON, JJ.

(17) S. 169—*Appeal from order of District Court—To which Court lies—Whether further appeal lies—Material irregularity—Revision.* **Bashehar Nath v. Kanhaiya Lal**, 84 P. R. 1913=45 P.L.R. 1914=22 Ind. Cas. 250. See Final Part, 1913, Col. 41.

(18) S. 169. See No. 8, *supra*.

1.—Imperial Acts—(Continued).**Act VI of 1882 (Companies)—(Concluded).**

- (19) S. 214—*Is auditor an officer of the Company—De facto officers of the Company.*

Where the shareholders of a Bank assembled in general meeting appointed the appellants as auditors in the manner prescribed in the Articles of Association, and where in pursuance of that appointment they entered upon and carried on the duties of auditors of the Bank.

Held, that the appellants became *de jure* officers of the Bank.

On a contention there was not a properly qualified *quorum* at the said general meeting, and that consequently, though the appellants acted as auditors, they were not properly appointed.

Held (by Ormond, J., Twomey, J., dissenting) that, if the shareholders at that meeting were unable to appoint an auditor owing to want of a *quorum*, there would be a casual vacancy of the office, and the Directors present might be taken to have duly filed it under Art 11 of the Company's rules. **Stuart Smith and Allen v. Official Liquidator, Bank of Burma**, 7 Bur. L.T. 230=24 Ind. Cas. 431.

ORMOND and TWOMEY, JJ.

- (20) S. 242—*Suit against registered Company dismissed after Company's liquidation—Effect of such dismissal—Res judicata.*

A suit against a registered Company was dismissed after the Company went into liquidation:

Held, that the dismissal of the suit did not bar the maintenance of the claim before the Official Liquidator. **Pearey Lal v. W. K. Porter**, 24 Ind. Cas. 99.

RAFIQUE and PIGGOTT, JJ.

Act XIV of 1892.

See CIV. PRO. CODE.

Act XV of 1892 (Presidency Small Cause Courts).

(1) Ss. 6, 41, Ch. VII—Dismissal of application under Ch. VII—Interference in revision when justifiable—Appeal from order of single Judge of High Court interfering in revision whether lies—Jurisdiction of High Court over Presidency Small Cause Courts. See **LETTERS PATENT (CALCUTTA)**, No. 4, 41 C. 323.

(2) S. 38. See No. 5, *infra*.

(3) S. 41—Exercise of power under—Conditions of such exercise—Failure to comply with—Effect—No jurisdiction—Revision by High Court. See CIV. PRO. CODE (1908), No. 177, 26 M.L.J. 467.

(4) S. 41. See No. 1, *supra*.

(5) Ss. 69, 38—*Small Cause Court—Two or more Judges sitting together under S. 39—Reference to the High Court—Power to make.* **Lodd Govindass Kristna Dass v. Rukmani Bhal**, 14 M.L.T. 310=21 Ind. Cas. 303. See Final Part, 1913, Col. 42.

1.—Imperial Acts—(Continued).

Act II of 1886 (Income-Tax).

Executor if liable to pay income-tax for income of estate—Suit for declaration that such income is not liable to be taxed, if lies—Contract Act, S. 72—Payment under coercion—Jurisdiction of Collector, to determine who is chargeable with tax.

The executor to an estate brought a suit against the Secretary of State for India in Council for a declaration that as executor he was not liable to pay any income-tax in respect of any income of the estate and that the Collector in realising the sums paid to him acted without jurisdiction.

Held—that to succeed in this suit it was incumbent on the plaintiff to show that the payment had been made by him under coercion; and assuming that there was coercion within the meaning of S. 72 of the Contract Act, the suit did not lie.

That income accruing to an executor under the will of a testator is liable to be taxed within the meaning of the Income-tax Act. Apart from the exemption provided in the Act in favour of persons whose income does not reach a certain amount, there is no personal exemption of which an executor as such could take advantage.

That in determining that the plaintiff was a person chargeable with income-tax, the Collector acted within the limit of his jurisdiction. **A. H. Forbes v. The Secretary of State for India in Council**, 19 C.W.N. 138.

JENKINS, C.J., and N.R. CHATTERJEA, J.

Act VII of 1887 (Suits Valuation).

- (1) Ss. 3, 4 and r. VI—*Suit for declaration relating to occupancy land or interest in occupancy land—Jurisdiction—Valuation.*

A suit which is one for declaration and relates to occupancy land or interest in occupancy land is clearly covered by S. 4 of the Suits Valuation Act, which must be read with the rules framed under the provisions of S. 3 to determine the value for purposes of jurisdiction. Therefore the value of a suit brought by the occupancy tenants of certain lands for a declaration that the landlords are not entitled to recover from them by way of rent more than 1/16th share of the produce, known as *lichh*, is, for purposes of jurisdiction, clearly 15 times the land revenue. **Jamal v. Qadir Baksh**, 54 P. R. 1914=238 P.L.R. 1914=153 P.W.R. 1914.

JOHNSTONE and SHAH, DIN, JJ.

- (2) S. 8—*Suit falling under S. 7 (Cl. XI), Court-fees Act—Valuation for purposes of Court-fees and jurisdiction—S. 14, Madras Civil Courts Act (III of 1878).*

In the case of suits falling under S. 7 (Cl. XI), Court-fees Act, the valuation is the same for purposes of Court fees and jurisdiction. There is nothing to indicate that S. 8 of the Suits Valuation Act should be read subject to the

1.—Imperial Acts—(Continued).

Act VII of 1887 (Suits Valuation)—(Contd.).

provisions of S. 14, Madras Civil Courts Act. **Yannavalli Seshagiri Row v. N arayana-swami Naidu**, 26 M.L.J. 573=24 Ind. Cas. 374.

AYLING, J.

- (3) S. 8—*Valuation of suits for cancellation of bond.*

Under S. 8 of the Suits Valuation Act, in suits for the cancellation and return of a bond the valuation as determinable for the computation of the Court-fee and that for the purposes of jurisdiction should be the same. **Krishna Mallar v. The Secretary of State for India in Council**, (1914) M.W.N. 767=16 M.L.T. 516.

WALLIS and AYLING, JJ.

- (4) S. 8—*Suit for establishing right as occupancy raiyat and for recovering possession thereof—Valuation—Jurisdiction. See ACT XII OF 1887 (BENGAL, N.W.P. AND ASSAM CIVIL COURTS), No. 4, 23 Ind. Cas. 964.*

- (5) S. 8—*Suit for recovery of immoveable property from tenant—Court fee—Valuation—Appeal. See ACT II OF 1901 (AGRA TENANCY), No. 21, 12 A.L.J. 938.*

- (6) S. 8—*Suit asking Court to administer the estate of a deceased person and give plaintiff his share therein—Nature of suit—Whether suit 'for account'—Valuation for purposes of jurisdiction. See COURT FEES ACT, No. 7, 100 P.R. 1914.*

- (7) S. 8—*Meaning of 'Consequential relief'—Suit for declaration that plaintiff was member of Committee of management—Consequential relief not warranted by averments in plaint—Suit incapable of valuation—Cognizance of plaintiff's valuation of relief sought when acceptable. See COURT FEES ACT, No. 5, 24 Ind. Cas. 316.*

- (8) S. 11, *application of—Wrong valuation put upon plaint—Court competent to try suit as valued by plaintiff—Suit beyond jurisdiction according to correct valuation—Trial of suit after extension of Court's pecuniary jurisdiction.*

The provisions of S. 11 of the Suits Valuation Act apply even if the plaintiff designedly exaggerates or understates the value of his claim for the purposes of choosing his own forum. (a).

In a case the defendant pleaded that the plaintiff had undervalued his claim and that the suit was really beyond the Court's jurisdiction. It was found that the actual valuation was beyond the jurisdiction. Subsequently, the Court's jurisdiction was raised and thus it became competent to try the suit even according to the actual valuation. The Court tried and decided the suit. It was contended that the trial was bad for want of jurisdiction:

Held, that, in the absence of anything to show that the disposal of the suit on its merits was prejudicially affected, the trial was good.

1.—Imperial Acts—(Continued).**Act VII of 1887 (Suits Valuation)—(Concid.).**

view of the provisions of S. 11 of the Suits Valuation Act. **Muhammad Sharafat Ullah v. Hira Lal**, 21 Ind. Cas. 52.

PIGGOT, J.C.

Reference:—(a) 24 C. 661=1 C.W.N. 556, R.

(9) S. 11—Error in valuation—Disposal of suit on the merits not prejudicially affected—Duty of Appellate Court—Order returning plaint for presentation to proper Court—Legality—Appeal. See CIV. PRO. CODE (1908), No. 163, 12 A.L.J. 21.

Act IX of 1887 (Provl. S.C. Courts).

(1) Ss. 16 and 28—Power of Court to pass order—Practice.

The effect of an order under S. 23 of the Act is to remove any bar which might otherwise exist by reason of the provisions of S. 16 of the Act to a trial of the suit by a Court of ordinary Civil jurisdiction.

The Judge of a Court of Small Causes has a discretion to return a plaint under the provisions of S. 23 of the Act on a finding that the relief claimed by the plaintiff would depend upon proof or disproof of title, which a Court of Small Causes could not finally determine. The Court acting under that section should frame the order so as to put this point beyond doubt, because certain legal consequences follow from that order which do not follow an order merely holding that the Small Cause Court has no jurisdiction. **Muhammad Abdul Ghafur Khan v. Gokal Prasad**, 12 A.L.J. 384.

PIGGOT, J.

(2) S. 23—Suit for rent—Denial of plaintiffs' right and title to sue as trustees—Questions that cannot be decided by Small Cause Court—Proof or disproof of title to immoveable property—Return of plaint for presentation to proper Court—Validity.

In a suit for rent by the trustees of a temple, the defendant denied the plaintiffs' title to the kudivaram right in the land and contended that the Revenue Courts alone had jurisdiction to try the suit; the defendant also denied the plaintiffs' right to sue as trustees. The Small Cause Court returned the plaint for presentation to proper Court.

Held that the order returning the plaint was proper.

Held also that the 'relief claimed' cannot be granted by the Small Cause Court without deciding the question of the plaintiffs' title to the kudivaram, and that the decision as to the grant of the relief "depended upon the proof or disproof of a title to immoveable property" within the meaning of the words of S. 23, Act IX of 1887.

Held also that the title of the plaintiffs as trustees is one which the Small Cause Court

1.—Imperial Acts—(Continued).**Act IX of 1887 (Provl. S.C. Courts)—(Ctd.).**

cannot finally determine. **R.M.P.S. Muthiah Chettiar v. Athinamulagi**, 15 M.L.T. 214=26 M.L.J. 225=22 Ind. Cas. 799.

SADASIVA IYER and TYABJI, JJ.

(3) S. 23—Return of plaint for presentation to proper Civil Court—Title to immoveable property—Refusal by Civil Court to entertain plaint—Jurisdiction. **Chander Radan Koer v. Sheodhar Prasad**, 18 Ind. Cas. 325=18 C.W.N. 380. See Final Part, 1913, Col. 44.

(4) S. 23—Suit instituted in Small Cause Court—Transfer of case to the file of Civil Court where the same Judge presides over both Courts. **Haril Balu v. Ganpatrao**, 15 Bom. L. R. 1036=21 Ind. Cas. 832=38 B.190. See Final Part, 1913, Col. 45.

(5) S. 23. See No. 1, *supra*.

(6) S. 25—Revision—Munsif not invested with Small Cause Court jurisdiction trying a case as such Court—Irregularity prejudicial to the applicant for revision.

A suit was filed in the Court of a Munsif who was invested with the jurisdiction of a Judge of the Court of Small Causes. Before he could hear the case and record any evidence, that officer was transferred. His successor was not invested with such powers. He, however, tried it as a Court of Small Causes and the order which he passed was in the form of a Small Cause Court decree.

Held, that the Munsif exercised a jurisdiction which was not vested in him, that an irregularity was committed which prejudiced the applicant and that the order was liable to be set aside in revision. **Shiam Behari Lal v. Kali**, 12 A.L.J. 109=22 Ind. Cas. 909.

KNOX, J.

(7) S. 25—Practice—Civil revision—Evidence—Review of—Finding of fact, interference with—Master and servant—Principal and agent.

Case in which the High Court acting under S. 25, Provincial Small Cause Courts Act, considered the evidence, admitted an affidavit to explain the deposition of a witness recorded by the Judge below and reversed a finding of fact arrived at by him.

Where a servant of the plaintiff conveys an order for work to be done to the plaintiff under instructions from the defendant, the latter is liable to pay for the work after it has been done. **Rebecca Stewart v. Debi Prasad**, 12 A.L.J. 271.

TUDBALL, J.

(8) S. 25—Revision—Small Cause Court assuming facts without evidence—Not receiving written pleas—House fallen in earthquake—Non-liability of tenant for its rent.

Held, that the judgment of a Court of Small Causes is liable to be set aside on revision under S. 25 of Act IX. of 1887, if it (1) assumes the existence of some facts; (2) refuses to

1.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Courts)—(Old.).**

receive and consider the pleas of the defendants; and (3) omits to decide all material points in dispute.

Held, also, that a tenant cannot be made liable for the rent of the house let to him, if it falls on account of earthquake and rain, i.e., through no fault of the lessees. **Pir Bakhsh v. Hira Lal**, 54 P.W.R. 1914=146 P.L.R. 1914.

SCOTT-SMITH, J.

(9) *S. 25—Revision—Finding of fact on meagre evidence—Surety.*

Held, that, a finding of fact based practically on no evidence by a Small Cause Court is liable to be set aside on revision under S. 25 of Act IX of 1887. A mere entry of a person's name as surety in the creditor's and broker's book, in the face of his flat denial on second appeal, is of no or little value. **Godhu Mal v. Firm of Ram Rakha Mal and Sham Das**, 70 P.W.R. 1914=173 P.L.R. 1914=24 Ind. Cas. 888.

JOHNSTONE, J.

(10) *S. 25—"Decided," meaning of.*

The word "decided" in S. 25 of the Provincial Small Cause Courts Act does not mean "decided on the merits." It simply means "disposed of," and the High Court's power to interfere is not restricted only to cases where there is a decision on the merits. **Ramanathan Chetty v. Maruthappa Kone**, 16 M.L.T. 502=25 Ind. Cas. 613.

SESHAGIRI AIYAR, J.

References:—10 Ind. Cas. 8=15 O.W.N. 666=14 C.L.J. 118, *F.*; 1 Ind. Cas. 288=13 C.W.N. 403, *Diss.*

(11) *S. 25—Suit tried under the Act—Revision—Ss. 84, 85, Reg. VII of 1901 (N.W.F.P. Law and Justice)—Court-fees. See COURT FEES ACT, No. 19, 3 P.W.R. 1914 (N.W.F.P.).*

(11-a) *Art. 3 'Act purporting to be done,' meaning of—Failure by defendant—(Government) to carry out a contract—Suit by plaintiff for money due under contract—Whether of Small Cause nature Second—appeal. The Secretary of State for India v. Aylavajjula Ramabrahmam*, 12 M.L.T. 299=(1912) M.W.N. 954=23 M.L.J. 732=16 Ind. Cas. 400=57 M. 538. See Final Part, 1912, Col. 41.

(12) *Sch. II, Art. 8—Suit for recovery of rent (other than house rent) if a suit of Small Cause Court nature—Second appeal—Civ. Pro. Code (1908), S. 102, if a bar—Revenue Sale Law (Act XI of 1859), S. 37, Cl. (4), scope of—Garden, not in existence, whether protected—Sale for arrears of revenue, effect of—Incumbrances, void or voidable—Option to annul, how to be indicated—Formal written notice, if essential—Sufficient notice, what constitutes.*

A suit for recovery of rent (other than house rent) is not a suit of the nature cognizable by a

1.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Courts)—(Old.).**

Court of Small Causes; and S. 102 of the Code of Civil Procedure is no bar to a second appeal to the High Court in such a suit (a).

S. 37, cl. (4) of Act XI of 1859 contemplates improvements or works of a permanent character; and they are protected irrespective of whether the lease was or was not given for the purpose of the work in question. But to afford protection the work must still be in existence or the land be used for the purpose of the work.

Where an under-tenure was claimed to be protected under S. 37, cl. (4) of Act XI of 1859 on the ground that the land was garden land, and it was found that the land ceased to be a garden about a quarter of century ago, and tenants were settled on the land since then:

Held, that the fact that there was once a garden on the land would not protect it.

The effect of a sale for arrears of revenue is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact. No particular method of expressing an intention to annul an under-tenure is necessary, but any unequivocal act is sufficient which indicates the intention to annul, and which brings that intention to the knowledge of the under-tenure-holder (b):

Institution of rent suits by the auction purchaser, and collection of rents by him from a large number of tenants amounting to obtaining possession of the estate through them, by executing decrees passed against the tenants in repudiation of the tenure-holder's title, may be deemed to be sufficient to indicate the intention to annul to the under-tenure-holder (c). **Sahodora Mudiall v. Sarbosobha Das**, 20 C.L.J. 494.

N. R. CHATTERJEE and BEACHCROFT, JJ.

References:—(a) 23 M. 547, *Expl. & Distd.* (b) 9 C. 683; 17 O.W.N. 984, *F.* (c) 6 C.L.J. 486, *Distd.*

(13) *Sch. II, Art. 8—Meaning of "rent"—Suit for money payable in respect of forest right—Jurisdiction. See ACT VIII OF 1885 (BENGAL TENANCY), No. 75, 20 O.L.J. 227.*

(14) *Sch. II, Art. 13—Kolavettu, suit to recover—Small Cause suit.*

A suit to recover *kolavettu*, i.e., price paid for the plaintiff's water used for irrigation purposes by the defendant, is cognizable by a Court of Small Causes. **Subramania Iyer v. E. S. B. Stevenson**, 22 Ind. Cas. 144.

SADASIVA IYER, J.

Reference:—17 M.L.J. 487, *F.*

(15) *Sch. II, Art. 13—Suit to recover dues payable to a person by reason of his interest in immovable property—Sum payable by inferior holder to superior holder—Revenue Jurisdiction Act (X of 1876), S. 5, cl. (c)—Civ. Pro. Code (1908), S. 102, O. VIII, r. 6—Set-off, when allowed—Set-off by Plaintiff;*

1.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S.C. Courts)—(Civ.).**

A suit for the recovery by an inamdar of sums payable by a Khatedar in respect of certain immovable property held by him, under the inamdar as his superior holder, is not cognizable by a Court of Small Causes, inasmuch as the sums payable by an inferior holder to a superior holder are dues payable to a person by reason of his interest in immovable property within the meaning of Art. 13, Sch. II of the Provincial Small Cause Courts Act.

The (plaintiff), an inamdar, claimed to recover arrears from the defendant who was a Khatedar of certain lands. The defendant claimed to be entitled to set off the stipend payable by the plaintiff to certain *pujaris* of a temple of whom defendant was one. The set-off having been allowed, the plaintiff appealed.

Held, that, as the defendant claimed the set-off in a different capacity, and in a different category to that in which he held as tenant or Khatedar of the plaintiff, he could not claim the set-off under O. VIII, r. 6 of the Civ. Pro. Code. **Madhav Rao Moreswar Pant Amatya v. Rama Kalu Ghadi**, 16 Bom. L.R. 746.

SCOTT, C.J. and DAVAR, J.

(16) Art. 13—Money spent under orders of Municipal Board by landlord—Liability of tenants—Suit for the money whether of small cause nature. See CONTRACT ACT, No. 58, 12 A.L.J. 931.

(16-a) Art. 28—Suit for the return of marriage presents—Death of bride and bridegroom—Property of intestate. **Bonda Chinnayya v. Pottula Achmmah**, 23 M.L.J. 282=(1912) M. W.N. 887=12 M.L.T. 808=16 Ind. Cas. 542=37 M. 588. See Final Part, 1912, Col. 42.

(17) Sch. II, Art. 38—Small Cause suit—Suit to recover value of paddy payable under agreement to maintain—"Suit relating to maintenance."

A suit to recover the value of paddy deliverable by one brother to another, under the terms of a partition deed, for the maintenance of their mother, is not a "suit relating to maintenance" within the meaning of Art. 38, Sch. II of the Provincial Small Cause Courts Act. Such a suit is cognizable by a Small Cause Court. **Annasami Sastrial v. A. S. Ramasami Sastrial**, 22 Ind. Cas. 39.

MILLER, J.

Reference :—14 M.L.J. 480, F.

(18) Sch. II, Art. 41—Jurisdiction—Under-proprietors, one of several, satisfying joint-decree for arrears of rent—Contribution, suit for, by one of several joint judgment-debtors—Cause of action, accrual of.

A suit by one of several joint under-proprietors, who satisfied the decree for arrears of rent passed jointly against them, for contribution, against the other joint under-proprietors, is not a suit exempted from the jurisdiction of a

1.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S. C. Courts)—(Civ.).**

Court of Small Causes. **Suraj Baksh Singh v. Raghubar Singh**, 24 Ind. Cas. 28.

LINDSAY, J.C.

References :—28 A. 292=A.W.N. (1906) 6=3 A.L.J. 6, F. 23 C. 189, D.

(19) Sch. II, Art. 41—Rent-decree by co-sharer landlord—Sale under decree—Passing of entire tenancy—Satisfaction of decree by person likely to be affected by sale—Suit for money paid—Jurisdiction. See CONTRACT ACT, No. 59, 24 Ind. Cas. 259.

(20) Sch. II, Art. 41—Applicability where suit is not for contribution but for recovery of money paid by plaintiffs for benefit of defendants. See CONTRIBUTION, No. 3, 20 C.L.J. 196.

(21) Sch. II, Art. 41—Application for execution by assignee of rent decree—Payment of decretal amount by one of the co-sharers—Suit by such a co-sharer for contribution. See CONTRIBUTION, No. 4, 20 C.L.J. 200.

Act XII of 1887 (Bengal, Agra and Assam Civil Courts).

(1) Temporary injunction by one Court—Transfer of suit to another Court after injunction—Breach of injunction after transfer—Jurisdiction of latter Court to punish for contempt. See CIV. PRO. CODE (1908), No. 431, 18 C.W.N. 470.

(2) How far applies in Sonthal Parganas. See SONTAL PARGANAS, No. 1, 18 C.W.N. 994.

(3) S. 8. See CIV. PRO. CODE (1908), No. 59, 18 C.W.N. 612.

(4) S. 19, sub-S. (1)—Suits Valuation Act, S. 8—Court Fees Act, S. 7, cl. V, sub-cl. (e)—Suit—Valuation—Interest claimed by plaintiff—Value of suit is value of interest claimed in suit—Jurisdiction.

The value of a suit is the value of the subject-matter in controversy, that is, the value of the interest claimed by the plaintiff (a).

Therefore, where a plaintiff seeks to establish his right as an occupancy *raiyat* in a garden and to recover possession thereof, the value of the suit must be determined with reference to the value of the interest claimed by the plaintiff, and not with reference to the entire interest in the land, that is, the interest claimed by the plaintiff as also the interest of the superior landlord; and if the value of the interest claimed by the plaintiff is less than Rs. 1,000, the suit is cognizable by a Munsif under sub-S. (1) of S. 19 of the Bengal, N. W. P. and Assam Civil Courts Act, 1887 (b). **Upendra Chandra Mitra v. Satocouri Dhar**, 28 Ind. Cas. 964.

MOOKERJEE and BEACHROFT, JJ.

References :—(a) 3 Agra H. C. R. (Rev. App.) 5, R. (b) 18 W. R. 109; 20 W.R. 83; 12 B.L. R. 113; 25 W.R. 39, *Rel.*

1.—Imperial Acts—(Continued).

Act XII of 1887 (Bengal, Agra and Assam Civil Courts)—(Concluded).

(5) S. 21 (1) (a)—Private arbitration—Award—Appeal—Jurisdiction. See AWARD, No. 4, 19 O.L.J. 263.

(6) S. 37—Partition, suit for.—Ijmali lands—Previous partition—Lands jungle or submerged in three mousas—Separate suits for partition, maintainability of.*

Separate suits for partition of *ijmali* lands lying in different villages are maintainable against the same defendants on principles of justice, equity and good conscience, and the plaintiff is not required to include in his suits those lands which have not emerged or become culturable and are incapable of partition. *Hem Chandra Choudhuri v. Rani Hemanta Kumari Debi*, 28 Ind. Cas. 442.

CARNDUFF and RICHARDSON, JJ.

Act V of 1888 (Inventions and Designs).

(1) Ss. 20, 29—Patent Act—Infringement—Defence—Want of subject-matter—Want of novelty—Difference between the Acts of 1888 and 1911—English and Indian Law.

Under the Patent Act of 1888 a defendant in an action for infringement is allowed to set up by way of defence all the grounds on which the grant of the patent could be opposed, grounds which are to be found in S. 20 of the Act. A defendant is not allowed to set up the defence that the invention was not new, unless the defendant or some person through whom he claims has, before the date of the delivery of the application for leave to file the specification, publicly or actually used in some parts of British India or of the United Kingdom the invention with respect to which the privilege is alleged to have been infringed.

The Indian Acts do not intend, as in England, that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty.

The defendant cannot raise the defence of want of subject-matter as distinguished from want of novelty and the restrictions imposed by S. 29 (4) are binding in both cases. All the statutory grounds for opposing the grant of a patent which can be pleaded in answer to an action for infringement of a patent under the Act of 1911 cannot be pleaded in a suit instituted before the Act as it is not applicable. *Bhathey Sundararayan v. A. A. Kuppasamy Iyer*, (1914) M.W.N. 817—27 M.L.J. 573.

WALLIS, C.J., and HANNAY, J.

Act IV of 1889 (Merchandise Marks).

Ss. 6, 7. See COMPANY, No. 3, 7 Bur. L.T. 116—15 Or. L.J. 337—23 Ind. Cas. 689.

Act VII of 1889 (Succession Certificate).

(1) Application, powers given to Subordinate Court to entertain—Appeal. *Basti Begam v. Saulat Bahadur*, 16 O.O. 197—21 Ind. Cas. 388, See Final Part, 1913, Col. 49.

1.—Imperial Acts—(Continued).

Act VII of 1889 (Succession Certificate)—(Ctd.).

(2) Succession certificate proceedings—Nature of enquiry. See SUCCESSION CERTIFICATE, No. 1, (1914) M.W.N. 24.

(3) S. 4—Debt, part of, certificate in respect of, if may be granted—Multiplicity of suits.

A certificate under Act VII of 1889 (Succession Certificate) can be granted in respect of a portion of a debt. The principle of law, which prohibits a multiplicity of suits, is in no way affected by the grant of certificates in respect of fractional shares of a debt. *Sreemutty Annappurna Dassay v. Nallal Mohan Das*, 18 O.W.N. 836—23 Ind. Cas. 556.

WOODROFFE and CARNDUFF, JJ.

References :—13 W.R. 265; 19 A. 129; 32 A. 335; 33 A. 327; 21 A.W.N. 125; 3 A.W.N. 84; 16 O.W.N. 231, R.

(4) S. 4—Certificate required for a part of a claim—Duty of District Judge to grant a certificate—Revision—S. 70 of the Punjab Courts Act XVIII of 1884 as amended by the Punjab Acts I and IV of 1912.

A suit is subject to the provisions of S. 4 of Act VII of 1889, although a part of it only requires a succession certificate (a).

A District Judge cannot refuse to grant such certificate simply on the ground that a regular suit involving the question of succession between the parties is pending before a Civil Court.

The question whether a succession certificate is required in a case is subject to revision under S. 70 of Act XVIII of 1884 as amended by the Punjab Acts I and IV of 1912.

Course to be adopted in such a case pointed out. *Bassa v. Mussammam Amir Bibi*, 73 P. W.R. 1914—175 P.L.R. 1914—24 Ind. Cas. 898.

JOHNSTONE, J.

Reference :—(a) 88 P.R. 1891, R.

(5) S. 4—Joint Hindu family—Deceased joint with the applicant—Grant of certificate.

Where an applicant for a succession certificate stated in his application that he was a member of a joint Hindu family with the deceased to whose estate he had succeeded by survivorship, held, that a succession certificate was unnecessary and the application must fail. *Mathura Prasad v. Durgawati*, 12 A.L.J. 525—36 A. 380—24 Ind. Cas. 182.

RAFIQ and PIGGOTT, JJ.

(6) S. 4—Pro note in favour of deceased person—Suit by assignee of pro note—Decree subject to production of certificate before execution—Proper order.

In a suit on a promissory note executed in favour of a deceased person, a Court has no jurisdiction to pass a conditional decree directing the production of a succession certificate before execution of the decree, even if the suit be by an assignee of the widow of the deceased promisee (a).

1.—*Imperial Acts—(Continued).*

Act VII of 1889 (Succession Certificate)—(Old).

The proper order in such a case is to direct the production of the succession certificate before decree, and on failure thereof to dismiss the suit (b). *Aravamuda Aiyangar v. Kalial Perumal*, 24 Ind. Cas. 143.

AYLING, J.

References:—(a) 15 B. 105; 15 M. 419=2 M. L.J. 116, F. (b) 17 M. 419, F.

(7) S. 4—*Succession certificate obtained in respect of a debt—Debt assigned—Succession certificate also handed over to assignee—Right of assignees.* *Rung Lal v. Annu Lal*, 11 A.L.J. 968=36 A. 21=22 Ind. Cas. 349. See Final Part, 1913, Col. 50.

(8) Ss. 16 and 18—*Suit to set aside succession certificate and decree passed thereon—Maintainability of suit—Certificate conclusive.*

No suit lies for a declaration that a succession certificate granted by the District Judge was obtained by means of false evidence, or for the setting aside of a decree obtained on the basis of the certificate thus obtained.

A succession certificate is conclusive as against the debtor under S. 16 of the Succession Certificate Act and it can be revoked by the District Judge only under S. 18 of the Act. *Rupan Bibi v. Bhagelu Lal*, 12 A.L.J. 544=36 A. 423.

TUDBALL and CHAMIER, JJ.

(9) S. 18. See No. 8, *supra*.

Act VIII of 1890 (Guardians and Wards).

(1) *Application for appointment of guardian of a minor—Directions to third party for depositing the minor's money in Court, legality of.*

In proceedings, under the Guardians and Wards Act, for appointment of a guardian of a minor, the District Judge has no power to add, to the order passed in the case, any directions to the rival applicant for guardianship to deposit in Court the minor's money which he has in his possession. *Mohan Singh v. Anar Kuer*, 12 A.L.J. 788=24 Ind. Cas. 518.

RAFIQ and PIGGOTT, JJ.

(2) *Civil Judge in Berar invested with unlimited original jurisdiction under the Hyderabad Assigned Districts Courts Law—Not competent to hear applications under Guardians and Wards Act—Appointment of guardian by such a Civil Judge ultra vires—Minority of ward not extended to 21 years—Meaning of, 'Court of Justice' in the Majority Act (IX of 1875).*

Under the Hyderabad Assigned Districts Courts Law, 1889, a Civil Judge was invested with power to try original suits exceeding Rs. 5,000 in value without limit as regards the value. *Held*, that such a Civil Judge was the District Court only so far as the trial of original suits was concerned. He was not the District

1.—*Imperial Acts—(Continued).*

Act VIII of 1890 (Guardians and Wards)—(Continued).

Court for any other purpose, e. g., for the purposes of the Guardians and Wards Act. The appointment of a guardian by such Civil Judge under Act VIII of 1890 is *ultra vires* (a). There is no appointment of a guardian in the eye of the law, the proceedings being null and void; and the ward therefore attains his majority at the age of 18 and not 21.

Although the words 'Court of Justice' in the Indian Majority Act, are not qualified in express terms by the words 'competent in this behalf,' it follows from general principles of law that the act of a Court without jurisdiction is a nullity. *Bapu v. Bhiwaji*, 10 N.L.R. 161.

MITRA, O.A. J.C.

Reference:—(a) 9 C.P.L.R. 19, R.

(3) *Mahomedan infant—Maternal uncle if a proper guardian—Sister's husband if qualified—Prohibited degrees of relationship—Adverse interest—Mahomedan girl—Appointment of governess until puberty.* See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 18 C.W.N. 853.

(4) S. 7—*Mother living in open adultery—Appointment of boy's paternal aunt.*

Held, that appointment of minor's paternal aunt as guardian is proper, when it is found that the minor's mother is living in open adultery and has borne children to a man to whom she is not married. *Musammam Hannami v. Musammam Partapi*, 80 P.W.R. 1914=67 P.L.R. 1914=23 Ind. Cas. 938.

BEADON, J.

(4-a) S. 7. See No. 35, *infra*.

(5) Ss. 7, 9, 19, 52—*Indian Majority Act (IX of 1875), S. 3—Letters Patent, Madras High Court, 1865, cl. 13—Jurisdiction of District Court and of the High Court in respect of infants, limitations as to—Custody of infants, application by father for restoration and delivery of, if by suit or application—Infants ordinarily resident within jurisdiction, meaning of—Guardian and Ward—Hindu father, if may appoint another as guardian of his sons—Authority so given, revocability of—Infants, when to be represented in an application for delivery of custody of their person—High Courts in India if may order person within jurisdiction to take possession of infants residing in England at the risk of habeas corpus—Mandatory injunction—Proper order to make in such cases—Indian Courts and English Courts; conflict of jurisdiction—Common law powers of Chartered High Courts and of District Courts over infants—Indian High Court, power of, to declare infant Ward of Court, for extending minority—Father, if may be appointed guardian—High Court's powers when case transferred from District Court—Issue not raised if can be decided on evidence on other issues.*

1.—Imperial Acts—(Continued).

**Act VIII of 1890 (Guardians and Wards)
—(Continued).**

As in England, so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hand. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation (a).

Where the appellant had offered to take charge of the respondent's two sons and defray the cost of their education at the University of Oxford, and the respondent thought it desirable to take advantage of the offer of giving his sons western education, notwithstanding the fact that this would entail a loss of caste, and by a letter purported to appoint her (the appellant) the guardian of his sons and to act as such, and the appellant thereafter left for England with the boys and made arrangements there for their tuition to enter the University of Oxford and defrayed the expenses of their maintenance and education and the father acquiesced in the sons being taken to England in appellant's custody; but about six months later demanded of the appellant the restoration of his sons, and on the refusal of the appellant so to do, instituted a suit in a District Court of Madras for a declaration that he was entitled to the guardianship and custody of his sons and that the appellant was not so entitled, and for an order on the appellant to hand over such sons to the respondent or such other person as to the Court might seem fit:

Held—that the District Court had no jurisdiction over infants except such as is conferred by the Guardians and Wards Act.

That the jurisdiction of the District Court is limited by S. 9 of the Guardians and Wards Act of 1890 to infants ordinarily resident within the district, and that it was impossible to hold that infants who had months previously left India with a view to be educated in England were ordinarily resident in the district.

That a suit *inter partes* is not the form of procedure prescribed by the Guardians and Wards Act (VIII of 1890) for proceedings in a District Court touching the guardianship of infants.

Semble.—That the powers of the Madras High Court to which the suit was subsequently

1.—Imperial Acts—(Continued).

**Act VIII of 1890 (Guardians and Wards)
—(Continued).**

transferred under cl. 13 of the Letters Patent of 1865 relating to the case would seem to be confined to powers which but for the transfer might have been exercised by the District Court.

Where after the suit had been so transferred to the High Court, the Judge on the Original side of the High Court declared the infants (one of whom was about to attain the age of majority, *viz.*, 18 years) to be Wards of the Court and then under S. 7 of the latter Act declared that the respondent was their guardian so as thereby to prolong the minorities of the boys until they attained respectively the age of 21 under S. 3 of the Indian Majority Act.

Held—that the latter order was not competent to the District Court in the suit in question. Nor was it competent to the High Court, whatever might be its jurisdiction to declare the infants Wards of Court, having regard to the fact that the infants were not before the Court and their interests were not adequately represented before the Judge. Further no order declaring a guardian could, by reason of S. 19 of the Guardians and Wards Act, be made during the respondent's lifetime, unless in the opinion of the Court he was unfit to be their guardian, which was not the case here.

That, although the respondent remained the guardian of his sons, notwithstanding his letter authorizing the appellant to act as their guardian, and the authority given by him to the defendant was always revocable, the question was whether in the events which had happened he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education and was at liberty to revoke the authority in the interest of the minors, and this question had to be determined having regard to the interests and welfare of the minors, bearing in mind their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants and in their presence.

That the question whether or not it would be to the interest of the minors to deliver them over to their father could not be properly decided without framing a definite issue to that effect and upon evidence admitted as relevant on other issues.

Such an issue can be properly determined only when the infants are properly represented and their wishes ascertained.

That the relief asked for being a mandatory order directing the appellant to take possession of the person of the infants in England, and bring them to India, and hand them over to their father, and regard being had to the age of the infants, any attempt on the part of the appellant to comply with this order would, if the infants had refused to return to India, have

1.—Imperial Acts—(Continued).

Act VIII of 1890 (Guardians and Wards) —(Continued).

been contrary to the law of England and would have at once exposed the appellant to proceedings on a writ of *habeas corpus* in England. No Court ought to make an order which might lead to such consequences.

That the utmost that a Court of competent jurisdiction in India could do under the circumstances of this case was to order the appellant to concur with the respondent, as the infant's guardian, in taking proceedings in England to regain the custody and control of his sons.

Leave having been given by the Judicial Committee to the infants to intervene in this appeal and they having expressed their unwillingness to return to India or abandon their chance of obtaining a University education in England, the order of the Madras High Court directing the appellant to take them back to India could not be lawfully carried out without the consent of the boys or without an order from the Court exercising the jurisdiction of the Crown over infants in England. *Mrs. Annie Besant v. G. Narayaniah*, 18 C.W.N. 1089=27 M.L.J. 80=(1914) M.W.N. 585=16 M.L.T. 165=20 C.L.J. 253=16 Bom. L.R. 645=12 A.L.J. 1155=24 Ind. Cas. 290 (P.C.).

THE LORD CHANCELLOR, LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Reference:—(a) (1821) Jac. 245, F.

(6) Ss. 7 (1), 34, 47, cl. (4)—Appointment of Guardian—Condition—Security, extent of—Object of appeal.

Where a District Judge appoints a guardian of the property of an infant on condition that he furnishes security to a certain extent, the order is made not under S. 34 of the Guardians and Wards Act, but under sub-S. (1) of S. (7); and such order is appealable under cl. (4) of S. 47 of the Act.

As security is required only to guard against mal-practices, the amount is sufficient if it affords reasonable protection against mal-practices which require time to be carried out. *Harindra Nath Mukerjee v. Ardhendu Kumar Ganguly*, 24 Ind. Cas. 202.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—1 C.L.J. 180, F.

(7) S. 7 (2)—Guardian under the Act—His powers—Implied removal of other guardians—Estoppel—Not applicable when plain provision of law would be defeated—Void deed—No consideration—Fresh contract of minor after attaining majority—Loan—Minor's necessities—Bond—Plain recital charging minor's estate. *A. R. Krishnan Chetty v. Yellalchami Tevan*, 10 M. L.T. 385=(1911) 2 M.W.N. 461=21 M.L.J. 1077=37 M. 88. See Final Part, 1911, Col. 47.

1.—Imperial Acts—(Continued).

Act VIII of 1890 (Guardians and Wards) —(Continued).

(8) Ss. 8 to 16—Family affairs satisfactory—Unnecessary interference by the District Courts to be avoided.

A left 200 *bigas* which were recorded as owned half and half by his two sons by different wives. These two women were apparently in good terms and, being peasant women, were quite well able to look after the interests of their own children. However, a sister of A chose to apply for guardianship of the persons and property of all his children as being her nephews and nieces.

Applications for guardianship were also made by some others, and some extraordinary and complicated orders were passed thereon by the District Court. On appeal, held, under the circumstances of this case, that there was not even a *prima facie* case for interference on the part of the District Court, and the parties must, as far as possible, be relegated to the position held by them before these guardianship proceedings were started. *Mussammatt Hayat Khatun v. Mussammatt Sharm Khatun*, 93 P. R. 1914.

KENSINGTON, C.J.

(9) S. 9. See Nos. 5 and 8, *supra*.

(10) Ss. 9, 39—Applicant for guardianship must reside within the jurisdiction of the Court. See *MAHOMEDAN LAW (GUARDIANSHIP)*, No. 2, 12 A.L.J. 392.

(11) S. 10. See No. 8, *supra*.

(12) S. 11. See No. 8, *supra*.

(13) S. 12. See No. 8, *supra*.

(14) S. 13. See No. 8, *supra*.

(15) S. 14. See No. 8, *supra*.

(16) S. 15. See No. 8, *supra*.

(16-a) S. 16. See No. 8, *supra*.

(17) S. 17—Infant son of pre-deceased outcasted son residing with mother in the family of mother's sister—Mother appointing her sister guardian by Will—Grandfather nominating a nephew as guardian, but latter unwilling to admit him in family circle—Infant's preference for aunt—Court's discretion in appointing guardian—Welfare of minor, chief consideration—Home influence, value of—Purdanashin lady if unfit to be guardian of infant of 15 years.

I, who had been outcasted, died in April 1899 leaving an infant son who in 1914 was about 15 years old, a widow who died in 1913 and his father B who was appointed guardian of the person and property of the infant, in July 1899. B being unable owing to caste difficulties to keep the infant in his custody acquiesced in the appointment in December 1905 of the infant's mother as guardian of his person, he himself continuing to be the guardian of the infant's property. The infant and his mother took up residence with the

1.—Imperial Acts—(Continued).

Act VIII of 1890 (Guardians and Wards) —(Continued).

latter's sister F, and before her death she made a Will clearly expressing therein her wish that her sister F should, after her death, be the infant's guardian. On her death B applied for the appointment of a nephew of his as the guardian of the person of the infant, and F also made a similar application. The uncle and not the aunt was appointed by the District Court. On appeal, the High Court ascertained on enquiry from B as well as his nominee that neither of them was willing to take the infant into his family circle, and their idea was to place him in charge of a tutor. The infant himself on being examined by the High Court expressed his preference for the aunt. It was found by the District Judge that the education of the infant in her aunt's house had been satisfactory :

Held, that it was desirable for the welfare of the minor that the aunt and not the uncle should be appointed guardian of the infant's person, and that her being a *purdanashin* lady did not make her unfit to be so appointed, as it was undesirable that the infant should at his age be removed from the influences of home life. But it was ordered and the aunt gave assurance that the grandfather and the uncle should have free access to the infant.

The primary point for consideration in such a case is what, in the circumstances of the case, is for the welfare of the infant.

In appointing a guardian the Court will pay great attention to the wishes of the father or mother of the infant unless such a course would be disadvantageous to the infant, and regard is always paid to the wishes of the minor if he be of years of discretion. *Fulkumari Bibee v. Budh Singh Dhudhuria*, 18 C.W.N. 1193.

MOOKERJEE and BEACHCROFT, JJ.

(18) S. 17—*Minor—Guardian appointed over person and property of minor—Alienation of minor's share of property on obtaining permission—Suit by minor after attaining 21 years to set aside sale and for partition—Guardian not party to suit—No relief to be given against alienee—Minor approving Court's order for one purpose and contesting it for another purpose—Whether can be allowed to do so.*

Plaintiff on attaining 21 years of age filed a suit asking the Court to set aside the sales of his share in the ancestral property by his cousin H, who was appointed by Court guardian of his shares and also for partition and possession of his share. He impleaded the alienees as parties to the suit but he did not join the guardian as a party. Plaintiff also alleged that the debts for which the property was alienated were really the private debts of H, who got himself appointed as guardian by Court and obtained permission to alienate them by falsely representing to the Court that these debts were binding on the plaintiff.

1.—Imperial Acts—(Continued).

Act VIII of 1890 (Guardians and Wards) —(Continued).

Held, that the Court could not permit the plaintiff to let H, his guardian who is said to have defrauded him, go scot-free, making apparently no attempt whatever to make him account for the consideration received, and secure from a perfectly innocent person property which he has lawfully purchased.

Held, also, that the plaintiff, who has actually approved the Court's order of appointment so far as it appointed H, guardian of his person and is actually relying on it as extending his minority up to 21 years in order to meet the plea of limitation, cannot be allowed to rely on the order to support one part of his case and to treat it as a nullity to support another part.

It cannot be assumed that the Court, when making the order appointing H, guardian, had not in view facts which would constitute it a legal one. *Valji Jasaraj v. Tayabji Mulla Mahomed Bhoj*, 8 S.L.R. 44.

CROUCH, A.J.C.

(19) S. 19. See No. 5, *supra*.

(20) S. 19 (c)—*Minor female—Assumption by Court of Wards of superintendence of her property—Application for guardianship of her person—Husband not competent to make such application—Court of Wards—Only person authorised to do so.*

Where the Court of Wards assumed superintendence of the property of a minor female who was under the *de facto* guardianship of her uncle, *Held* that the husband is not competent to make an application for guardianship of the person of the minor female, and that, in view of the express prohibition contained in S. 19 (c), Guardians and Wards Act, the Court of Wards is the only person authorised to move in the matter. *Haji Mahomed Baradio*, 7 S.L.R. 199 24 Ind. Cas. 944.

HAYWARD, J.C.

(21) S. 24—*Personal guardian appointed for minor girl—Court assuming responsibility for minor's marriage.*

It is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility for the marriage of a minor, where a guardian for the person of the minor has already been appointed under the Act. *Lal Singh v. Sham Lal*, 98 P.E. 1914.

KENSINGTON, C.J.

Reference :—22 B. 509, R.

(22) Ss. 24, 25, 26. 49 (1), 47 (1)—*Guardian and Ward—Application for sanction to marry a Mahomedan ward—Guardian for marriage—Guardian of person—Mahomedan law—Who can act as guardian for marriage—Guardian, if found to provide for suitable marriage—Mahomedan law as to guardianship in marriage, if abrogated—Procedure*

1.—Imperial Acts—(Continued).

Act VIII of 1890 (Guardians and Wards) —(Continued).

to be followed in case of marriage—Court's power to restrain unsuitable marriage—Appeal—Revision.

The guardian for marriage of a Mahomedan infant (a Ward of Court), who may have negotiated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of the person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider the objections and suggestions, if any, and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of ages, inequality of rank and fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable, he will sanction it.

Under the Mahomedan law, the guardian of the person of an infant is not necessarily the guardian for the marriage of the girl. Under that law, none but a Moslem can act as a guardian for marriage of a Mahomedan minor.

The Mahomedan Law does not require that the guardian should provide suitable marriage for his ward, though it gives him the power to contract a marriage for the infant.

The Mahomedan Law on the subject of guardianship in marriage has not been abrogated by implication in S. 24 of the Guardians and Wards Act.

A Ward of Court cannot marry without the consent of the Court. If a proposed marriage is unsuitable, the Court can, as representing the sovereign authority in whom the guardianship of all infants is, in theory, vested, restrain the marriage, even through the guardian or the father has given his consent (a).

An order of the District Judge selecting a suitable husband for a Mahomedan girl on the basis of a report of a Hindu Nazir, is not appealable, as the order does not come under S. 47, cl. (1) of the Guardians and Wards Act, read with S. 43, sub-S. (1) and Ss. 24, 25 and 26, and can be set aside only by the High Court in the exercise of its revisional jurisdiction. *Monijan Bibi v. District Judge of Birbhum*, 20 C.L.J. 91=19 C.W.N. 290.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) (1871) 4 Brown P.C. 355; (1827) 2 Russel 1 (29), R.

(23) S. 25—Guardian and Ward—Mother appointed guardian of person and property of minor son—Minor living with his grand-uncle—Application for custody of minor by certificated guardian—Welfare of minor—Practices—Enquiry—Evidence for the applicant—Opportunity to produce evidence.

* The mother of a minor boy, who was guardian of his person and property appointed by the

1.—Imperial Acts—(Continued).

Act VIII of 1890 (Guardians and Wards) —(Continued).

Court, applied under S. 25 of the Guardians and Wards Act for custody of the minor, aged about 14 years, who was living with his grand-uncle. The District Judge refused the application and directed that the minor should remain with his grand-uncle so long as he wished to remain with him.

Held, that the welfare of the minor was only to be considered in deciding the matter and the application was rightly refused.

Held, also, that the enquiry made was quite sufficient and the Court was not bound to make a protracted enquiry. *Musammatt Juggo Kaur v. Durga Das*, 249 P.L.R. 1914=159 P.W.R. 1914.

SCOTT-SMITH, J.

(24) S. 25. See No. 22, *supra*.

(25) S. 26. See No. 22, *supra*.

(26 & 27) S. 29—Sale by certificated guardian of a minor, valid and enforceable on behalf of a minor—Powers of certificated guardian regulated and defined not by general rule of law relating to minors but by the Guardians and Wards Act. *Babu Ram v. Said-un-nissa*, 11 A.L.J. 788=20 Ind. Cas. 916=35 A. 499=19 C.L.J. 251. See Final Part, 1913, Col. 55.

(28) S. 30—"Any other person," whether include creditor injuriously affected.

The words "any other person affected thereby," in S. 30 of the Guardians and Wards Act do not include a creditor who might be injuriously affected by a transfer of property. *Lalji Dass v. Chet Ram*, 104 P.L.R. 1914=75 P.W.R. 1914=22 Ind. Cas. 829=75 P.R. 1914.

RATTIGAN and SCOTT-SMITH, JJ.

(29) S. 34. See No. 6, *supra*.

(30) S. 39—Guardian not validly appointed—Trespasser cannot be removed under the section.

S. 39 of the Guardians and Wards Act can only refer to the removal of guardians validly appointed, and not to guardians who have not been so appointed. Therefore, if A appoints a guardian by will for the property of the minor son of a complete stranger, B, and that guardian takes possession of the minor's property, a petition under S. 39 of the Guardians and Wards Act cannot be filed to remove this guardian, as he is a mere trespasser. *Kanakasabai Mudalliar v. Ponnusami Mudalliar*, 21 Ind. Cas. 848.

SADASIVA AIYAR and SPENCER, JJ.

(31) S. 39. See No. 10, *supra*.

(32) Ss. 39, 42, 47—Guardian, removal of—Successor to guardian removed, appointment of—Appeal.

An appeal was preferred to the High Court against an order passed by the District Judge

1.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards)**
—(Continued).

removing the appellant from the guardianship of a minor, and appointing the *nabir* of the Court to be guardian. Upon an objection being taken as to the competency of the appeal.

Held, that an appeal lay inasmuch as the question contested in the appeal was whether the guardian was properly removed; and there being no materials on the record for any opinion as to whether there was a case for the removal of the guardian, the case was sent back to the lower Court so that the matter might be properly dealt with under S. 39 of the Guardians and Wards Act after giving the guardian opportunity to give any explanation he might desire to put forward. **Mahadeb Mondal v. Bidhi Chand Mondal**, 20 C.L.J. 298.

COXE and D. CHATTERJEE, JJ.

- (33) Ss. 39, 47, 48—*Inherent power—Court's power to recall the previous order appointing guardian—Court having no jurisdiction to appoint guardian—Minor attained majority before application—Court's cognizance of matter required for ends of justice—Civ. Pro. Code (1908), Ss. 115, 151—Jurisdiction to determine that Court has no jurisdiction—Appeal—Revision—Courts power in revision to investigate facts—Appellate and revisional jurisdiction.*

A Court has an inherent jurisdiction to recall an order previously made for the appointment of guardian of a minor, on the ground that the minor attained majority before the appointment was made. S. 48 of the Guardians and Wards Act is not a bar to such a proceeding. Such an order (*viz.*, recalling the order previously made for the appointment of guardian) is not appealable, and cl. (g) of S. 47 of the said Act is not applicable.

A Court which exercises powers under the Guardians and Wards Act has inherent jurisdiction to deal with matters brought before it, of which cognizance may be required in the interests of justice.

S. 151 of the Code of Civil Procedure does not formulate a new doctrine. It merely furnishes legislative recognition of a well-established principle, which is applicable quite as much to Courts called upon to deal with matters under the Guardians and Wards Act as to ordinary Civil Courts.

When the jurisdiction of a Court is invoked in respect of a particular matter and such jurisdiction is challenged, it is the duty of the Court to determine the essential facts of the actual existence of which alone the Court is competent to assume jurisdiction; in other words, the Court has jurisdiction to determine that it has no jurisdiction to deal with the matter brought before it.

If, even after the order has been made on the application, the Court is apprised that it has

—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards)**
—(Continued).

been made to assume jurisdiction in a matter over which it has in reality no jurisdiction, the Court has inherent power to investigate the matter and to recall the previous order if it transpires that it has been made without jurisdiction.

It is competent to the Court to investigate the facts in revision, if the Court is satisfied that such a step is needed in the ends of justice (a).

A Court in the exercise of its appellate jurisdiction investigates facts, and, if necessary, substitutes its own appreciation of the evidence for that of the primary Court. But when the Court as a Court of revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess, or declined a jurisdiction which it did possess, or has in the exercise of its jurisdiction acted illegally or with material irregularity.

A Court of revision may look into the evidence to determine whether the subordinate Court has acted illegally or irregularly in the exercise of its jurisdiction. **Rathmoni Dasl v. Ganada Suddari Dasl**, 20 C.L.J. 218—19 C.W.N. 84.

MOOKERJEE and BEACHCROFT, JJ

Reference :—(a) 1 C.W.N. 67, R.

- (34) S. 42. See No. 32, *supra*.

- (35) Ss. 42, 47, 7—*Order under S. 42 appointing guardian—Whether appeal lies against—Nature of order under S. 42—Appeal allowed under S. 47.*

An appeal lies against an order under S. 42 of the Guardians and Wards Act appointing the Court of Wards as the guardian of the property of certain minors.

The order of appointment expressed to be made under S. 42 is made in exercise of the power given under S. 7. S. 47 allows an appeal against an order under S. 7, appointing or declaring a guardian. **Ghulam Hyder Ghousbux v. Abdul Fateh Mahomed Khan**, 7 S.L.R. 90 = 23 Ind. Cas. 776.

PRATT, J.C., and KEMP, A.J.C.

- (36) S. 43. See No. 22, *supra*.

- (37) S. 43 (4)—*Civ. Pro. Code, 1908, O. XXXIX, r. 2 (2)—Guardian and ward—Guardian of person of female ward—Power of Court to demand security from guardian—Appeal against order demanding security—Death of person at whose instance order was passed—Abatement of order.*

Held, that the District Court was competent to require the guardian of a female infant to furnish security to prevent his giving the infant in marriage to any person without the consent of the proper male relation of the girl.

1.—Imperial Acts—(Continued).**Act VIII of 1890 (Guardians and Wards)
—(Concluded).**

On the application of a person the guardian was ordered to furnish security. The order was appealed against but before judgment was passed on appeal, the person on whose application security was demanded, who was respondent on appeal, died.

Held, that the order did not abate on account of the death of the respondent. **Ganda Mal v. Ramji Das**, 20 P.L.R. 1914 = 12 P.W.R. 1914 = 23 Ind. Cas. 351.

REID, C.J.

(38) S. 47. See Nos. 6, 22, 32, 33 and 35, *supra*.

(39) S. 48. See No. 33, *supra*.

(40) S. 52. See No. 5, *supra*.

Act IX of 1890 (Railways).

(1) S. 7—*City of Bombay Municipal Act (Bombay Act III of 1888)*, Ss. 289, 293—*Public streets—Vesting of Public streets in Municipality—Laying of Railway lines under statutory authority over such streets—Land need not be acquired—Land Acquisition Act (I of 1894)*.

Where a Railway Company wishes to lay a line of railway upon and across a street, it is neither necessary nor appropriate to proceed under the Land Acquisition Act for the acquisition of the land. If the Government, under S. 7 of the Railways Act, were to direct the Collector to take order for the acquisition of land, he would make his award and take possession, and the land would then vest absolutely in Government for the Railway Company free from all incumbrances. The land would then cease to be portion of the street and the Railway Company would be enabled to exercise the power given to it of constructing the railway upon and across the street.

The effect of S. 289 of the Bombay City Municipal Act, 1888, vesting all public streets, and the pavements, stones and other materials in the corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control and maintenance of the street as a highway for public purposes.

The Great Indian Peninsula Railway in constructing the Harbour Branch Railway laid down the lines of rails in a level crossing across a public street known as the Sewri Koliwada Road, vested in the Municipal Corporation of Bombay under S. 289 of the Bombay City Municipal Act. The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under S. 293 of the Act or acquiring the land required for the level crossing under the Land Acquisition Act, 1894. The defendant company pleaded that they had authority to

1.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Continued).**

make and maintain the lines of railway under S. 7 of the Railways Act. The lower Court granted the declaration sought, on the ground that the defendant company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act, but until it had done the one or the other, it was a trespasser on Municipal land. The railway company having appealed:

Held, dismissing the suit, that the statutory authority under S. 7 of the Railways Act being established, the application of S. 293 of the City of Bombay Municipal Act was excluded by the words "notwithstanding anything in any other enactment for the time being in force." **The Great Indian Peninsula Railway v. The Municipal Corporation of Bombay**, 16 Bom. L.R. 104=33 B. 565=23 Ind. Cas. 765.

SCOTT, C. J., and BATCHELOR, J.

(2) Ss. 41, 42, 122—*Reservation of separate accommodation for different communities not forbidden—Question of undue or unreasonable preference—Jurisdiction of Court to decide the question—Indian entering compartment reserved for Europeans—Trespass—Liability of Railway Company for damages for illegal removal of the Indian*. **Mathradas Ram Chand v. The Secretary of State for India in Council**, 7 S. L. R. 42=21 Ind. Cas. 499. See Final Part, 1913, Col. 58.

(3) S. 42. See No. 2, *supra*.

(4) S. 47—"Day," definition of—*Coaching Tariff Rules, North Western Railway—Notice*.

The provision in r. 74 that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day, is neither unreasonable nor *ultra vires*.

The fact that the day of expiry of the return ticket is specified on the ticket is enough notice of the Regulations of the Company. **The Secretary of State v. Sahjram Asanmal**, 8 S.L.R. 14=25 Ind. Cas. 801.

HAYWARD, J.C., and BOYD, A.J.C.

(5) Ss. 72, 76—*Railway Company—Consignment of goods—Risk note, Form H—Non-delivery—Contents of packages, loss of—Complete packages, meaning of—Damage, suit for—Company, whether responsible for loss—Burden of proof*.

Certain goods were consigned to the defendant Railway Company for delivery to the plaintiff, under a Risk note known as Form H, made under the provisions of S. 72, Railways Act. By that Risk note the owner undertook "to hold the Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to all or any consignment for any cause whatsoever except for loss of a complete consignment or of one or more complete packages

1.—Imperial Acts—(Continued).

Act IX of 1890 (Railways).—(Continued).

forming part of a consignment, due either to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants, transport agents or carriages." Upon a suit being brought by the plaintiff against the Company for damages for loss of the contents of some packages.

Held, that the onus lay upon the plaintiff to prove that the loss was not caused by any of the risks undertaken by the owner under the Risk-note (a).

Held further, that the loss of the contents of the packages could not be said to be loss of "complete packages" within the meaning of the terms of the Risk-note. *East Indian Railway Company v. Nilkanta Roy*, 19 C.L.J. 142=22 Ind. Cas. 679=41 C. 576=19 O.W.N. 95.

FLETCHER and CHATTERJEA, JJ.

Reference:—(a) 16 C.W.N. 766, F.

(6) S. 76. See No. 5, *supra*.

(7) S. 77.—*Loss of goods consigned—Suit against East Indian Railway—Service of notice on Agent—Notice served on Goods Superintendent, if sufficient—Promise by Goods Superintendent to pay certain liquidated sum to plaintiff, if binding on Railway Company.*

The plaintiff brought this suit against the East Indian Railway Company to recover damages for not having delivered certain goods that had been consigned to the plaintiff, after having served a notice on the Goods Superintendent. There was no evidence to show that the notice ever reached the Agent of the Company.

Held, that the plaintiff was bound to serve the notice as provided by S. 77, Railways Act, upon the Agent of the Railway Company, and that the notice served by the plaintiff was bad and, therefore, the suit was not maintainable (a).

A promise made by the Goods Superintendent to pay a liquidated sum to the plaintiff as the value of the lost goods, without the knowledge of the Agent of the Railway Company, is not binding upon the Company. *Radha Kissen v. East Indian Railway Company*, 21 Ind. Cas. 970=19 O.W.N. 62.

FLETCHER and CHATTERJEA, JJ.

References:—(a) 18 Ind. Cas. 509=16 O.W.N. 356=15 C.L.J. 211; 19 Ind. Cas. 678=17 C.W.N. 1184=18 C.L.J. 147, F.; 8 Ind. Cas. 479=18 O.W.N. 24=4 M.L.T. 427, D.

(8) Ss. 77, 140.—*Railway Company—Goods, loss of—Notice of claim to compensation—District Traffic Superintendent, notice on, whether sufficient.*

A notice of claim for loss of goods consigned through a Railway Company, if served on the District Traffic Superintendent and not on the Agent in India of the Company, is not a good notice within the meaning of S. 140, Railways

1.—Imperial Acts—(Continued).

Act IX of 1890 (Railways).—(Continued).

Act. East Indian Railway Company v. Ramgati Ram, 19 C.L.J. 180=23 Ind. Cas. 142.

STEPHEN and MULLICK, JJ.

References:—18 C. L. J. 147; 17 C.W.N. 1184, F.; 18 C.W.N. 24, D.

(9) S. 80.—*Consignments in bags—Bags found loose but not torn—Refusal of Railway to re-weigh goods and have shortage noted in their books—Damages—Consignment to be carried over two Railways—Liability for non-delivery.*

A handed a consignment of chillies to the North-Western Railway to be carried to Agra Fort (G.I.P. Ry.) for B. When B went to take delivery of the chillies at Agra Fort, he found the bags loose. He requested the station staff to re-weigh and allow him to make a note of the shortage, if any. The station staff refused to re-weigh them and allow B to make entries in their books, which, according to them, were incorrect.

Ultimately, the Railway authorities of the Great Indian Peninsular Railway, sold the chillies, and, after deducting their charges, offered the balance of the sale-proceeds to B who declined to accept it. B, sued the Great Indian Peninsular Railway for damages:

Held, (1) that the Great Indian Peninsular Railway were not liable to be sued for non-delivery of the goods;

(2) that the only suit that could have been brought was one against the North-Western Railway for non-delivery of goods;

(3) that B, was not entitled to make any entries in the Company's books;

(4) that the Great Indian Peninsular Railway Company, as Agents of North-Western Railway, were entitled to refuse to deliver goods on the condition insisted by B;

(5) that, as B failed to pay the freight and take delivery, the Railway Company were entitled after due notice to sell the goods. *Koka Mal v. G.I.P. Railway*, 21 Ind. Cas. 428.

CHAMIER and RAFIQUE, JJ.

(10) S. 80.—*Parties to suit for compensation—Railway accepting goods for delivery—Loss on another Railway—Cause of action—Necessary facts not mentioned in the plaint—Replication filed—Code of Civil Procedure (1903), O. VII, rr. 5 and 11.*

The plaintiffs sued the B. B. & C. I. Railway Company, at Agra for compensation for the shortage of goods consigned to them from a station on the B. N. W. Railway to Agra Fort. The plaint however did not mention that the Agra Fort Railway station was under the administration of B. B. & C. I. Railway Company, but it contained an allegation to the effect that the above Company, was bound to deliver the full quantity of goods consigned to the plaintiffs. The defendant Company pleaded that the

1.—Imperial Acts—(Continued).**Act IX of 1890 (Railways)—(Concluded).**

plaint did not disclose a cause of action against it, inasmuch as it did not contain an explicit averment that the loss, injury or destruction of a portion of the consignment had occurred while it was in transit on the defendant's railway, it further pleaded that, the B. N. W. Railway Company not having been impleaded, the suit was bad in law. The plaintiffs, thereupon, filed a replication alleging that the defendant Company had accepted liability for loss and the conduct of the Company showed that the loss, injury or destruction had taken place on their line.

Held that the plaint and the replication taken together disclosed a cause of action against the defendant Company, and the necessary issue had been fairly raised and ought to have been tried out and the plaint ought not to have been rejected.

Held, further that, under the provisions of S. 80 of the Railways Act, the plaintiff had the option of impleading either the Railway Administration to which the goods were delivered by the consignor or the Railway Administration on whose railway the loss, injury or destruction of a portion of the consignment had occurred. **Makhan Lal v. The Bombay, Baroda and Central India Railway Company**, 12 A. L. J. 339.

PIGOT, J.

- (11) S. 80—*Injury to through-booked goods—Goods, transmission of, by two Companies—Goods, non-delivery of—Compensation, suit for—Delivering Company, whether liable.*

Certain goods were consigned, under a through-booking, to a Railway Company for delivery at a station on the line of another Company. Upon a suit being brought for damages for loss of the goods against the booking Company and the delivering Company:

Held, that the delivering Company was not liable under S. 80, Railways Act, for any injury to such goods, unless it was proved that the loss, injury, destruction or deterioration occurred on the line of the Company. **East Indian Railway Company v. Nope Chand Magni Ram**, 19 C.L.J. 434—23 Ind. Cas. 22.

FLETCHER and CHATTERJEE, JJ.

References:—3 Bom. L. R. 260; 3 M. 240, F.

- (12) S. 80—*Open delivery, right to—Consignment not tampered with—Refusal by the Railway Co. to open the goods and examine them before giving delivery at destination—Railway Co. not bound to give that class of delivery—Act not wrongful—Not liable for damages.* **Jwala Prasad & Co. v. Great Indian Peninsula Railway**, 11 A.L.J. 772—21 Ind. Cas. 448. See Final Part, 1913, Col. 60.

(13) S. 123. See No. 2, *supra*.

(14) S. 140. See No. 8, *supra*.

1.—Imperial Acts—(Continued).**Act IV of 1893 (Partition).**

- Ss. 8, 2—*Co-sharer applying for sale under S. 2—No right to buy up share of others—Right of other co-sharers to buy—Property, part of which must be left joint—Whether susceptible of partition.*

A property is not susceptible of partition by metes and bounds, if the part which is a passage giving access to the dwelling rooms allotted to the co-sharers has necessarily to be left joint.

Under the Partition Act, a co-sharer who applies for a sale has no right to buy up the share or shares of the remaining co-sharer or co-sharers. The right to buy out is vested in those other sharers under S. 3, and is exercised by them against the sharer who, by his application under S. 2, has shown his willingness to have his share converted into money. **Jhamandas Lillaram v. Mulchand Pahlumal**, 7 S.L.R. 117—24 Ind. Cas. 273.

PRATT, J.C., and KEMP, A.J.C.

Act I of 1894 (Land Acquisition).

- (1) *Acquisition—Instances as to the rate of lands sold in the vicinity of land acquired under Act I of 1894—Costs of Pleadings.* **Kanwar Ramzur Singh v. The Secretary of State**, 174 P.W.R. 1913—309 P.L.R. 1913—21 Ind. Cas. 270. See Final Part, 1913, Col. 61.

- (2) *Vesting of public streets in Municipality—Laying of Railway lines under statutory authority over such streets—Land need not be acquired.* See ACT IX OF 1890 (RAILWAYS), No. 1, 16 Bom. L.R. 104.

- (3) Ss. 9, 12 and 18—*Award made by Collector, without being communicated to applicant, effect of—Limitation for filing objection—High Court's revision.* **Hari Das Pal v. The Municipal Board, Lucknow**, 16 O.C. 374—22 Ind. Cas. 652. See Final Part, 1913, Col. 62.

- (4) Ss. 9, 25 (2)—*Objection under S. 9 not taken—Sufficient explanation.*

Where the Government notified the plaintiff's land to be acquired under the Land Acquisition Act and the plaintiff failed to put in objections under S. 9 or to show any sufficient reason for not filing such objections, *held*, that the Judge, on the case coming before him, ought not to have interfered with the award of the Collector.

Held, also that the fact that there were certain private negotiations for sale of the land between the Government and the plaintiff in which the Government had offered more than what the Collector allowed was not sufficient reason, within the meaning of S. 25 (2), for failing to make a claim under S. 9. **Narain Dutt v. Superintendent of Dehra Dun**, 12 A.L.J. 1819.

TUDBALL and RAFIQ, JJ.

- (5) Ss. 11, 19 (1) (d) and 23—*Award by Collector—Contested in Civil Court—Burden of proof—Market value—Basis of valuation—Value of neighbouring lands.*

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

Ordinarily, where a claimant contests before a Civil Court the amount of compensation award under the Land Acquisition Act by a Collector, the burden is upon him to show that the amount so awarded is calculated on a wrong basis; but where such award was made without taking any evidence, that burden becomes very light; the mere *ipse dixit* of a Collector has very little weight and is not *prima facie* evidence of the correctness of the award and the Collector has to justify his award under S. 19 (1) (d) of the Act (a).

* Speculation as to the effect which any suggested development may produce on prices must be excluded, except to the extent to which it is shown that such speculations had actually entered into the market price of the land to be acquired at the date of declaration.

Where, therefore, on the date of such declaration, there is a scheme of development of the town and that was known generally, enhancement in the value of the market rates consequent on such development must be taken into account, for determining the market-value of the land to be acquired (b).

Where there are two *data* available for ascertaining the market-value of the land sought to be acquired, one based on the market value of the neighbouring lands and the other on the classification of lands into agricultural and building sites, it is safer to adopt the former valuation in determining the market-value of the land sought to be acquired and not the latter, as it is an uncertain basis. *Marwadi Padmaji Mischand v. The Deputy Collector of Adoni*, 27 M.L.J. 106=24 Ind. Cas. 141.

TYABJI and SPENCER, JJ.

References:—(a) 11 C.W.N. 875, F. (b) 26 B. 1 (23)=28 I.A. 121, F.

(6) S. 12. See No. 3, *supra*.

(7) S. 18—*Incompetency of objector to raise a question not referred to a Civil Court—Subsequent settlements more reliable.*

Held, that, in a Land Acquisition case no question for which the objector has not asked the Collector to make a reference under S. 18 of Act I of 1894 to the Civil Court, can be raised.

Held, also, that the records of the recent settlements are more reliable than those of the old ones, as in modern times the former are prepared with more care and accuracy. *Hafiz Anwar Ali v. Ram Sarup*, 8 P.P.W.R. 1914=180 P.L.R. 1914=24 Ind. Cas. 903.

JOHNSTONE and CHEVIS, JJ.

(8) S. 18—*Pleader's fees, assessment of—Civil Digest (Oudh), para. 272, r. 9.*

Held, that, for the purpose of taxation of pleader's fees, proceedings taken on reference under S. 18 of the Land Acquisition Act should not be treated as a suit within the meaning of

1.—Imperial Acts—(Continued).

Act I of 1894 (Land Acquisition)—(Continued).

the rules contained in para. 272 of the Oudh Civil Digest. Pleader's fees in such cases should be assessed under r. 9, of the latter paragraph. *Sajjad Ali Khan (Nawab) v. Secretary of State for India in Council*, 17 O. C. 284.

LINDSAY and STUART, J. CS.

(9) S. 18—*Money paid out to one party before reference heard—Power of Court to entertain reference—Inherent power to recover the money.* *Jogesh Chandra Rai v. Yakub Ali*, 17 C. W. N. 1057=21 Ind. Cas. 111. See Final Part, 1910, Col. 63.

(10) S. 18. See No. 3, *supra*.

(11) Ss. 18, 19—*Procedure prescribed by Ss. 18 and 19 must be strictly observed—Whether time can be extended on ground of minority.*

In this case the award of the Collector was made on 7-6-1912 and a vague petition on unstamped paper was presented to the Collector by all the respondents on 11-7-1912. This petition was returned as unstamped. On 23-7-1912, H, one of the respondents, acting for himself, presented a written objection to the award, but in it he merely asked the Collector to review his award and grant him further compensation. The Collector rejected this application as time-barred. On 3-8-1912, H, filed another petition before the Collector which was also rejected as time-barred. On 14-8-1912, G, another respondent, on his own behalf, applied to the Collector practically for a review of his award. This application was also rejected as time-barred. The other respondents M and A, who were minors, made no application to the Collector after the rejection of the unstamped petition of 11-7-1912, but their mother was acting as their guardian.

The Collector, however, after rejecting the various petitions made to him, directed that the applications be forwarded to the Divisional Judge "to be put up along with the other cases before him." The Divisional Judge apparently regarded this order of the Collector as a reference under Ss. 18 and 19 of the Act and acted on it.

Held that the Divisional Judge had no jurisdiction to deal with the case of the respondents; because (1) there was no application by any of the respondents asking the Collector to take action under S. 18 of the Act; (2) these petitions were time-barred; (3) the Collector rejected the petitions and did not refer them under S. 19 to the Divisional Judge; and (4) so far as minor respondents M and A were concerned, there was no application at all before the Collector after their petition of 11-7-1912 was rejected (a).

Held, also that the procedure prescribed by Ss. 18 and 19 of the Act was laid down in very clear terms and must be strictly observed.

Held further that, under S. 18 of the Act, the extension of time was allowable on the ground

1.—Imperial Acts—(Continued).

Act I of 1895 (Land Acquisition)—(Continued).

of minority. *The Secretary of State v. Hakim*, 64 P.R. 1914=244 P.L.R. 1914=158 P.W.R. 1914.

RATTIGAN and BEADON, JJ.

Reference:—(a) 90 B. 275 (285), R.

(12) Ss. 18, 19, 54—*Application to Collector time-barred—Order of Divisional Court rejecting reference on that ground—Appeal to Chief Court whether lies—Signature to award when sufficient—Collector accepting application after time—Effect upon Government—Waiver—Chief Court whether can interfere in revision.*

An award purporting to be made under this Act was announced by the Collector on 18-8-1910. On 6-5-1910, i.e., more than 6 weeks from the date of the award, the application was made to the Collector requiring that the matter be referred to the Court, under S. 19 of the Act. The reference was made accordingly, but the Divisional Judge found that the claimant's application was time-barred and dismissed it.

Held, on appeal to the Chief Court, that no appeal lay under S. 54 of the Act, as the Court below made no award at all, but merely dismissed the application as time-barred (a).

Quære:—Whether the Chief Court can deal with the case on the revision side.

In this case the award did not bear the full official signature of the officer making it, but was signed 'A. D. Land Acquisition officer'. *Held*, this signature was sufficient for the purposes of the Act (b).

The fact that the Collector overlooked that the application before him was time-barred would not mean that he 'waived' the question of limitation and cannot bind the Government, and it is open to the Court to hold that the application to the Collector could not form the basis of a reference under Ss. 18 and 19, inasmuch as it was barred by time (c). *Ghulam Mohy-ud-din v. Secretary of State for India*, 48 P.R. 1914=208 P.L.R. 1914=149 P.W.R. 1914=24 Ind. Cas. 379.

RATTIGAN and SCOTT-SMITH, JJ.

References:—(a) 39 C. 393, F. (b) 123 P.R. 1909, R. (c) 30 B. 275; C.A. No. 276 of 1913, F.

(13) Ss. 18, 30—*Apportionment of compensation—Reference on zamindar's application—Tenant's right to dispute apportionment.*

Where definite apportionment was made by the Collector between the zamindar and his tenant, and the matter was referred to the Court on the application of the zamindar and not of the tenant:

Held, that the tenant could not dispute the Collector's award before Court. *Maharall walaad Mittha v. Dewan Mushtak Singh walaad Diwan Pararam*, 8 S.L.R. 18=25 Ind. Cas. 803.

HAYWARD, J.C., and BOYD, A.J.C.

(14) S. 19. See Nos. 5, 11 and 12, *supra*.

1.—Imperial Acts—(Continued).

Act I of 1895 (Land Acquisition)—(Continued).

(15) S. 23—*Compulsory acquisition—Compensation—Hypothetical scheme of development.*

In assessing the amount of compensation for the compulsory acquisition of open sites of land, hypothetical building schemes of development are admissible in evidence and are a proper method of valuation. *Merwanji Maanherji Cama v. The Government of Bombay*, 16 Bom. L.R. 55 (P.C.).

LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW, SIR JOHN EDGE, and MR. AMIR ALI.

(16) S. 23—*Noabad Mehal property, acquisition of—Apportionment of compensation between Government and claimant—Basis of calculation of value of Government interest—Chance of enhancement of rent, value of.*

A Noabad Mehal held under Government implies a hereditary and transferable title in perpetuity, subject to payment of rent for all lands under cultivation.

Where certain properties included in a Noabad Mehal held under the Government were acquired under the Land Acquisition Act:

Held—that the mere fact that the rent was enhanceable did not justify the Court awarding half the compensation money to Government, as Government would not in ordinary course increase the assessment unless the assets of the property also increased.

That the interest of the Government ought to be measured by capitalizing the present rent at 30 years' purchase. *Jogesh Chandra Ray v. The Secretary of State for India in Council*, 18 C.W.N. 531=24 Ind. Cas. 65.

MOOKERJEE and BEACHCROFT, JJ.

(17) S. 23—*Compensation—Market value of built land—Principles of assessment of value—Recognised mode—Taking average of prices at recent sales.*

Per Maclean, C.J.—In order to ascertain the market-value of property at a certain time, it is an *indicium* and a valuable *indicium* as to the value of the property to ascertain what prices have been recently obtained for lands more or less similarly situated in the same neighbourhood. But the circumstances in each case under which the purchases are made must be borne in mind. If the plot be a small plot, a higher price is probably obtained than if it were a large one. The precise situation of the land in each case is often a matter of very considerable importance as either enhancing or lowering the price. Again, a particular person owning an adjoining property or who has some particular object in desiring to acquire some special piece of land would be inclined to pay a higher price. A smaller price would be given for an undivided share with its possible burden of litigation to obtain a partition than for an entire property.

1.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

In the case of *basti* land, in a city like Calcutta, the principle of assessing the amount of compensation to be allowed at so many years' purchase of the rental is not unsound. If twenty years' purchase be arrived at, after considering the future possibilities of the land for building purposes, the situation of the land, the fact that it has been opened out by new roads, that it is near an open space, and matters of that class, it cannot be said that such a principle of valuation was *per se* wrong or contrary to law.

Per Banerjee, J.—The market-value of land to be acquired should be ascertained, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner could dispose of it (a).

There are three recognised modes of determining the market-value; *first*, by ascertaining the price or prices, at which the whole or any part or parts of the land acquired has or have been sold and purchased in recent years; *second* by ascertaining the net annual income of the property and by taking a certain number of years' purchase of that income depending upon the nature of that property; and *third*, by ascertaining the price at which the lands in the vicinity have been sold and purchased, and making all due allowance for situation and the circumstances attending each particular sale (b).

In going by averages, that is, in adopting the third mode mentioned above, the exceptional instances should always be excluded from the computation. The only instances to be taken into consideration are those that are as similar as possible to the one under consideration, similar not only in point of site but also as regards all other intended circumstances. **Amrita Lal Basak v. The Secretary of State for India in Council**, 24 Ind. Cas. 78.

MACLEAN, C.J. and G. D. BANERJEE, J.

References :—(a) 2 C. 103; 15 B. 279, *Rel.*
(b) 15 B. 279, *Rel.*

(18) S. 23—*Land acquisition—Owner deprived of facilities for irrigation by wrongful act of Municipal Corporation—Corporation itself subsequently acquiring land—Compensation.*

Where, by the wrongful act of a Municipal Corporation, the owner of a piece of land classed as 'wet' was deprived of the facilities (in the nature of an easement right) which existed for irrigating such land, and the Municipal Corporation acquired the land itself subsequently for public purposes, in estimating the compensation to be paid to the owner, the calculation must be made not merely on the market value of the land, but also on the amount of damages payable to the owner for the deprivation of water-rights of his land. **Gopalachariar v. The Deputy Collector of Madras**, 22 Ind. Cas. 306.

WHITE, C.J. and SANKARAN NAIK, J.

1.—Imperial Acts—(Continued).**Act I of 1894 (Land Acquisition)—(Continued).**

(19) S. 23—*Calcutta municipal Act (III B.C. of 1899), S. 557, cls. (c) and (d)—Bustee land, acquisition of—Mode of valuation—Future use of land if can be considered in ascertaining value—Evidence as to under-tenants and rents paid by them, if relevant to determine market-value—Evidence as to sales of lands other than bustee lands in the neighbourhood, if admissible—Cl. (c), S. 557, meaning and effect of—Cl. (d), presumption under, nature of.*

A piece of bustee land was acquired at the expense of the Corporation of Calcutta, and the Special Land Acquisition Judge on a reference under S. 18 of the Land Acquisition Act, refused to admit evidence relating to the under-tenants and the rents paid by them and disallowed questions put to a value with regard to sales of other lands in the neighbourhood which were not bustee lands :

Held—That cl. (c) of S. 557 of the Calcutta Municipal Act, which amends the Land Acquisition Act, means that, when a land is compulsorily acquired, any use to which the land may be put in future, should not be taken into consideration in determining its value, but the valuation shall be determined according to the market-value then existing of the land or building in the position that the matters then were. That this clause precludes evidence being given of the purposes to which bustee lands can be put in future, and the Land Acquisition Judge rightly refused to admit evidence relating to the under-tenants and the rents paid by them, such matter being not relevant for the purpose of ascertaining the market-value as defined by sub-S. (c) of S. 557.

That the Judge was right in disallowing the questions put to the witness with regard to sales of other lands in the neighbourhood which were not bustee lands, although in ordinary cases under S. 23 of the Land Acquisition Act such evidence would have been admissible.

That the presumption under cl. (d) of S. 557 is a rebuttable presumption, and it is only until the contrary is shown that the Court is entitled to presume that twenty-five times the annual value of the property as entered in the Assessment-book is the value of the property within the meaning of sub S. (c). **Mainendra Chandra Nandi v. The Secretary of State for India**, 18 C. W. N. 884=28 Ind. Cas. 412=41 C. 987.

FLETCHER and RICHARDSON, JJ.

(20) S. 23—*Compensation—Market value—Price paid by owner—Evidence.*

The mere fact that the owner of the property, acquired under the Land Acquisition Act, had obtained it cheap would not entitle the Government to get it under the fair market-value; but the price which was paid by the owner very shortly before the publication of notification would be a valuable piece of evidence to help

I.—Imperial Acts—(Continued).**Act I of 1895 (Land Acquisition)—(Concluded).**

the Court in ascertaining the true market-value of the property. *Qamar Ali v. The Collector of Bareilly*, 28 Ind. Cas. 542.

RICHARDS, C.J. and BANERJI, J.

(21) S. 23—*Compensation—Adaptability for quarrying—Value to be determined.* *Daya Khushal v. The Assistant Collector, Surat*, 15 Bom. L. R. 845=21 Ind. Cas. 330=38 B. 37. See Final Part, 1913, Col. 64.

(22) S. 23. See No. 5, *supra*.

(23) S. 23 (4)—*Land acquisition—Compensation—Back land—Injurious affecting—Acquisition for certain purpose, if can be abandoned.* *Guru Das Kundu Chowdhry v. The Secretary of State for India in Council*, 18 C.L.J. 244=22 Ind. Cas. 354. See Final Part, 1913, Col. 64.

(24) S. 25 (3). See No. 4, *supra*.

(25) S. 30. See No. 13, *supra*.

(26) S. 31 (2)—*Applicability to shebait—Position of shebait—Power to withdraw compensation money.* *Ramprasanna Nandi Chowdhuri v. Secretary of State for India*, 40 C. 895=22 Ind. Cas. 272. See Final Part, 1913, Col. 67.

(27) S. 49. See No. 30, *infra*.

(28) S. 54—*Civ. Pro. Code, 1908, S. 96 (1)—Bombay Civil Courts Act (XIV of 1869), S. 16—Reference in case where the award does not exceed Rs. 5,000—Decision by Assistant Judge—Appeal to District Court—Second appeal to High Court not allowed.*

A reference, under S. 18 of the Land Acquisition Act, from an award which did not exceed Rs. 5,000 was tried by an Assistant Judge under the provisions of the Bombay Civil Courts Act, 1869. An appeal from the decision of the Assistant Judge was heard by District Judge. On second appeal:

Held, that the appeal to the High Court was not maintainable. *Ahmudbhoy Habibbhoy v. Waman Dhondu*, 16 Bom. L.R. 72=38 B. 387=23 Ind. Cas. 614.

SCOTT, C.J. and BATCHELOR, J.

(29) S. 54. See No. 12, *supra*.

(30) Ss. 54, 49 (1), *proviso 2—Preliminary decision—Award—Appeal—High Court.* *Mulraj Khatay v. The Collector of Poona*, 15 Bom. L. R. 802=21 Ind. Cas. 179. See Final Part, 1913, Col. 66.

Act XV of 1895 (Crown Grants).

Application of, to lease by Government in the ordinary way of business. See REGISTRATION ACT (1908), No. 12, 12 A.L.J. 219.

Act III of 1897 (Epidemic Diseases).

S. 3—*Power of Local Government—Delegation to Collector—Delegation by Collector—Ultra vires—Offence, how proved—Rules under the Act—Meaning of "taking measures."* *Magappa Thevar v. Emperor*, (1913) M.W.N. 920=14 M.L.T. 448=14 Cr. L.J. 670=21 Ind. Cas. 666. See Final Part, 1913, Col. 69.

I.—Imperial Acts—(Continued).**Act X of 1897 (General Clauses).**

(1) S. 10. See LIMITATION ACT (1908), No. 5, 26 M.L.J. 23.

(2) S. 10—*Applicability.* See LIMITATION ACT (1908), No. 1, 17 O.C. 254.

(3) S. 10—*Suit under S. 77, Registration Act, 1908—Court closed on the last day of period of limitation—Institution on re-opening day—Suit within time.* See REGISTRATION ACT (1908), No. 20, 15 M.L.T. 238.

(4) S. 24—*Notification issued by Government exempting agricultural leases from registration—Registration Act (1908), subsequently passed—Effect of.*

Where the Government in 1885 issued a notification exempting agricultural leases from registration and did not modify or cancel the notification after the passing of the Registration Act of 1908, *held* that the notification was still in force, in view of the General Clauses Act, and an unregistered agricultural lease was admissible in evidence. *Hazari Singh v. Tirbeni Singh*, 12 A.L.J. 792.

RAFIQ and PIGGOTT, JJ.

(5) S. 27. See HIGH COURT RULES (BOMBAY), No. 1, 16 Bom. L.R. 204.

Act V of 1898.

See CRIM. PRO. CODE.

Act II of 1899.

See STAMP ACT.

Act IX of 1899 (Arbitration).

(1) Ss. 13, 14—*Legal misconduct of arbitrator—Setting aside award—Court's power to remit award for reconsideration.* See AWARD, No. 7, 41 C. 313.

(2) S. 14. See No. 1, *supra*.

(3) S. 19—*Agreement to refer to arbitration—Suit filed by Receiver—Application to stay suit and to refer to arbitration—Insolvency proceedings, sufficient ground to refuse to stay suit—Provincial Insolvency Act, 1907, S. 16 (2).*

J. entered into a written agreement for sale of certain sugar as guarantee broker of F. & Co. The agreement contained a clause by which the parties agreed to refer all matters in dispute between them to arbitration. J. failed to sell certain consignments of sugar and became insolvent. F. & Co. proved their claim for damages against J. before the Official Receiver. The amount of damages was subsequently reduced by the Judge. The Receiver then sued to recover from F. & Co. the balance with interest of Rs. 25,000, the guarantee deposit. F. & Co. wanted this suit to be referred to arbitration under the arbitration clause in the agreement.

Held, that the main question in the suit which related to the amount of damages and

I.—Imperial Acts—(Continued).**Act IX of 1899 (Arbitration)—(Concluded).**

which had been already decided by the Judge in insolvency proceedings depended upon a difficult question of law (a).

That the main question could now be litigated only with the leave of the Court in view of S. 16 (2) of the Provincial Insolvency Act, and that the insolvency proceedings would be sufficient reason why the matter should not be referred to arbitration in the discretion vested in Court by S. 19 of the Arbitration Act. **James Finlay & Co. v. E. Raymond**, 8 S.L.R. 60.

HAYWARD, J.C.

References:—(a) 6 S.L.R. 187; 8 S.L.R. 95, R.

Act VI of 1901 (Assam Labour and Emigration).

S. 91—Conditions imposed by rules under—Power of dismissal for breach of such conditions—Whether implies power to suspend—Suit for damages—Institution by agent of person contracting with Government—Remoteness—Dismissal of suit—Tortious act of servant of Government—Liability of latter for such act—Ratification—Servant exceeding scope of authority—Effect upon liability of appointing authority—Libel—Government order containing language giving rise to alleged libel—Publication under statutory authority and in execution of its duty—Absolute privilege—Proof of publication under authority from Secretary of State—Necessity of—Government of India Act, (21 and 22 Vic, c. 108), 1858, S. 3. **A. M. Ross v. The Secretary of State for India in Council**, 24 M.L.J. 429=19 Ind. Cas. 353=(1913) M.W.N. 758=37 M. 55. See Final Part, 1913, Col. 75.

Act VIII of 1904 (Universities).

University Regulations—Provision for post graduate studies, if compulsory or enabling—University lectureship. See **MANDAMUS**, No. 1, 18 C.W.N. 430.

Act III of 1905 (Paper Currency).

S. 24—Pro-note payable to "so and so or order or bearer"—Contract Act, S. 23—Pro note void—Consideration, suit on original—Negotiable Instruments Act, S. 120—Holder in due course, whether includes payee of instrument payable to bearer—Evidence Act, S. 57 (1)—Judicial notice.

A promissory-note made payable to "so and so or order or bearer," contravenes the provisions of S. 24 of the Paper Currency Act, and is, therefore, void under S. 28, Contract Act. Nothing can be recovered on the document.

If the promissory-note is executed for a debt which already exists, the promisee can sue on the original consideration.

Under S. 120 of the Negotiable Instruments Act, a holder in due course does not include the payee of a negotiable instrument payable to bearer.

I.—Imperial Acts—(Continued).**Act III of 1905 (Paper Currency)—(Cl.2).**

Courts are bound under S. 57 (1), Evidence Act, to take judicial notice of the provisions of S. 24 of the Paper Currency Act, without the defendant having raised the objection in his defence at all. **Mirza Hidayat Ali Beg v. Nga Kyang**, U.B.R. (1914), 1st Qr. 13=24 Ind. Cas. 721.

SHAW, J.C.

Act III of 1907 (Provincial Insolvency).

(1) Ss. 2 (1) (g), 18, 20 (c), 40 (1), 44, 47—Profits from 'jatri' or 'pilgrim business'—Insolvency of Panda or guide—Appointment of receiver to carry on the 'pilgrim business'—Meaning of 'business' or 'trade' in Ss. 20 (c) and 40 (1). **Anand Mahanti v. Ganesh Maheswar**, 40 C. 678=21 Ind. Cas. 969. See Final Part, 1918, Col. 77.

(2) Ss. 4 (b) and 5—Heir of deceased debtor—Petition at the instance of creditor to adjudicate—Maintainability—Petition to administer deceased debtor's estate—Whether lies—Presidency Towns Insolvency Act, S. 108.

There is no provision in the Provincial Insolvency Act which enables the creditor of a deceased debtor to file a petition for the administration of his debtor's estate similar to the one contained in S. 108 of the Presidency Towns Insolvency Act.

Unless the relation of creditor and debtor has been established between the heir of a deceased debtor and his creditors, no petition for adjudication lies against the heir at the instance of the creditors of the deceased. *In the matter of an application by Shivji Dhamji to declare Samabal Fakira Basrio, an insolvent*, 8 S.L.R. 93.

CROUCH, A.J.C.

(3) Ss. 4, 11—'Unable to pay his debts' in S. 4—Meaning of—Object to get the Court to realise petitioner's share in family property—Abuse of process of Court—Dismissal of petition—Civ. Pro. Code, 1908, S. 55—Judgment-debtor—Arrest of—Whether entitled to adjudication order—Powers under O. XXI, r. 40. **Ponnuswami Chetty v. Narayanaswami Chetty**, 14 M.L.T. 805=25 M.L.J. 545=21 Ind. Cas. 293. See Final Part, 1913, Col. 79.

(4) S. 5. See No. 2, *supra*.

(5 & 6) Ss. 5, 6 (3), 15 (1) and 16 (1)—Debts not exceeding assets—Power of the Court to dismiss petition—Sufficient cause—Act of bankruptcy—Court's inherent power—Abuse of the process of Court.

A debtor whose debts amount to Rs. 500 is "entitled to present" an insolvency petition (S. 6, cl. 3) and an act of bankruptcy is committed by the presentation of his petition (S. 5).

A debtor petitioned to the Court to adjudicate him an insolvent and alleged that, owing to insufficiency of assets, he was unable to pay

I.—Imperial Acts—(Continued).**Act IM of 1907 (Provincial Insolvency)**
—(Continued).

his debts which exceeded Rs. 500. The Court was not satisfied on the evidence in the case that the debtor's debts exceeded his assets and dismissed the application. *Held* that S. 15 (1) of the Provincial Insolvency Act, which empowers the Court to dismiss the petition for any "sufficient cause," deals entirely with a creditor's petition and does not apply to a debtor's petition, and a debtor whose debts amount to Rs. 500 is entitled on his application to be declared an insolvent under S. 16 (1).

Held also that the presentation of a petition on one ground that the debts amount to more than Rs. 500 which the applicant is unable to pay does not amount to an abuse of the process of the Court. *Trilokinath v. Badri Das*, 12 A.L.J. 355=23 Ind. Cas. 4=36 A. 250 (F.B.).

RICHARDS, C.J., RYVES and PIGGOTT, JJ.

References:—15 C.W.N. 213; 15 C.W.N. 990; 32 A. 645; 9 A.L.J. 699, R.; 32 A. 547, D.; 25 M.L.J. 545, Not F.

(7) S. 6. See Nos. 5 and 6, *supra*.

(8) Ss. 6, sub-S. 2, 47, sub-S. (1)—"*Debtor ordinarily resides or carries on business or personally works for gain*"—*Guard running train from D to K but residing at D—No permanent residence at K—Whether Court at K has jurisdiction over his petition in insolvency*—Civ. Pro. Code, 1908, S. 31—*Objection to jurisdiction to be taken in first Court—Power of Appellate Court—If doctrine applicable to petition in insolvency*. *Madho Prasad v. A. N. Walton*, 20 Ind. Cas. 370=18 C.W.N. 1050. See Final Part, 1913, Col. 80.

(9) S. 11. See No. 3, *supra*.

(10) Ss. 12, 46 (3)—*Insolvency petition by a creditor—Notice to all creditors—Any creditor entitled to appeal under S. 46 (3)*.

Where a creditor files a petition to adjudicate his debtor an insolvent, notice under S. 12 (1) to all other creditors must issue under S. 12 (2). Any other creditor is a person entitled to appeal under S. 46 (3) of the Provincial Insolvency Act. *Muthu Karuppan Chettiar v. Muthuraman Chettiar*, (1914) M.W.N. 899.

OLDFIELD and TYABJI, JJ.

(11) Ss. 13 (3), 47—*Attachment of property as that of insolvent—Order made before adjudicating the applicant an insolvent—Rules of Code of Civil Procedure, 1908, applicable—Orders XXI, XXXVIII*.

An attachment under S. 13 (3) of the Provincial Insolvency Act is analogous to an attachment before judgment effected under O XXXVIII of the Code of Civil Procedure, 1908, and the Insolvency Act laying down no procedure to be followed, a Court is bound to consider a claim preferred to such an attachment in the manner provided for investigation of claims to property attached in execution of decrees. A party aggrieved is not bound to wait so long as the receiver takes no steps to deal

I.—Imperial Acts—(Continued).**Act III of 1907 (Provincial Insolvency)**
—(Continued).

with the property. *Hashmat Bibi v. Bhagwan Das*, 12 A.L.J. 24=36 A. 65=24 Ind. Cas. 752.
RYVES and PIGGOTT, JJ.

(12) S. 15. See Nos. 5 and 6, *supra*.

(13) S. 16—*Adjudication order—Vesting of property*.

The property of an insolvent vests in the Receiver from the date of adjudication and after that date the insolvent cannot maintain any suit on a chose in action belonging to him. *T. S. Ramasamy Iyengar v. Ramalinga Mudaliar*, 22 Ind. Cas. 687.

AYLING, J.

References:—5 Ind. Cas. 931=7 M.L.T. 185=33 M. 15, F.

(14) S. 16. See Nos. 5 and 6, *supra*.

(15) S. 16, sub-S. (2)—*Prohibition contained in S. 16, sub-S. (2), applicability of—Order of discharge, operation of*.

Held, that the prohibition which is contained in S. 16, sub-S. (2) of the Provincial Insolvency Act is aimed at creditors to whom notice of the insolvency proceedings has been given, and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered.

Held further, that an order of discharge operates only to free debtors from the debts entered in the Schedule. *Fida Husain v. The Collector of Shahjahanpur, Manager of Parwar Estate*, 17 O.C. 267.

LINDSAY, J.C.

(16) S. 16 (2)—*Leave of Court—Reference to arbitration—Insolvency proceedings whether sufficient ground to refuse to refer*. See ACT IX OF 1989 (ARBITRATION), No. 3, 8 S.L.R. 60.

(17) S. 16 (2) and (5)—*Mortgage-decree—Right of mortgagee to execute decree after adjudication of judgment-debtor*.

There is nothing in S. 16 (2) (b) of the Provincial Insolvency Act which bars the holder of a mortgage-decree from executing his decree, even after the judgment-debtor is adjudicated an insolvent. Even if he give to the term 'property of the insolvent' so wide a definition as to include an interest in property transferred by way of mortgage, even then the plaintiff could take advantage of the sweeping exception created by S. 16 (5). *H. H. Mir Haji Nur Mahomed Khan v. Kadir Bux*, 7 S.L.R. 194=24 Ind. Cas. 830. •

CROUCH and BOYD, A.J. CS.

Reference:—14 A. 358, R.

(18) Ss. 16 (2) (a), 42 (1), 44—*Insolvency proceeding—Adjudication of insolvency with condition, if valid—Court's duty after vacating invalid order—Condition, non-fulfilment of—'Salary'—Property—Civ. Pro. Code, 1908, S. 60*.

1.—*Imperial Acts—(Continued).*Act III of 1907 (Provincial Insolvency)
—(Continued).

'Salary' is 'property' of the insolvent within the meaning of S. 46, sub-S. (2), cl. (a) of the Provincial Insolvency Act.

The statutory law in this country, in making an appropriation of income for the benefit of a creditor, fixes the amount under S. 60 of the Code of Civil Procedure read with sub-S. (2) of S. 16 of the Provincial Insolvency Act.

- A debtor, when arrested in execution of a decree, applied to be adjudged an insolvent. An order for adjudication was made on the 24th August, 1909, in his favour, and he was directed, pending realisation by sale of his assets, existent or suspected, to pay one-fourth of his salary, i.e., Rs. 25 per month into Court until the sum realized from him should equal one third of the family debt for which the creditor had obtained a decree. On the 24th February, 1910, the District Judge recorded an order to the effect that the amount deposited by the insolvent should remain in deposit. On the 11th April 1910, he ordered that, as the insolvent had failed to abide by the condition that he should pay one-fourth of his salary to the Receiver, the order of adjudication should be annulled.

Held, that the order for adjudication was properly made on the 24th August, 1909, but the condition, which was annexed to that order, was imposed without jurisdiction. Such adjudication could not be cancelled, under sub-S. (1) of S. 42 of the Provincial Insolvency Act.

That it was open to the High Court, not only to reverse the order of the 11th April, 1910, but also to consider what direction should be given when the order had been vacated at the instance of the insolvent.

That the District Judge should have directed the Receiver to arrange for payment to him of one half of the salary earned by the insolvent. *Ram Chandra Neogi v. Syama Charan Bose*, 19 O.L.J. 83=21 Ind. Cas. 950=18 C.W.N. 1052.

MOOKERJEE and BEACHCROFT, JJ.

(19) S. 18. See No. 1, *supra*.

(20) Ss. 18, 36, 43 (3)—*Power of District Judge to dispossess third persons of property belonging to insolvent—Appeal—Leave to appeal.*

S. 18 of the Provincial Insolvency Act empowers a Court, where it appoints a Receiver, to remove any person in whose possession or custody any property of the insolvent is from possession or custody thereof, and put it in charge of the Receiver provided the insolvent had a right to remove him. The Court has also power to enquire whether certain property in possession of a third party is or is not the property of the insolvent.

S. 36 of the Provincial Insolvency Act does not apply to a case where the Court adjudicates certain property, in possession of a third person,

1.—*Imperial Acts—(Continued).*Act III of 1907 (Provincial Insolvency)
—(Continued).

to be the property of the insolvent and no appeal lies against such an order.

Case in which leave to appeal under S. 46 (3) allowed by High Court. *Bansidhar v. Kharagjit*, 12 A.L.J. 1278.

CHAMIER and PIGGOTT, JJ.

(21) S. 20. See No. 1, *supra*.

(22) S. 20 (d)—*Fraudulent decree against insolvent—Whether suit maintainable.*

A decree was passed against the plaintiffs. They applied to be declared insolvents but stated that the decree was a fraudulent decree. After they were declared insolvents they brought this suit for declaration that the decree was a fraudulent decree.

Held, that the suit was maintainable and S. 20 (d) of the Provincial Insolvency Act was not applicable. *Ram Narain v. Behari*, 12 A. L.J. 925.

KNOX, J.

(23) Ss. 20, 22, 46—*Objections to the acts of the Receiver—Civ. Pro. Code has no application—District Court—Appeal—Special leave.* *Mul Chand v. Murari Lal*, 11 A.L.J. 979=21 Ind. Cas. 702=36 A. S. See Final Part, 1913, Col. 84.

(24) Ss. 20, 23—*Powers of Court to inquire into claims against insolvent and into claims by or on behalf of insolvent—Power to order debtor of the insolvent to deposit the amount of the debt into Court.* *Govind v. Gopala*, 9 N.L.R. 182=22 Ind. Cas. 69. See Final Part, 1913, Col. 84.

(25) Ss. 20, 23—*Sale by Insolvency Court—Application to cancel sale on ground of fraud—Limitation.* See LIMITATION ACT, 1908, No. 43, 36 P.W.R. 1914.

(26) S. 22—*Official Receiver's order—Time for obtaining copy of—Not excluded—Limitation Act, Ss. 12, 29.*

The time occupied by the petitioner in obtaining a copy of the Official Receiver's order cannot be excluded from the twenty-one days within which he must apply to the Court to modify it under S. 22 of the Provincial Insolvency Act. *M. Duraiswami Iyengar v. Meenakshi Sundara Iyer*, 16 M.L.T. 246=(1914) M.W.N. 831.

OLDFIELD and SESHAGIRI IYER, JJ.

References:—(a) 84 M. 505; 35 A. 410; 17 Ind. Cas. 593, R.

(27) S. 22—*Insolvency proceeding—Receiver, appointment of—Receiver acting in excess of his authority—Third person, remedy of—'Person aggrieved' who is.* *Hanswar Ghose v. Rakhal Das Ghose*, 18 O.L.J. 359=20 Ind. Cas. 653=18 C.W.N. 866. See Final Part, 1913, Col. 85.

(28) S. 22. See No. 23, *supra*.

(29) S. 23. See Nos. 24 and 25, *supra*.

(30) S. 30—*Set-off when may be allowed.* See INSOLVENCY, No. 1, 95 P.L.R. 1914.

I.—Imperial Acts—(Continued).**Act III of 1907 (Provincial Insolvency)**
—(Continued).

(31) S. 36—*District Judge acting under—Jurisdiction to refer matter to subordinate Court.*

A Receiver appointed in a certain insolvency matter reported to the District Judge that a certain mortgage made by the insolvent should be set aside. The Judge referred the matter to the Munsif for a report as to whether the mortgage was made *bona fide*. Held that the Judge alone had jurisdiction to decide the matter and had no power to refer it to a subordinate Court. *Jagannath v. Lachman Das*, 12 A.L.J. 889—36 A. 549.

CHAMIER and RAFIQ, JJ.

(32) S. 36—*Transfer by insolvent made two years before adjudication order—Jurisdiction.*

Under S. 36 of the Provincial Insolvency Act, a Judge has jurisdiction only in respect of transfers made within two years of the date of his order of adjudication, and cannot annul a transfer made within two years preceding the date of presenting the petition in insolvency. *Jokhan Singh v. Deputy Commissioner, Fyzabad*, 23 Ind. Cas. 924.

PIGGOTT, J.C.

(33) S. 36. See No. 20, *supra*.

(34) S. 37—*Sale before adjudication—Evidence given at insolvency proceedings, whether admissible against purchaser in proceedings under S. 37.*

Where a sale made by an insolvent is impugned under S. 37 of the Act, evidence given at the insolvency proceedings, can be used against the purchaser, though not a party to the insolvency proceedings to prove that the insolvent was unable to pay his debts at the time of the sale. *Gangala Kamkotayya v. Bhimavarapa Guraya Reddy*, 23 Ind. Cas. 597.

SESHAGIRI IYER, J.

(35) S. 37, sub-Ss. (1) and (2)—*Fraudulent preference, how determined—Debtor's intention and motive material—Preference due entirely to pressure from creditor if fraudulent—Creditor if may plead good faith—Onus.*

Under S. 37 of the Provincial Insolvency Act, good faith on the part of the creditor affords him no protection where the intention of the debtor to give him preference is established, although sub-S. (2) of the section protects a person who, in good faith and for valuable consideration, has acquired title through or under a creditor of the insolvent.

"Preference" implies an act of free will, and there can be no "preference" where the act is the result of pressure brought to bear on the debtor by the creditor, though there would be fraudulent preference where, notwithstanding that the payment or disposition might never have been made but for the impetuosity of the

I.—Imperial Acts—(Continued).**Act III of 1907 (Provincial Insolvency)**
—(Continued).

creditor, it is also a fact that the payment would never have been made but for the desire to prefer.

The presumption of fraudulent intention may be repelled, if it is apparent that the debtor acted in fulfilment of a prior agreement, but it will not suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation or that he acted from motives of kindness or gratitude. The intention of the debtor is the paramount consideration and if the transaction can be properly referred to some other motive than that of giving the particular creditor a preference over the others, the payment is not fraudulent.

In the determination of the question whether a person is able or unable to pay his debts as they become due from his own money, the fact that he has money locked up which at a later period may be available for the payment of his debts is immaterial.

Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so, though in such a case the onus may shift. *Nripendra Nath Sahu v. Ashutosh Ghose*, 19 C.W.N. 157.

MOOKERJEE and BEACHCROFT, JJ.

(36) S. 40. See No. 1, *supra*.

(37) S. 42. See No. 18, *supra*.

(38) S. 43—*Insolvent, acts of bad faith of—Proceedings in their nature criminal—Necessity of framing charge, etc.*

A proceeding against a debtor under S. 43 (2) of the Provincial Insolvency Act is in the nature of a criminal proceeding, and, as in all criminal cases, it is necessary in such a proceeding that there should be a charge, a finding and a conviction as a foundation for the sentence, and everything should be strictly and accurately pursued, and, if on any of these three points a substantial defect should appear, it would be a ground for reversing the proceeding. *Harlihar Singh v. Maheshur Prasad*, 18 C.W.N. 692.

JENKINS, C.J. and CHATTERJEA, J.

(39) S. 43—*Bad faith of a debtor, Judge's power to take cognizance of—Act of bad faith, effect of.*

Under S. 43 of the Provincial Insolvency Act, a Judge can take cognizance of the bad faith of a debtor at any time, whether before or after the making of the order of adjudication, although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved. *Nanhe Mal v. King-Emperor, through Raghubir Prasad*, 17 O.C. 188.

LINDSAY, J.C.

References:—13 O.C. 94; 15 C.W.N. 212, D.

1.—Imperial Acts—(Continued).

Act III of 1907 (Provincial Insolvency) —(Continued).

- (40) S. 43—*Transfer—Fraudulent concealment of property—Omission to insert in schedule amounts to concealment—Meaning of transfer.*

Where an insolvent, in the schedule of property attached to his application under S. 11 of the Provincial Insolvency Act, made no mention of the property in question :

Held, that in omitting to mention it he fraudulently or vexatiously concealed the property within the meaning of S. 43 (2) (b) of the Act.

The word 'transfer' in S. 43 of the Insolvency Act means what a transfer is defined to be in the Transfer of Property Act, e.g., a sale, a mortgage, or a gift. *Nga Chok v. Mi Pwa On*, U.B.R. (1914), 1st Cr. p. 1=24 Ind. Cas. 767.

SHAW, J.C.

(41) S. 43—*Bad faith, act of, committed by debtor—Imprisonment—Criminal case—Charge—Opportunity to answer charge to be given.* *Amiruddi Karikar v. Jadab Karikar*, 19 Ind. Cas. 920=19 C.L.J. 430. See Final Part, 1913, Col. 87.

(42) S. 43. See No. 20, *supra*.

(43) S. 44. See Nos. 1 and 19, *supra*.

(44) S. 46. See Nos. 10, 29, *supra*.

(45) S. 46 (1) *Additional Judge—Whether subordinate to District Court—Appeal—Order convicting the insolvent—Civil appeal—Practice—Interference with order in appeal.*

Held (by Richards), C. J. and Banerji, J., Knox, J., dissenting) that a Court of an Additional District Judge is not a Court subordinate to the District Court within the meaning of S. 46 (1) of the Provincial Insolvency Act, and an appeal from the order of the Additional Judge lies to the High Court and not the District Court (a).

Held by the Full Bench that an appeal from an order of an Additional Judge convicting the insolvent of concealing his account books is a civil appeal.

Where an insolvent knew that an enquiry was being made as to whether he had concealed his account books and he did not show to the Court that he had not done so and the Court convicted him, *held* that the High Court will not interfere in appeal, even though no proper charge had been made against him (b). *Chiranjilal v. King-Emperor*, 19 A.L.J. 1106 (F.B.).

RICHARDS, C. J., KNOX and BANERJI, JJ.

References:—(a) 34 A. 393, F. (b) 19 C.L.J. 430; 7 A.L.J. 609, R.

(46) S. 46 (2) and (3)—*Appeal from orders of the District Court—Whether order dismissing applicant's petition for adjudication*

1.—Imperial Acts—(Continued).

Act III of 1907 (Provincial Insolvency) —(Concluded).

as an insolvent for abuse of process comes under any of the sections enumerated in cl. 2 of S. 46—*Whether appeal lies.*

Where the applicant's petition for adjudication as an insolvent was dismissed on the grounds of fraud and abuse of the process of the Court.

Held, that such an order could not be made under any of the sections enumerated in S. 46 (2) and no appeal can be laid against it except with the leave of the District Court or of the High Court. *R. M. Ramanathan Pillay v. M.L.V.E.R.M. Firm*, 7 Bur. L.T. 53=24 Ind. Cas. 493=7 L.B.R. 257.

FOX, C.J. and HARTNOLL, J.

(47) S. 47. See Nos. 1, 8 and 11, *supra*.

Act V of 1903.

See CIV. PRO. CODE.

Act VI of 1908 (Explosives).

Ss. 5, 6—*Bomb found in portion of house open to access to all members—Liability of owner to arrest—Possession in law—Arrest by Police prima facie legal—Bona fides, presumption of—Malicious motive, proof of, if makes arrest actionable—Fraud and crime, charge of, in civil action—Pleading—Proof—Charges how far should be definite—Onus of proof—Presumption of innocence—Case of fraud set up in pleading, if should be allowed to be changed—Court if may give relief on other grounds of fraud than that alleged—Counsel's privilege—Counsel, if may appear as witness—Professional etiquette—Duty of counsel not to accept retainer when likely to be called as witness—Counsel if may cross-examine from personal knowledge—Witness, cross-examination of, charges by counsel during against witness and third parties—Court if may ask to see instructions—Evidence Act, Ss. 3, 118, 125, 149, 150—Privilege of witness—Document withheld on ground of privilege—Withholding if ground for adverse inference—Joint tort if actionable as conspiracy—Conspiracy, apart from tort if actionable—Illegal arrest, malicious prosecution and imprisonment charged as result of concert—Suit for damages—Limitation—Limitation Act (1908), Arts 19, 23, 36, 120—Judge, if may rely on expert treatises not referred to at trial—Judgment, if may be revised after delivery—Acquittal, judgment of, how far conclusive in proceeding between private persons. *Donald Weston v. Peary Mohan Dass*, 40 O. 893=18 C.W.N. 185=23 Ind. Cas. 25. See Final Part, 1913, Col. 92.*

Act IX of 1908.

See LIMITATION ACT.

Act XVII of 1908.

See REGISTRATION ACT.

1.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency).

- (1) Ss. 7, 12, 36, 107, 108 and 1909—*Application for administration of deceased insolvent's estate—Properties standing in name of persons other than insolvent—Notice of motion for delivery of properties to Official Assignee—Jurisdiction.*

The jurisdiction given by S. 36 of the Presidency Towns Insolvency Act does not include a power to determine questions of title as between the Official Assignee and a stranger to the insolvency, where *prima facie*, and until the contrary is proved, the title is in the stranger.

Where, therefore, an Official Assignee, applying for the administration of the deceased insolvent's estate under S. 108 of the Presidency Towns Insolvency Act, comes by way of a notice of motion and applies under S. 36 of the Act for delivery to him of property standing in the name of persons other than the deceased insolvent, and an order is made under S. 36 of the Act, the order is one made without jurisdiction and must be set aside. *Sornammal v. The Official Assignee of Madras*, 27 M.L.J. 66=24 Ind. Cas. 239.

WHITE, C.J. and OLDFIELD, J.

References:—15 Q.B.D. 159=54 L.J. Q.B. 402=53 L.T. 156=2 Morrell 184; 19 Q.B.D. 92=56 L.J.Q.B. 338=56 L.T. 806=35 W.R. 569=4 Morrell 202, F.

- (2) S. 9—*Requirements of—Substantial compliance—Whether sufficient—Amendment—When to be allowed—Rights of other parties—Prejudice.* *T. Mahomed Ayyab Sahib v. Messrs. G P. Gunais & Co.* 18 M.L.T. 275=(1913) M.W.N. 264=24 M.L.J. 564=19 Ind. Cas. 19=87 M. 555. See Final Part, 1913, Col. 92.

(3) S. 12. See No. 1, *supra*.

(3-a) S. 15. See No. 6, *infra*.

- (4) S. 17, proviso—*'Power'—Interpretation—Suit to enforce mortgage not contemplated—'Deal with his security'—Rights of transferring or assigning—Leave to be obtained previous to institution of suit—Suit by mortgagee of share of co parccener in a joint Hindu family—Other members of family not necessary parties—Partition cannot be demanded in same suit.*

The proviso to S. 17 of the Presidency Towns Insolvency Act of 1909 refers to such powers as the mortgagees and pledgees may have of selling the property mortgaged to, or hypothecated to them without recourse to a suit, and the words 'deal with his security' refer to the rights they may have of transferring or assigning the debt due to, and the security in the possession or at the disposal of, the said creditors.

The leave contemplated by S. 17 is leave that must be obtained previous to the institution of the suit.

Obiter dictum: In a suit by a creditor to establish his mortgage against the share of his mortgagor in the property of a joint Hindu

1.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency)—(Concluded).

family, the other members of the family are not necessary parties. Before he has established his mortgage and executed his decree and purchased his mortgagor's share, the creditor cannot ask for partition in the same suit in which he wishes to establish his claim under his mortgage. *Lalchand v. Balakrishna*, 21 Ind. Cas. 689.

DAVAR, J.

Reference:—(1885) 55 L.T. 747, D.

- (5) S. 17—*Order for adjudication—Suit by secured creditor—Leave of the Court.* *B. N. Lang v. Heptollabhai Ismailjee*, 15 Bom. L. R. 939=21 Ind. Cas. 714=38 B. 359. See Final Part, 1913, Col. 98.

- (6) Ss. 21, 15—*Adjudication order—Insolvent applying to withdraw petition on the ground that he had settled with his creditors—Practice.* *In re Subratil Jan Mahomed*, 15 Bom. L. R. 748=20 Ind. Cas. 859=38 B. 200. See Final Part, 1913, Col. 94.

(7) S. 36. See No. 1, *supra*.

- (8) Ss. 36 (5) and 55—*Proceedings under S. 36 (5)—Court cannot declare a transaction void under S. 55 in such proceedings—"Void," meaning of.* *Khan Sahab Bangi Abdul Kadhar Sahib v. The Official Assignee of Madras*, 14 M.L.T. 51=25 M.L.J. 808=20 Ind. Cas. 485=(1914) M.W.N. 247. See Final Part, 1913, Col. 95.

(9) S. 55. See No. 8, *supra*.

- (10) S. 56—*Fraudulent preference—Surety—Creditor.* *Ismail Mawoon Dawoodji v. Official Assignee*, 7 L.B.R. 44=21 Ind. Cas. 5=6 Bur. L.T. 166. See Final Part, 1913, Col. 97.

(11) S. 107. See No. 1, *supra*.

- (12) S. 108—*Petition to administer deceased debtor's estate—No corresponding provision in Act III of 1907. See Act III of 1907 (PROVINCIAL INSOLVENCY), No. 2, 8 S.L.R. 98.*

(13) S. 109. See No. 1, *supra*.

- (14) Ss. 108, 109, 110, 111—*Administrator-General appointed to administer estate of insolvent—Insolvency Law inapplicable. See Act II of 1874 (ADMINISTRATOR-GENERAL'S), No. 8, 22 Ind. Cas. 566.*

(15) S. 109. See Nos. 1, 14, *supra*.

(16) S. 110. See No. 14, *supra*.

(17) S. 111. See No. 14, *supra*.

Act II of 1910 (Paper Currency).

- (1) S. 26—*Pro-note payable to any person or order—Indorsement in blank—Whether becomes 'payable to bearer on demand.'* *Sanna Hman Saib v. Moosa Ema Mahomed Moosa Saib*, 7 L.B.R. 70=22 Ind. Cas. 77=7 Bur. L.T. 36. See Final Part, 1913, Col. 98.

(2) S. 28. See BANKERS AND CUSTOMERS, No. 1, 24 Ind. Cas. 301.

1.—Imperial Acts—(Continued).

Act IX of 1910 (Electricity).

- (1) *Ss. 14, 19—Alteration of pipes or wires—Compensation for damage—Damage, detriment or inconvenience.*

The Bombay Gas Company had laid its gas main of 8 inches along a street known as Babu Khote Street in Bombay, at a level of 2 feet 2½ inches to 2 feet 5 inches below the surface of a road. Towards the end of 1907, the Bombay Electric Supply and Tramways Company laid its electric traction cable along the street in earthen ware troughing diagonally across and over the Gas Company's main; and covered the gas main totally for a distance of 12 feet, and partially for a distance of about 6 feet, leaving only 1½ inches to 3 inches of earth over the gas main. In 1913, the Gas Company were desirous of replacing the 8 inches main by a 4 inches main; but on digging the surface of the street they found that about 36 feet of their main was rendered inaccessible for the purpose of removing the same by reason of the Electric Company's cable. The Gas Company had to effect a diversion in the lay of their new main; and they claimed from the Electric Company the costs incurred in such diversion, under S. 19 of the Electricity Act, 1910. To arbitrate upon the differences between the two Companies, Government appointed arbitrators under S. 53 of the Act.

The arbitration stated a special case under S. 10, cl. (b), of the Arbitration Act, for the opinion of the High Court upon the following questions:—

(a) Whether, upon a true construction of the Electricity Act, the damage claimed to have been suffered by the Gas Company was the subject of compensation under S. 19 of the Act?

(b) Whether, by reason of the Gas Company not having availed themselves of the provisions of S. 14 of the Act, they were entitled to any remedy in respect of the position of the cables?

Held, (1) answering the first question in the affirmative, that the damage claimed to have been suffered lay in the Gas Company having been deprived of access to its own property by acts done by the Electric Company in the exercise of its power.

(2) That S. 14, Electricity Act, was no bar to the claim, for the provisions of the section applied to acts done by the operator or by the owner at his request and expense; whereas in the present case the complaint was that the Gas Company was cut off from access to its own property by acts done in the exercise of its power by the Electric Company and that those acts were not so done as to cause the least damage, detriment or inconvenience to the Gas Company that might be. *The Bombay Gas Company and The Bombay Electric Company, Re*, 16 Bom. L. R. 964.

DAVAR and BEAMAN, JJ.

1.—Imperial Acts—(Concluded).

Act II of 1912 (Co-operative Societies).

- (1) *Ss. 19, 20—Priority of registered societies to other creditors, how enforceable—Rateable distribution—S. 78, Civ. Pro. Code 1908, if applicable—Charge if any.*

By an application made under S. 78 of the Code of Civil Procedure a registered Co-operative Society cannot enforce its prior claim within the meaning of S. 19 of Act II of 1912, as against a judgment-creditor at whose instance property is going to be sold, if they have no decree or a charge under S. 20 of the said Act.

Other remedies may still be open to such Society. *Munshi Abdul Kadir v. Shahabapur Co-operative Bank*, 18 C.W.N. 1140.

HOLMWOD and CHAPMAN, JJ.

- (2) S. 20. See No. 1, *supra*.

Act VI of 1913 (Mussulman Wakf Validating).

- (1) *Wakf Act (VI of 1913)—Statute, construction of—Retrospective effect.*

The Mussulman Wakf Validating Act, 1913, has no retrospective effect. *Amirbibi v. Azizabibi*, 16 Bom. L.R. 977.

MACLEOD, J.

(2) If would operate retrospectively. See *MAHOMEDAN LAW (WAKF)*, No. 2, 19 C.W.N. 76.

Act VII of 1913 (Companies).

S. 2 (13)—Meaning of "private Companies"—Syndicate—Combination of several firms—Competition—Object of preventing—Gain to be distributed amongst subscribers—Failure to register under the Act—Effect. See ACT VI OF 1882 (COMPANIES), No. 8, 10 N.L.R. 98.

Act III of 1914 (Copyright).

See COPYRIGHT, No. 1, 18 C.W.N. 1078.

2.—Bengal Acts.

Act XXVII of 1855 (Sonthal Parganas).

- (1) *Revision—High Court—Indian High Courts Act (24 and 25 Vic., C. 104), S. 15—Appellate jurisdiction—Sub-Deputy Collector of Sonthal Parganas—Sonthal Parganas Act (XXXVII of 1855)—Courts—Ejectment—Non-saleable tenure—Executing Court—Reg. II of 1886, S. 2—Executing Court's order, if can be widened—Rules for the guidance of Civil Courts in the Sonthal Parganas, para. 29—Regulation of 1893, S. 27.*

The Court of the Sub-Deputy Collector in the Sonthal Parganas, which tried a suit for rent valued less than Rs. 100, is not a Court subject to the appellate jurisdiction of the High Court within the meaning of S. 15 of the Indian High Courts Act. In relation to that Court, the Court of the Commissioner is the High Court (a).

There is a fundamental distinction between the Courts established under the Bengal Civil Courts Act and the Courts established under

2.—Bengal Acts—(Continued).

Act XXVII of 1855 (Sonthal Parganas) —(Continued).

the Sonthal Parganas Act, although the same individual may preside over two different Courts. In the trial of civil suits in Courts established under the Bengal Civil Courts Act, the general laws and regulations are to be applied, whereas the trial of suits in the Courts of officers under the Sonthal Parganas Act is removed from the operation of the general laws and regulations and is governed by "Directions" issued by the Lieutenant-Governor.

A tenant whose right is not saleable may, in execution of a decree for rent, be, with the consent of the Deputy Commissioner, evicted and land may then be resettled. The eviction in execution can be effected only by the Court executing the decree.

S. 2 of Reg. II. of 1883 was framed for the protection of the raiyat.

If the execution Court decides in favour of ejectment, the order is not to be carried out until it has been sanctioned by the Deputy Commissioner. The scope of the order as made by the executing Court cannot be widened by the Deputy Commissioner, as a matter of fact. *Darbari Panjara v. Bhoti Roy*, 19 C.L.J. 294 = 18 C.W.N. 575 = 41 C. 915 = 23 Ind. Cas. 883.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—19 C.L.J. 292, R.

(1-a) See SONTHAL PARGANAS, No. 1, 18 C.W.N. 994.

(2) S. 1, cl. (2)—*Sonthal Pergunahs Justice Reg. (V of 1803) S. 27—Sonthal Pergunahs Civil Courts Rules, No. 29—Suit valued over Rs. 1,000, proceedings in, if subject to High Court's superintendence—Execution proceeding, order in, if may be revised—Proper case for interference—Same officer subject to Lieutenant-Governor in some proceedings, to High Court in others—Charter Act (24 and 25 Vict., c. 104), S. 15—Civ. Pro. Code (1908), S. 115.*

All suits over Rs. 1,000 in value being, under the Sonthal Pergunahs Act of 1855, triable according to the general law and in the same manner as if that Act had not been passed, Judicial Officers in the Sonthal Pergunahs are subject to the general powers of superintendence of the High Court, in so far as proceedings in suits over Rs. 1,000 in value are concerned.

Execution proceedings being proceedings in suit are, when they arise out of the suits over Rs. 1,000 in value, similarly subject to revision by the High Court (a).

Where a tenure in the Sonthal Pergunahs, having been put up for sale in execution of a mortgage decree passed in a suit over Rs. 1,000 in value, the landlord, under r. 29 of the Rules for the guidance of Civil Courts in the Sonthal Pergunahs, objected to the description of the property as *mourasi mokurari* alleging it to be a tenancy-at-will, and the matter being brought

2.—Bengal Acts—(Continued).

Act XXVII of 1855 (Sonthal Parganas) —(Concluded).

before the High Court in a Rule, order was passed by consent discharging the landlord from the record and directing the property to be sold subject to the objection of the landlord that the tenancy was not a *mourasi mokurari*, but the landlord nevertheless by a fresh application obtained an order from the Deputy Commissioner, without whose sanction the tenure could not (under r. 29 aforesaid) be sold, for further enquiry into his claim, and the Deputy Commissioner having called for a report from the Sub-Divisional Officer, who was also the Subordinate Judge, the latter officer as Subordinate Judge adjourned the sale proceeding pending enquiry by himself as Sub-Divisional Officer.

Held—that the order of the Subordinate Judge staying the sale was fit to be set aside by the High Court in the exercise of its general powers of superintendence.

As no case had been decided, S. 115 of the Civ. Pro. Code did not apply. *Sardhari Sah of Deoghur v. Hukum Chand Sah*, 18 C.W.N. 662 = 41 C. 576.

COXE and CHATTERJEE, JJ.

Reference:—(a) 18 C. 133, R.

(3) S. 2—*Revision—Civ. Pro. Code, 1882, S. 622—High Court—Sub-Divisional Officer exercising jurisdiction under Sonthal Parganas Act.*

The Commissioner and not the High Court can revise the proceedings of the Sub-Divisional Officer exercising jurisdiction as a Court created under S. 2 of the Sonthal Parganas Act. *Golam Najaf Miah v. Panchanan Gupta*, 19 C.L.J. 292 = 23 Ind. Cas. 876.

DOSS and RICHARDSON, JJ.

(4) S. 2—High Court's powers of superintendence. See REGULATION V OF 1893 (SONTHAL PERGUNAHS), No. 2, 22 Ind. Cas. 848.

Act XXXI of 1838 (Land Settlement).

S. 2, S³e ACT VIII OF 1885 (BENGAL TENANCY), No. 2, 19 C.L.J. 614.

Act X of 1859 (Bengal Rent).

S. 23 (6)—*Tenant dispossessed by landlord—Possessory suit in Civil Court, if lies—Sp. cific Relief Act, S. 9—"Illegal ejectment," meaning of. Jamla Singh v. E. J. Kingsley*, 17 C. W. N. 1201 = 21 Ind. Cas. 224. See Final Part, 1913, Col. 89.

Act XI of 1859 (Revenue Sale Law).

(1) *Sale of entire estate—Persons holding portions of estate for over 12 years adversely to the then owners, if may maintain possession against purchaser—Limitation—That survey—Dispute of owners of neighbouring mohals as to boundary—Determination by Survey authorities—Decisions, value of, as*

DIGEST OF CASES.

2.—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)—(Ctd.).

evidence, though not as estoppel—Acquiescence—Privy Council—Practice—Concurrent findings on issue of fact—Reg. II of 1819, resumption of alleged lakhraj and settlement with person other than zemindar—Dispute between grantee and zemindar as to whether specified plots are zemindari or lakhraj—Onus.

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and the purchaser at a Revenue sale purchases not the interest of the defaulting owner but that of the Crown, subject to the payment of the Government assessment, and as against a person who claims title to any portion of the estate by adverse possession, the time limited by the Limitation Act commences to run from the date of the sale.

When there are concurrent findings of the Courts below on an issue of fact, the Judicial Committee accepts these findings, unless it is established that the judgments of the Courts below are clearly wrong (a).

Where the question whether certain lands were included within a mahal, was in 1849, in the course of a Thak survey, determined by the Survey authorities in a proceeding in which opportunity had been given to all parties interested of making their claims, raising their objections and producing their evidence :

Held—That, though the parties were not estopped by the decisions arrived at, these were obviously of high authority, and, when acquiesced in by all the parties interested for a length of time and made the basis of important transactions, should not be disturbed unless upon the clearest proof that they were erroneous.

Where certain lands within a permanently settled mahal were resumed under Reg. II of 1819 and settled along with other Government Khas Mahal lands with a person other than the zemindar, the onus of proving that lands within the ambit of the zemindari did form part of such resumed land as against the zemindar did not lie on the person who claimed it as such, in the sense that on his failure to discharge it, the lands must be taken to remain and be vested in the zemindar. *Maharaja Surja Kanta Acharjya Babadur v. Sarat Chandra Roy Chowdhuri*, 18 O. W. N. 1281-27 M.L.J. 365-16 M.L.T. 290 = (1914) M.W.N. 757=16 Bom. L. R. 925=20 C.L.J. 568 (P.C.).

LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, SIR JOHN EDGE, and MR. AMEER ALI.

Reference :—(a) 12 A. O. 101 (1896), R.

(2) Ss. 6, 88—Notification of sale, publication in Government Vernacular Gazette, if necessary Omission if nullifies sale—Irrregularity. *Kacha Charan Das v. Sharfuddin Hossain*, 17 O.W.N. 1136=20 Ind. Cas. 423=41 O. 276. See Final Part, 1913, Col. 200.

2.—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)—(Ctd.).

(8) Ss. 7, 13—*Fraud—Revenue sale—Defaulting co-sharer purchaser—Co-sharers in joint estate, relation between, as to payment of share of Government revenue—Mutual confidence—Irrregularity—Sale notification—Error as regards specification of shares, immaterial—Fraud—Revenue sale, notice, of concealment of, evidence of, if relevant.* *Chowdhury Ram Prasad Singh v. Chowdhury Pawan Singh*, 19 C.L.J. 97=21 Ind. Cas. 354. See Final Part, 1913, Col. 101.

(4) S. 13—*Revenue sale—Share in arrear—Estate not in arrear—'Estate'—Defaulter if to show erroneous debit—Collector's jurisdiction to sell.* *Indramani Dasya v. Priya Nath Chakravarti*, 18 C.L.J. 505=18 O.W.N. 490=21 Ind. Cas. 953. See Final Part, 1913, Col. 102.

(5) S. 13. See No. 3, *supra*.

(6) Ss. 14, 33—*Separate share—Whole estate put up for sale, if arrears not deposited within 10 days—Sharers of defaulting shares if may buy—Several co sharers paying dues within 10 days—Purchaser, who is—Right of co-sharer declared purchaser how may be challenged in Civil Court—Benami, proof of—Circumstantial evidence—Court's discretion in granting time to deposit deficit Court-fees—Mistake—Limitation.*

When an order allowing a plaintiff to deposit deficit Court-fees has been made and complied with, no question of limitation can be raised. But it is not proper for a Court to extend the period of limitation allowed by law to the prejudice of defendants, by giving the plaintiff time to deposit deficit Court-fees, when there is no question of any mistake, merely to suit the convenience of the plaintiff.

Direct evidence to prove a transaction *benami* cannot be expected, since the whole object of such a transaction is to suppress evidence of the real facts. The true facts can be proved by circumstantial evidence.

When, on a share of a revenue paying estate, in respect of which a separate account has been opened, being put up for sale, the highest offer does not equal the amount due thereon, and the Collector stops the sale and declares that the entire estate will be put up to sale for arrears, unless the other recorded sharer or sharers or one or more of them shall within 10 days purchase the share in arrear by paying to Government the whole arrear due from the share, and more than one such recorded co-sharer separately make the necessary payment within the time specified, the Collector must recognise as purchaser the depositor who first pays the whole amount, or, if there are more depositors than one, must recognise as joint purchasers those whose payments first amount to the total arrears due.

S. 33 of Act XI of 1859 applies to sales under S. 14, and when the first payer has been

2.—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)—(Old.).

declared by the Collector to be the purchaser, a co-sharer who has paid up the arrears subsequently cannot have the sale set aside by suit in the Civil Court, except upon proof of the circumstances specified in S. 33. Such a sale under S. 14 cannot be attacked as a nullity and as such not requiring proof of those circumstances (a).

Quere:—Whether S. 14 of Act XI of 1859 precludes sharers of the share exposed for sale from purchasing the defaulting share. **Mussett, Sambho Kuer v. Harihar Pershad**, 18 C.W. N. 1071.

COXE and IMAM, JJ.

References:—(a) 21 C. 884 and 21 C. 70, F.

(7) *Ss. 14, 33—Court-fee—Suit filed with insufficient Court-fee—No mistake—Court not to give time to file deficient Court-fee—Extension of period of limitation—Benami transaction—Direct evidence—Bengal Revenue Sale Law (Act XI of 1859), Ss. 14, 33, Construction of—Defaulting proprietors if excluded from sales under S. 14—First depositor to be purchaser—Suit to set aside sale under S. 14—Plaintiff must prove injury.*

It is not proper for a Court to extend the period of limitation beyond that allowed by law and to the prejudice of defendants when there is no question of any mistake, merely to suit the convenience of the plaintiff.

Therefore, where a suit was instituted on the last day with a Court-fee of Rs. 800 in defect and the Court allowed two adjournments to put in this money and subsequently the Court was closed for three days and the money was paid on the opening day:

Held, that the order of the Court was quite unjustifiable, but as the order had been complied with, the question of limitation could not be raised.

Direct evidence of a *benami* transaction cannot be expected. The whole object of such a transaction is to suppress evidence of the real facts. But the true facts can be proved by circumstantial evidence.

As there is no previous reference in S. 14 of the Bengal Revenue Sale Law, 1859, to any sharer, the words "other recorded sharer" must mean "a recorded sharer of a share other than the share exposed for sale." This perhaps would by implication exclude any sharer of the share exposed for sale, even though he himself might have paid his *quota* of the revenue due on the share exposed for sale. It seems doubtful if the Legislature intended this. It is clear from S. 33 that defaulting proprietors may purchase at sales for arrears of revenue and there is no reason why they should be excluded from sales under S. 14.

The word "other" in S. 14 seems to be *share in arrears*. The framers of the section

2.—Bengal Acts—(Continued).

Act XI of 1859 (Revenue Sale Law)—(Old.).

did not advert to the possibility of more than one separate account falling into arrears.

S. 14 was intended merely to give co-sharers a chance of saving the estate and to secure the payment of the revenue, and was not at all intended to deprive the rights of the co-sharers *inter se*.

The purchase is effected by the payment of the arrears. As soon as the payment is made the purchase is complete and there is nothing left for any one else to buy. The Collector is bound, therefore, to recognise the depositor who first pays the whole amount, or if there are more depositors than one, to recognise as joint purchasers those whose payments first amount to the total arrears due.

S. 33 of the Bengal Revenue Sale Law applies to sales under S. 14, and where the plaintiff has suffered no injury, S. 33 is fatal to the suit for setting aside a sale under S. 14 (a).

Where the defendant has been formally declared the purchaser under S. 14, and the land has been delivered into his possession, to take it away from him and to give it to the plaintiff would be a manifest annulment of the sale. **Bahuria Sambho Kuer v. Harihar Prasad**, 24 Ind. Cas. 276=41 C. 1092.

COXE and IMAM, JJ.

References:—(a) 21 C. 844, F.; 21 C. 70=20 I.A. 165, R.

(8) S. 33. See Nos. 2, 6 and 7, *supra*.

(9) *Ss. 36, 37, Excep. (4)—Benami purchase—Real purchaser, if can sue for possession and annulment of incumbrance—"Purchaser," meaning of, in S. 37—Burden of proof—Exemption—Benefit of 4th Excep. to S. 37.*

S. 36 of the Bengal Land Revenue Sales Act, 1859, does not bar a suit for possession of lands as appertaining to a *taluk* purchased at a revenue sale in the name of a *benamidar* (a).

The language of the section should be given a restricted interpretation and not extended to cases not manifestly covered by it (b).

The word "purchaser" in S. 37 of the Act does not mean only "a certified purchaser or his heirs or assignees." The real purchaser is a purchaser within the meaning of the section, and is entitled to avoid incumbrances.

In a suit to avoid incumbrances (*howlas*) under S. 37 of the Bengal Land Revenue Sales Act, 1859, the defendants are bound to prove something more than the existence of the *howlas* and their long possession, and must establish that the lands in suit actually appertain to the *howlas* named or that the *howlas* still exist and that the defendants are owners of them or at least have been in possession of them for a sufficiently long period on assertion of their title under the *howlas* (c).

Where a defendant claims exemption from the provisions of the Revenue Sale Law which

2.—Bengal Acts—(Continued).**Act XI of 1859 (Revenue Sale Law)—(Old.).**

entitle a purchaser to annul incumbrances in respect of land in his possession, the benefit of the 4th exception to S. 37 of the Act of 1859 must be limited only to such portions of land as are covered by buildings, tanks, etc., and cannot be extended to cover those lands included in the lease on which no permanent works have been constructed (d). *Mathuranath Ghoshal v. Ratneswar Sen*, 23 Ind. Cas. 917.

CABENDUFF and CHAPMAN, JJ.

References:—(a) 2 C.W.N. 493, D. (b) 7 Ind. Cas. 849; 15 C.W.N. 706 (703); 13 C.L.J. 798, Rel. (c) 3 C.W.N. 341, R. (d) 12 C.W.N. 1049, Rel.; 30 C. 498, R.

(10) S. 37—*Putnidar, purchase by, of zemindari at sale for arrears of revenue—Right to annul subordinate tenures, when putni registered under the Act.*

The plaintiff, who was the owner of a *putni* which was especially registered and so protected at a sale for arrears of revenue, purchased the parent estate at the sale for arrears and sought to annul the tenures subordinate to the *putni*:

Held—that the plaintiff was not entitled to annul the tenures subordinate to the *putni*. *Satowri Chatterjee v. Priyanath Basu*, 18 C.W.N. 672.

COXE and RAY, JJ.

(11) S. 37—*Taluk in existence before Permanent Settlement—Portion thereof transferred and held under a new name—Such portion if protected, when it can be traced to original taluk.*

When a portion of a Taluk existing from before the Permanent Settlement is transferred and that portion is subsequently held in proportionate *jama* under a name different from the original Taluk, but the subsequent transfer and descent thereof can be traced from the original Taluk, the portion so transferred is also protected under S. 37, Act XI of 1859. *Doyamaye Chowdhuran v. Narendra Kishore Roy*, 19 C.W.N. 79.

NEWBOULD and ROY, JJ.

(12) S. 37. See No. 9, *supra*.

(13) S. 37 (4), scope of—Garden not in existence whether protected—Effect of sale for arrears of revenue—Incumbrances void or voidable—Option to annul how to be indicated—Formal written notice if essential—What constitutes sufficient notice. See ACT IX of 1887 (PROVL. S.O. COURTS), No. 12, 20 C.L.J. 494.

Act VIII of 1885 (Bengal Rent Recovery).

(1) S. 5. See ACT I OF 1879 (CHOTA NAGPUR LANDLORD AND TENANT PROCEEDINGS), No. 2, 22 Ind. Cas. 778.

(2) S. 6—*Landlord and tenant—Unregistered purchaser of under-tenure if acquires title under purchase—If entitled to deposit amount of rent-decree obtained against registered tenant—Person interested in protection of under-tenure—*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Rent Recovery)—(Concluded).**

Sale in execution of rent-decree after deposit, if legal—Question of fact—How much was deposited—Whether deposit sufficient—Question of law—Second appeal—“Costs of process,” what are—Sale after deposit—Bona fide purchaser for value. Moni Lal v. Uma Charan, 20 Ind. Cas. 337=19 C. L. J. 388. See Final Part, 1913, Col. 104.

(3) S. 16—*Encumbrances, annulment of—Under-tenure, sale of—Tenure-holder willfully defaulting to pay rent—Decree under Rent Law—Purchaser and price settled before-hand—Sale, a private sale.*

An intermediate landlord is bound to protect his own tenant from all paramount claims, and commits an act of fraud against his under-tenure-holder when he enters into an agreement with another person to get rid of the under-tenure by means of a fraud and fictitious sale for arrears of rent.

A tenure-holder deliberately defaulted to pay the superior landlord his just dues, with the intention that the decree might be obtained against him and his tenure sold, so that the under-tenure might be extinguished, an unencumbered title conveyed to the purchaser and the maximum of benefit conferred upon the defaulter. The plan succeeded; the decree was made under the provisions of the Rent Law and was executed. The purchaser was settled before the sale and the price also was fixed:

Held, that the purchaser was in no better position than a purchaser by a private transfer and his claim for annulment of the under-tenure must be refused. *Uma Charan Mandal v. Midnapore Zemindari Co.*, 20 C.L.J. 11=23 Ind. Cas. 896=19 C.W.N. 270.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—18 W.R. 240, F.

Act VII of 1868 (Bengal Land Revenue Sales).

S. 12 (3)—*‘Recognition’—Under-tenure—Purchaser, suit by, for ejectment—Settlement officer’s remark that under-tenure is not binding—Bengal Tenancy Act (VIII of 1885), S. 101, sub-S. (2).*

The expression “tenures created or recognised by the settlement proceedings of any current temporary settlement” in the third clause of S. 12 of Act VII (B.C.) of 1868, has reference to S. 9, cl. (2) and S. 14, cl. (1) of Reg. VII of 1882. The third clause of S. 12 also applies when proceedings have been instituted under Ch. X of the Bengal Tenancy Act.

Recognition implies something more than a mere record of a fact found to exist; it involves the notion of either acquiescence in or sanction of a fact found to exist (a).

The record of rights prepared under sub-S. (2) of S. 101 of the Bengal Tenancy Act contained an entry in respect of the under-tenures claimed by the petitioners. The existing rent was

2.—Bengal Acts—(Continued).

Act VII of 1868 (Bengal Land Revenue Sales)—(Concluded).

mentioned and the new rent settled was also stated. But in the remark column a note was made by the Settlement Officer to the following effect: "This *etram* is not binding upon the Government."

Held, that there was no recognition of the under-tenure in law or in fact and the petitioners were not protected under the third clause of S. 12 of Act VII (B.C.) of 1868. *Lukshidhar Barua v. Saroda Charan Dey*, 20 C.L.J. 40 = 24 Ind. Cas. 253.

MOOKERJEE and BEACHROFT, JJ.

Reference:—(a) 7 W.R. 60, D.

Act VI of 1870 (Chota Nagpur Encumbered Estates).

S. 3—Release-deed executed by proprietor at a time when his estate was managed under—Validity—Effect of admission to that effect in a *chhar sanad*. See *KHORPOSH GRANT*, No. 1, 19 C.W.N. 102.

Act VI of 1870* (Village Chaukidari).

Meaning of 'assigned,' 'appropriated'—What *chaukidari* lands are resumable. See *CHAUKIDARI CHAKRAN LANDS*, No. 1, 19 C.W.N. 65 (P.C.).

Act VI of 1871 (Civil Courts).

How far applies in Sonthal Parganas. See *SONTHAL PARGANAS*, No. 1, 18 C.W.N. 994.

Act VII of 1876 (Land Registration).

(1) Suit for rent—Plea that plaintiff was benamidar whether available to defendant when plaintiff is registered under. See *ACT VIII OF 1885 (BENGAL TENANCY)*, No. 36, 24 Ind. Cas. 118.

(2) Ss. 3 (2), (8) and 78—"Estates"—"Proprietor"—Chaukidari Chakran land, resumption of—Resumed Chaukidari chakran land, whether estate—Chaukidars Act (VI of 1870), Ss. 51, 52, 54, 55—Settlement of resumed Chaukidari Chakran land with zamindar—Non-registration of zamindar's name—Suit for rent by zamindar, whether to fail under S. 78 of *Land Registration Act*. *Tinkori Mukherjee v. Kumar Satya Niranjan Chakravarthi*, 20 Ind. Cas. 250 = 18 C.W.N. 158 = 19 C.L.J. 286. See *Final Part*, 1913, Col. 107.

(3) S. 78—Suit for rent—Registration—Burden of proof. See *ACT VIII OF 1885 (BENGAL TENANCY)*, No. 38, 23 Ind. Cas. 844.

(4) S. 78. See No. 2, *supra*.

Act I of 1879 (Chota Nagpur Landlord and Tenant Procedure).

(1) Ss. 31, 38, 94. See *LANDLORD AND TENANT*, No. 6, 21 Ind. Cas. 955.

(2) S. 47—Suit for rent—Description of property in arrears defective—Amendment ordered by High Court by consent of parties to be made by first Court—Amendment made by lower appellate Court, if legal—

2.—Bengal Acts—(Continued).

Act I of 1879 (Chota Nagpur Landlord and Tenant Procedure)—(Concluded).

Amendment order made under what power—Civ. Pro. Code (1908), O. VI, r. 18—*Amendment made after fifteen days of order, whether bad*.

The High Court in an appeal held that the plaint in the suit did not specify correctly the property in respect of which rent was due as it should have done according to S. 47, of the *Chota Nagpur Landlord and Tenant Procedure Act* of 1879, and acting on an agreement between the parties directed that the description in the plaint should be amended, and ordered that after such amendment had taken place the sale proclamation should be drawn up afresh. The case was remitted to the first Court through the lower appellate Court, but the latter Court allowed an amendment of the plaint and left it to the decree-holder to take further steps:

Held, (1) that the order of amendment made by the High Court was not made under O. VI of the Civ. Pro. Code, but under the power of the Court to order that certain steps should be taken by the parties to enable the differences between them to be properly settled, and, therefore, the amendment is not out of time though not made within fifteen days under O. VI, r. 18 of the Civ. Pro. Code;

(2) that, as the case fell within the scope of S. 5 of the *Rent Recovery Act* (VIII B. C. of 1865), there was no necessity for an amendment of the decree, the amendment of the plaint being considered sufficient;

(3) and that, as the High Court directed an amendment of the plaint to be made by the first Court, the order of amendment by the lower appellate Court was bad. *Madan Mohan Nath v. Maharaja of Chota Nagpur*, 22 Ind. Cas. 778 = 19 C.W.N. 200.

STEPHEN and MULLICK, JJ.

(3) S. 88. See No. 1, *supra*.

(4) S. 94. See No. 1, *supra*.

Act IX of 1879 (Bengal Court of Wards).

Ss. 23, 23-A, 24, 48, 51, 60, 60-A—Decree, execution of—Property in the hands of the manager, whether attachable.

S. 48 of the Court of Wards Act does not control the provisions of the Code of Civil Procedure as to the attachment and sale of property in execution of decrees.

Per Richardson, J.—All that S. 48 of the Act does is to lay down instructions for the guidance of the manager in the due course of management and as to the order in which the ward's liabilities are to be satisfied out of the free funds at the manager's disposal. *Upendra Nath Sen Roy Chowdhury v. Bimala Kanta Sen Roy Chowdhury*, 19 C. L. J. 406 = 23 Ind. Cas. 694 = 18 C. W. N. 1055.

CANNIFF and RICHARDSON, JJ.

2.—Bengal Acts—(Continued).**Act VI of 1880 (Bengal Drainage).**

Ss. 36, 36-A, 38—Costs of drainage construction—Apportionment—Person made liable, engagement to pay in instalments by—Recovery by certificate from purchaser.

The provisions of the Public Demands Recovery Act for summarily recovering the amount due from a landholder under an engagement entered into under S. 38 of the Bengal Drainage Act can only be put in force against the person who gave it.

They cannot be enforced against a person who has subsequently purchased his properties and who has not been made liable for the costs of construction under S. 36-A of the Bengal Drainage Act. *Srimati Nogendra Bala Chowdhurani v. The Secretary of State for India in Council*, 18 C.W.N. 944=19 C. L. J. 610=23 Ind. Cas. 782.

FLETCHER and RICHARDSON, JJ.

Act IX of 1880 (Bengal Cess).

(1) S. 95—Returns filed by certificated guardian of minor, it admissible in favour of minor—"Authorised agent."

A road-cess return filed on behalf of a minor by his certificated guardian is not admissible in favour of the minor.

The words in S. 95 of the Road and Public Works Cess Act requiring returns filed under the Act to bear the signature and address of the person or his authorised agent are directory only and the fact that the certificated guardian was not the authorised agent of the minor does not make the returns admissible in his favour. *Srimati Rajani Bala Dasul v. Bhaja Hari Koley*, 18 C.W.N. 1076.

FLETCHER and RICHARDSON, JJ.

(2) S. 95—Hindu widow—Unauthorised reduction of rent—Reversioner, if bound—Road-cess return filed by Hindu widow, if can be used in favour of reversioner—Evidence Act, S. 32, cl. (3)—Collection papers, admissibility of, person who collected rent, dead—Additional rent for excess land—Proof. *Lachmi Prosad Chowdhury v. Jag Mohan Lal Chaubey*, 18 C.L.J. 633=22 Ind. Cas. 594. See Final Part, 1913, Col. 111.

Act II of 1882 (Bengal Embankment).

Ss. 54, 56, 59, 68, 69, 74—Poolbundi charges—Putni lease—Contract—Apportionment of charge by Collector—Contractual right, if can be enforced—Suit for declaration and injunction if maintainable—Contract, if valid—Embankment Act at the time of contract, repeal of. *Siba Prosad v. Gossain Das*, 18 C.L.J. 337=20 Ind. Cas. 489=18 C.W.N. 86=41 C. 180. See Final Part, 1913, Col. 112.

Act III of 1884 (Bengal Municipal).

(1) S. 85 (a)—Assessment—"Circumstances"—Civil Court, power of, to assess.

The word 'circumstances' in S. 85 of the Bengal Municipal Act is equivalent to 'means,'

2.—Bengal Acts—(Continued).**Act III of 1884 (Bengal Municipal)—(Concl'd.).**

so that taxation should be according to the means and property of the person to be taxed, within the Municipality (a).

A Civil Court cannot assess the value for the purpose of S. 85 of the Bengal Municipal Act. *Deb Narain Dutt v. Chairman of Barulpur Municipality*, 19 C.L.J. 205=41 C. 168.

JENKINS, C.J. and MOOKERJEE, J.

References:—(a) 7 C.L.J. 31; 35 C. 859, F.

(2) Ss. 190, 224, 226, 229, 270, cl. (2)—Nali (drain) removal of—Order for removal of drain, if within power of Municipality—Consent—Es-toppel. *Gopal Misser v. Kerat Chand*, 20 Ind. Cas. 358=20 C.L.J. 132. See Final Part, 1913, Col. 114.

(3) S. 224. See No. 2, *supra*.

(4) S. 226. See No. 2, *supra*.

(5) S. 229. See No. 2, *supra*.

(6) S. 270. See No. 2, *supra*.

Act VIII of 1885 (Bengal Tenancy).

(1) S. 5 (1), (5)—Tenure-holder—Presump-tion, if rebutted—Tenure-holder reserving a portion of land to be cultivated by himself—Land partly cultivated by under-tenant and partly by tenant—Lease, construction of.

A person who has acquired from a proprietor a right to hold land for the purpose of collect-ing rents or bringing it under cultivation by establishing tenants on it is *prima facie* within the definition of a tenure-holder in S. 5 (1) of the Bengal Tenancy Act, but there may be other persons who are tenure-holders, although they may not have acquired a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it; in other words, it is possible for a person to be a tenure-holder, although a part of the land in his occupation is cultivated by himself, and was intended to be cultivated by himself. The fact that the land has been culti-vated by the under-tenants is perfectly consis-tent with the inference that the tenant is a tenure-holder, although he has reserved a por-tion of the land to be cultivated by himself or by his servants.

The presumption of a tenant being a tenure-holder, arising from holding an area exceed-ing 100 standard bighas, is not rebutted by showing that he has reserved a portion of the land to be cultivated by himself or by his servants.

Where a grant was made in order that the grantees might cultivate the land after making it fit for cultivation at his own expense by his own efforts and the lease also provided that "the grantee may enjoy the land by cultivating it or having it cultivated; and that it will be competent to the grantee to make such other arrangements or adopt such other means as he might consider necessary for cultivating the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

same and the grantor would not raise any objection thereto."

Held, that the terms of the lease did not negative the statutory presumption under S. 5 (5) of the Bengal Tenancy Act.

Where the grant was for the purpose of reclamation, and the grantee was expected to reclaim the land at his own expense, and in the lease, there was a period of remission fixed, during which no rent was to be paid on account of the land itself, the rate of rent itself was fixed in perpetuity and a premium was paid by the grantee to the grantor :

Held, that the grant was intended to be that of a tenure. *Bibhudendra Mansingh Bhrambar Rai v. Debendra Nath Das*, 20 C.L.J. 140.

JENKINS, C.J., and MOOKERJEE, J.

Reference:—29 C. 707, R.

- (2) S. 7 — *Alluvial accretion — Settlement with one of the proprietors—Land Settlement Act (XXXI of 1859), S. 2—Pre-existing contract, how far binds the settlement-holder—Fair rent—Civ. Pro. Code (1908), S. 103—Necessary party.*

Certain lands were formed by gradual accretion by recession of a river. These lands were resumed by the Government and were settled with plaintiff on the 9th April, 1903. The land was held by the defendant under a lease granted to him by the plaintiff (who was a co sharer proprietor to the extent of two thirds share) and her co-sharers, on the 19th February, 1884.

Held, that, in respect of the two-thirds share, the plaintiff was bound by the terms of the contract, that is, she was entitled to realise rent at the rate mentioned in the lease, and in respect of the remaining one-third she was in the position of a stranger and was entitled to realise rent at the rate assessed by the Settlement authorities as payable by the under-tenure-holder of the original estate (a).

That, as in the present case, the Settlement authorities determined the fair rent payable by the actual cultivators of the soil and not by the tenure-holder, the fair rent was assessed under S. 7 of the Bengal Tenancy Act by the High Court acting under S. 103 of the Code of Civil Procedure.

That the co-sharers of the plaintiff were not necessary parties to such a suit for rent. *Muktakeshi Das v. Srinath Das*, 19 C.L.J. 614.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 30 C. 811, R.; 26 C. 739; 19 C.L.J. 808, Dist.

- (3) Ss. 11, 18, 85, 170 cl. (3)—"Transfer," whether includes lease—Sub-lessee under permanent tenure-holder or raiyat at fixed rate, whether may deposit money to prevent sale of holding in execution of rent decree.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

The term "transfer," as used in S. 11 or S. 18 of the Bengal Tenancy Act, includes a lease, as a lease is a transfer of an interest in immovable property. Therefore, a permanent tenure-holder or a raiyat at a fixed rate of rent is competent to grant a sub-lease of his tenure or holding.

Consequently the sub-lessee may pay money into Court under S. 170, cl. (3), to prevent a sale of the tenure or holding.

The provisions of S. 85 are subject to those of S. 18, in other words, S. 85 has no application to case where S. 18 applies. *Hari Mohan v. Atal Krishna Bose*, 23 Ind. Cas 925.

MOOKERJEE and BEACHCROFT, JJ.

- (4) Ss. 12, 17, 195 (c)—Transferee of portion of patni if may claim recognition by zemindar. See REG. VIII OF 1819 (PUTNI), No. 5, 18 C.W.N. 629.

- (5) Ss. 12, 63, Sch. II—*Permanent tenure, transfer of—Tenant, transferor or transferee—Tender of rent by transferee, coupled with demand of statutory receipt, if valid tender—Landlord if may insist on giving receipt in another form.*

The transfer of a permanent tenure under S. 12 of the Bengal Tenancy Act is complete as soon as the document is registered, and a valid transfer under that section operates to discharge the transferor from the liability to pay rent which thereupon passes to the transferee. As a consequence the transferee becomes by operation of law the tenant of the tenure, and the transferor ceases to be the tenant, though he is not thereby necessarily absolved from liability under the terms of the contract between him and the landlord.

Such a transferee when he tenders rent as tenant is entitled under S. 62, Bengal Tenancy Act, to claim a receipt with his name thereon as that of the tenant.

Where the landlord, upon the transferee's demanding it, refused to grant such a receipt and proposed to grant another describing the original tenant as still the tenant of the tenure and the transferee as merely the person in occupation thereof :

Held—that there was a valid tender wrongly refused by the landlord.

A tender is not vitiated because a receipt is asked.

A tenant, who tenders rent with a request for a receipt in the statutory form, does not seek to impose on the landlord any condition on which he is not entitled to insist; and when the landlord refuses to give such a receipt and offers to grant a receipt in a form which would compromise the position of the transferee, there is an improper refusal of a valid tender. *Rup Chand Ghose v. Narendra Krishna Ghose*, 19 C.W.N. 112.

MOOKERJEE and BEACHCROFT, JJ.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(6) S. 17. See No. 4, *supra*.(7) S. 18. See No. 8, *supra*.(8) S. 20 (3)—Non-occupancy holding if heritable. See **HANDLORD AND TENANT**, No. 15, 18 C.W.N. 828.(9) S. 22 (2)—Applicability. See **OCCUPANCY**, No. 1, 19 C.L.J. 400.(10) S. 25—Unauthorized transfer of holding—Effect of usufructuary mortgage—Abandonment—Forfeiture. **Bhupendra Nath Bose v. Banai Tanti**, 40 C. 870 = 22 Ind. Cas. 416. See Final Part, 1913, Col. 117.(11) Ss. 26, 178 (3) (d)—Non-transferable occupancy holding if may be disposed of by will—Testator or heir at law if estopped. See **OCCUPANCY**, Nos. 3 and 4, 18 C.W.N. 1290 and 1294.

(12) S. 29—Enhancement of rent—Consolidated rent—Partition—Total rent remains unaltered—Distribution of rent by agreement of parties.

The defendant held two separate tenancies under the plaintiff and his co-sharers. In 1866 the holding were amalgamated and the consolidated rent was fixed at Rs. 80. In 1892, there was a partition amongst the superior landlords; the consequence was that the disputed land fell into the share of the plaintiff, and by agreement of parties, Rs. 16-4 was fixed as the fair rent payable in respect thereof. The defendant contended that as, before 1866, Rs. 7 was payable as annual rent in respect of that land, there was an enhancement in contravention of S. 29 of the Bengal Tenancy Act:

Held, that there was no enhancement at all.

If the total rent remained unaltered, its distribution, by agreement of parties, over different parcels of land, did not constitute enhancement within the meaning of the Bengal Tenancy Act. **Rowshan Sircar v. Shyama Charan Chakrabarty**, 20 C.L.J. 391.

MOOKERJEE and MULLICK, JJ.

(13) S. 29, cl. (b)—Enhancement of rent by contract—Limit of enhancement—Settlement of additional land with original holding—Original holding sub-divided among three brothers—Kabuliat for enhanced rent executed by one—Non-receipt of nazrana for additional land—Recognition of sub-division of original holding—Agreement to pay enhanced rent, at more than 2 annas in rupee, whether legal.

There was originally a *jama* held by the defendant and his two brothers. This *jama* was partitioned by the three, and then the defendant alone executed a fresh *kabuliyat* on an enhanced rent for an area which included not only the part of the original *jama* allotted to him on the partition, but also some additional land of which he had taken possession. There was no evidence to show how much of the new holding belonged to the original holding

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

and how much was additional land. The increase in the rent was agreed to in consideration of the landlord's remitting the *nazrana* usually payable on the settlement of fresh lands with a tenant, and also of his recognizing the sub-division of the original holding:

Held, (1) that the *onus* of proving that a *kabuliat* contravenes the provisions of S. 29, cl. (b) of the Bengal Tenancy Act is on the tenant (a).

(2) That S. 29, cl. (b) had no application to the circumstances of this case.

(3) That, as for the *kabuliat*, it either contravenes the section or it does not; if it does, it is bad *in toto* and cannot stand in part, as the good cannot be severed from the bad (b). **Taramani Chaudhurani v. Safatulla Mandal**, 22 Ind. Cas. 854.

CARNDUFF and RICHARDSON, JJ.

References;—(a) 4 Ind. Cas. 577 = 13 C.W.N. 181, F. (b) 24 C. 895 = 1 C.W.N. 442, F.

(14) S. 29 (b)—Rent, enhancement of—Settlement for term on nominal rent—Less rent payable during term—Rent payable—Nominal rent mentioned payable after term. **Srimati Mahanaya Kar v. Kishore Chang**, 18 C.L.J. 502 = 21 Ind. Cas. 948 = 18 C.W.N. 738. See Final Part, 1913, Col. 118.

(15) Ss. 29, 43—Rent, suit for—Agreement, registered—Agreement to convert, after expiry of lease, money rent into rent in kind, if an enhancement and enforceable. **Gobind Mandar v. Banarsi Prasad**, 18 C.L.J. 74 = 21 Ind. Cas. 351. See Final Part, 1913, Col. 118.

(16) Ss. 29, 74, 147-A, 147-B—Compromise decree—Enhancement—Rent in kind—Illegal cess—Record of rights, entry in—Presumption rebutted.

In the record of rights, the rent which was payable in kind was stated to be one half of the produce. In a suit subsequently brought, the landlord claimed more than a half-share of the produce, and the tenant did not resist the claim. In fact, the common case of both the parties was that, for a long series of years, the tenant paid rent to the landlord at the rate alleged, and they jointly prayed that a decree might be drawn up in the terms of the petition of compromise filed by them:

Held, that a decree could be drawn up in accordance with the terms of the compromise, as neither S. 29 nor S. 74 of the Bengal Tenancy Act governed the matter.

The quantity of produce in excess of a half share admitted by the tenant, to be payable, was not an illegal cess within the meaning of S. 74 of the Bengal Tenancy Act; it was paid as part of the rent, though the landlord used to pay certain officers their salaries from the excess quantity of produce thus received by him from the tenant.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

S. 29 of the Bengal Tenancy Act deals with the cases of enhancement of money rent of an occupancy raiyat and not of rent in kind.

Held, also, that S. 147-B of the Bengal Tenancy Act did not apply as the presumption of accuracy which attaches to an entry in the record of rights, was rebutted in this case. *Fazl Imam v. Sukor Mahton*, 19 C.L.J. 333.

MOOKERJEE and BEACHCROFT, JJ.

- (17) Ss. 29, 113—*Landlord and tenant—Kabuliat taken at enhanced rate on promise to grant pattah including extra land in tenant's holding—Grant of pattah but not including promised land—Promised land in tenant's possession—Suit for recovery—Pattah invalid—Oral settlement before pattah, whether effectual.*

The defendant originally held a *jama* of Rs. 24 under the plaintiff which did not include the lands now in dispute. At the settlement in 1897, *jama* upon that holding was increased to Rs. 29-8. Subsequently the defendant was found in possession of these disputed lands and he agreed to pay Rs. 88-8 for his holding provided that the disputed lands were included in that settlement. The defendant executed a *kabuliat* and the plaintiff agreed to grant a *pattah* of all the lands, but, as a matter of fact the *pattah* which he granted did not include the disputed lands. The plaintiff sued for recovery of possession or in the alternative for Rs. 37-2 as rent and cesses:

Held, (1) that the *pattah* was invalid under S. 29 of the Bengal Tenancy Act as well as under S. 113;

(2) that the *jama* stated in the *kabuliat* was void and not by law recoverable by the plaintiff;

(3) that nothing more could be given to him in any case as there had been already an illegal enhancement;

(4) that a go-by must be given to the *pattah* and the oral settlement before it was given effect to (a);

(5) that the plaintiff had no claim to recover the land, nor could any more rent as claimed be decreed to him. *Manikya Bahadur v. Jina Bazi*, 23 Ind. Cas. 579.

HOLMWOOD and CHAPMAN, JJ.

References:—(a) 31 O. 614=14 M.L.J. 196=5 Bom L.R. 498=8 C.W.N. 489=31 I.A. 122 (F.C.), *applied*.

(18) Ss. 30, 188—*Suit for enhancement by one of many co-shebaits Maintainability.* See *SHEBAIT*, No. 3, 24 Ind. Cas. 366.

(19) Ss. 31-4, 50 (2), Chap. X, Ss. 115, 116—*Enhancement—Prevailing rate—Presumption of fixity of rent—Average of prices.*

Where rent is settled under Chap. X of the Bengal Tenancy Act, it cannot be enhanced under S. 113 of the Act for fifteen years even on the ground of prevailing rate.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Where, after an entry in the record of rights that the tenant is an occupancy raiyat, the landlord brought a suit for enhancement of rent.

Held, that, in view of the plain language of S. 115 of the Act, the tenant was not entitled to the benefit of the presumption arising under S. 50 (2) (a).

Where, in a certain village all the tenants hold at different rates, there is no prevailing rate.

Where, in a certain area, two stable food crops are grown on all the lands, in decreasing enhancement, the mean or average of the increase of the prices should be taken into consideration. *Haribar Persad Bajpai v. Ajur Misir*, 23 Ind. Cas. 604.

TEUNON and CHAPMAN, JJ.

References:—(a) 3 Ind. Cas. 449=13 C.W.N. 1149 (F.B.)=10 C.L.J. 343=37 C. 30, *Rel.*, 12 C.W.N. 904, *Not F.*

(20) S. 43. See No. 15, *supra*.

(21) Ss. 48, 49—*Contract Act, S. 37—Under-raiyat—Written lease for a term of years—Tenant, death of, before expiry of term—Under raiyati holding, heritability of—Lease, expiry of—Ejectment, suit for—Heir, if entitled to notice to suit.*

An ordinary holding of an under raiyat from year to year is not in itself heritable, and there is nothing in the Bengal Tenancy Act which makes it heritable. But a leasehold property under the Bengal Tenancy Act or under any other Act, if it is for a term of years, is necessarily heritable, inasmuch as the contract enables the lessee to remain in possession for the full term. An under-raiyati cannot therefore be said to be under no circumstances heritable.

Where, therefore, on the death of the original tenant of a raiyat, holding under a written lease for a term of years, before the expiry of the term, his son succeeded him as an under raiyat, and went on cultivating the land after the expiry of the lease;

Held, that he was liable to be ejected without a notice to quit. *Nirode Mohan Dey v. Jagaralli*, 20 C.L.J. 828.

HOLMWOOD and CHAPMAN, JJ.

(22) S. 49—*Under raiyati, if transferable—Effect of transfer—Ejectment of under-raiyat.* See *LANDLORD AND TENANT*, No. 43, 19 C.W.N. 43.

(23) S. 49. See No. 21, *supra*.

(24) S. 50—*Presumption—Assertion by tenant of certain rent more than twenty years before suit—Same rent claimed in present suit—Presumption that rent has not been altered for twenty years—Ancient document*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

—*Proper custody—Interference with discretion as to custody by Appellate Court—Evidence Act, Ss. 13, 43, 90—Assertions of right—Admissibility in evidence.*

The presumption of S. 50 of the Bengal Tenancy Act does not rest upon whether one uniform rate of rent has been paid or not, but upon whether the rent has or has not been changed.

Where a tenure-holder asserted in a rent suit, brought against him more than twenty years before the present suit for rent, that his rent was Rs. 71 *sicca*, and in the present suit rent was claimed at the same rate, and there was no evidence of a change of rent:

Held, (1) that the fact that in the present suit rent was claimed at the same rate was an admission that the rent of the tenure had remained unaltered for upwards of twenty years and was evidence that there had been no change in the rate of rent from the date of the previous suit;

(2) that the defendants were entitled to the presumption under S. 50 of the Bengal Tenancy Act.

Documents containing assertions of the right of a tenure-holder to hold the tenure at a certain rental are admissible under S. 13 of the Evidence Act (a).

Whether the custody of a document is a proper one under S. 90 of the Evidence Act, is a question to be decided upon the circumstances of each case; and an Appellate Court will always be slow to interfere with the discretion of the Court below vested in it under S. 90 in refusing or admitting the document. *Rani Dinamani Chaudhuran v. Jagat Chundra Bhattacharjee*, 23 Ind. Cas. 773.

WOODROFFE and MULLICK, JJ.

Reference:—(a) 22 C. 533=22 I. A. 60, R.

(25) S. 50—*Rent, enhancement of—Presumption—Boundary, confusion of.* *Adit Singh v. Sukhraj Rai*, 17 C.L.J. 435=21 Ind. Cas. 385. See Final Part, 1913, Col. 120.

(26) S. 50—*Suit not under the Act—Uniform rent from a long time—Presumption of fixity of rent.* See LANDLORD AND TENANT, No. 12, 22 Ind. Cas. 367.

(27) S. 50. See No. 19, *supra*.

(28) Ss. 50, 105, 109-A—*Question of enhancement of rent if a question under S. 105—Presumption under S. 50—Kabuliyat executed since Permanent Settlement—Confirmatory lease.*

Where, in a proceeding for settlement of rent under S. 105 of the Bengal Tenancy Act, the Settlement Officer held that the rent of the tenure was not enhanceable by reason of the application of S. 50 of the Bengal Tenancy Act, and the Special Judge on appeal held that the tenure having originated in a *kabuliyat* of 1298, the rent was enhanceable.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Held—that the question decided being a question relating to an incident of the tenancy did not come under S. 105 of the Act and a second appeal was not barred by S. 109-A of the Act;

that, as the *kabuliyat* was a document by which a previously existing lease was recognized, the presumption under S. 50 of the Act applied. *Bisheshur Ray Chowdry v. Rajendra Kumar Singh*, 18 C.W.N. 949.

JENKINS, C.J., and D. CHATTERJEE, J.

(29) Ss. 50 (2), 106—*Raiyat holding at fixed rate—Presumption—Unexplained variation—Alteration in rate of rent, if variation—Record of rights, entry in—Presumption.* *W. M. Grant v. Harashal Singh*, 18 C.L.J. 76=20 Ind. Cas. 53=19 C.W.N. 117. See Final Part, 1913, Col. 120.

(30) Ss. 50, 115—*Record of rights—Entry as occupancy raiyat—Presumption of fixity of rent, whether applicable.*

A tenant, recorded in a Record of Rights prepared under Chap. X of the Bengal Tenancy Act as an occupancy *raiya* merely, is not entitled to the benefit of the presumption as to fixity of rent under S. 50 of the Act, according to the provisions of S. 115. *Brendra Kishore Manikya Bahadur v. Faizuddin*, 22 Ind. Cas. 948.

IMAM and CHAPMAN, JJ.

(31) S. 52—*Suit, maintainability of—Rent, assessment of, suit for—Grants—Alteration of rent in respect of alteration in area.*

In a suit to recover possession of a tank on the ground of dispossession or in the alternative for assessment of rent, it was found that the land in suit was not part of the original holding of the defendant but was subsequently acquired and treated as an addition to the original holding, and the Court below refused the prayer for possession, but decreed the liability of the defendant to pay rent for the same.

Held, that the suit was not maintainable as not being framed under S. 52 of the Bengal Tenancy Act, though the facts found in the case were such as would have been necessary to find if the suit had been framed as one under S. 52. *Hara Chandra Majumdar v. Maharaja Radha Kishore Manikya Bahadur*, 20 C. L.J. 296.

JENKINS, C.J., MOOKERJEE and BEACH-CROFT, JJ.

(32) S. 52—*Landlord and tenant—Suit for additional rent for increased area—Excess of land found in tenant's possession—Standards of measurement same on both occasions—Allowance for difference in systems of measurement, if to be granted.*

In a suit for additional rent for excess area, where it is found that the standards of measurement were the same on both the occasions, when the land was first let out and when the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

excess area was discovered, and that there has been an increased area in the possession of the tenant, the Court is not entitled to allow any deduction on the ground of difference in the systems of measurement. **Baidya Nath Dutt v. Jawahir Mundal**, 23 Ind. Cas. 794.

COXE and IMAM, JJ.

References:—11 Ind. Cas. 212=14 C. L. J. 146=15 C. W. N. 921, D.

(33) Ss. 52 (1), (b), 180 (1)—*Diara land, tenant holding—Reduction of rent upon diluviation, if may be claimed by him.*

A *raiyat* who holds *diara* land cannot, until he has acquired occupancy right in his holding by twelve years' continuous possession, demand a reduction of rent under cl. (b), sub-S. (1) of S. 52 of the Bengal Tenancy Act.

"Holding" in sub-S. (1) of S. 180 of the Act means the holding as the tenant received it from the landlord. **Srinibash Proshad v. Ram Raj Tewary**, 18 C.W.N. 598=22 Ind. Cas. 822.

STEPHEN and MULLICK, JJ.

Reference:—14 C. W. N. 470, R.

(34) S. 52 (6)—*Rent, Enhancement of—Consolidated rent.*

If it is found that the Court is entitled to make a presumption under sub-S. (6) of S. 52 of the Bengal Tenancy Act, then the rent is to be determined by reference to the area and the rent is not a consolidated one. **Uma Singh v. Rai Tarini Prosad Bahadur**, 19 C. L. J. 451.

JENKINS, C.J., and MOOKERJEE, J.

(35) Ss. 52, 188—*Co-sharer landlord, suit by, for additional rent for additional land, if maintainable—Co-sharers joined as defendants—S. 52, if applicable to cases in which new land has been taken by tenant. Darik Dhakal v. Aswini Kumar Nag*, 20 Ind. Cas. 659=18 C. W.N. 942. See Final Part, 1913, Col. 191.

(36) Ss. 60, 153—*Appeal—Second appeal—Suit by lessee—Plea that rent paid to lessor—Conflicting claim to land between parties—Plea that plaintiff benamidar, whether available to defendant when plaintiff registered under Land Registration Act (VII of 1875).*

In a suit for rent, where the plaintiff is a lessee and the tenant-defendant claims to pay rent not to the plaintiff but to his lessor, there is a question of title between parties having conflicting claims to the land on the ground that in such a case both parties are claiming to be tenants of the same degree under the same person. But if the plaintiff is a mere mortgagee, then there cannot be conflicting claims as to their respective interests in the land between the plaintiff and the defendant.

Obiter dictum:—Where the plaintiff is registered under the Land Registration Act as proprietor or mortgagee, it is not open to the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

defendant to take the plea that the plaintiff is a *benamidar* and, therefore, not entitled to get rent from the defendant. **Sheikh Mohamed Hosain v. Hiranman Raut**, 24 Ind. Cas. 118.

MULLICK, J.

(37) Ss. 61, 62, Sch. III, Art. (2) (a)—*Rentsuit for—Limitation—Rent deposited—Deposit, insufficient—Agreement to pay rent in cash and kind—Rent in kind to be changed into one of cash on failure to deliver—Cash in lieu of delivery fixed—Market rate of rent in kind, if can be realised—Oral evidence as to market rate, if admissible.*

The period of limitation prescribed in Art. 2, cl. (a) of Sch. III of the Bengal Tenancy Act is applicable to a suit for rent whenever rent has been deposited under S. 61, even though the allegation of the tenant that what he had deposited was the full amount due at the time may ultimately prove to be incorrect (a).

S. 61 of the Bengal Tenancy Act is applicable to a case where the parties agreed that, upon failure, to deliver the rent payable in kind, a fixed sum is to be paid in lieu thereof.

Where the tenants agreed to pay Rs. 9 in cash and to deliver a specified quantity of paddy, that, in default of delivery, they would, year by year, according to the instalments specified, pay Rs. 39 as the value of the paddy, and in a subsequent part of the document it was stated that they would pay Rs. 48 in all to the landlord, namely Rs. 9 in cash and Rs. 39 in lieu of the paddy, if it remained undelivered:

Held, that the tenants were liable to pay Rs. 39 for the paddy undelivered and not its market-value at the date of the suit.

The rights of the parties should be determined upon the terms of the contract, and oral evidence was not admissible to show that the parties really intended to enter into a contract different from what had been entered in the instrument. **Saei Bhusan Dey v. Umakant Dey**, 20 C.L.J. 153.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 18 C.W.N. 84, Not F.; 51 C. 166, *Expl.*

(38) Ss. 61, 66—*Withdrawal of portion of claim in suit—Application for withdrawal in second appeal, whether may be granted—Deposit of rent—Interest.*

The plaintiff sued for rent for the years 1814 to 1816 and for the first half-year of 1817. There was also a prayer for ejectment. Seeing that the plaintiff could not succeed in his prayer for ejectment, as he had sued for rent for the first half of 1817, he prayed in second appeal that he might be permitted to withdraw his claim in respect of 1817:

Held, that the application could not be granted at that stage.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

A deposit of rent without the interest then due is not a sufficient deposit within S. 61 of the Bengal Tenancy Act. *Shyam Chaddra v. Shanga Dei*, 23 Ind. Cas. 777.

TEUNON, J.

(39) Ss. 61, 195 (e)—Putnidar, if may deposit rent in Court in case of doubt as to who is entitled to receive it—Putni Regulation (VIII of 1919).

- A putnidar who entertains a bona fide doubt as to who is entitled to receive rent from him, is entitled to deposit the rent in Court under S. 61 of the Bengal Tenancy Act, no provision of the Putni Regulation (VIII of 1919) being in any way affected by that section. *Bata Krishna Rana v. Janaki Nath Panday*, 18 C. W. N. 916=41 C. 1000=24 Ind. Cas. 71.

MOOKERJEE and BEACHCROFT, JJ.

(40) S. 62. See No. 37, *supra*.

(41) S. 63. See No. 5, *supra*.

(42) Ss. 65, 66, 148 (h), 195—Sale of putni—Suit by vendor for back rents not assigned—Putni if may be sold free of darputni in execution of decree made—First "charge" stranger to land if may claim—Darpatnidar, deposit of putni rent by, in proceeding under—Putni Regulation (VIII of 1919), S. 13—Darputnidar's lien, priority of—"Salvage lien," statutory—Scope of the Act and the Regulation.

The right to bring a tenure or holding to sale under S. 65 of the Bengal Tenancy Act, exists so long as the relationship of landlord and tenant exists.

- The right to bring a tenure or holding to sale under S. 65 being thus exclusively in the landlord, a person to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the tenancy is situated has no such right.

The view that either from the nature of the debt being arrears of rent, or the decree being for arrears of rent, the tenure becomes *ipso facto* hypothecated for the debt is untenable upon a proper construction of S. 65. A stranger to the property cannot avail himself of the special remedy given by that section to the landlord to recover arrears attached to the tenure or holding (a).

The special lien which a subordinate tenure-holder acquires under S. 13 of Reg. VIII of 1919 by depositing the putni rents in arrears for which the putni has been advertised for sale by the zemindar under that Regulation, is not affected by proceeding taken in respect of the putni under the Bengal Tenancy Act, the Putni Regulation being a self-contained Act specially excluded from the operation of the Bengal Tenancy Act by S. 195 of that Act.

Where a landlord, after he has sold his property, sues for the back rents which he has not assigned to his vendee, and obtains a decree,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

and his vendee also sues for rents which accrued due subsequently to his purchase, the latter only can execute the decree against the tenure or holding. His vendor can execute his decree against his debtor as a money decree only. *Arthur Henry Forbes v. Maharaj Bahadur Singh*, 18 C.W.N. 747=15 M.L.T. 380=(1914) M.W.N. 897=12 A.L.J. 658=27 M.L.J. 4=23 Ind. Cas. 632=41 C. 926 (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

References:—(a) 33 C 566=10 C.W.N. 547, D.

(43) Ss. 65, 195 (e). See REGULATION VIII OF 1919 (PUTNI), No. 11, 20 C.L.J. 1.

(44) S. 66. See Nos. 38 and 42, *supra*.

(45) S. 74. See No. 16, *supra*.

(46) S. 85. See No. 3, *supra*.

(47) S. 85 (2)—Under-raiyat, sub-lease by—Permanent lease by under-raiyat if invalid—Application by analogy of statutory provision to cases outside it—Permanent lease described as one for nine years to meet objection of Registering Officer.

S. 85 of the Bengal Tenancy Act, has no application to a permanent lease created by an under-raiyat in favour of a sub-lessee; nor can the provisions of that section be applied to such a case by analogy (a).

The leases in this case were held to be permanent leases. *Guru Das Das v. Kali Das Changa*, 18 C.W.N. 882=24 Ind. Cas. 287.

JENKINS, C.J., and CHATTERJEE, J.

Reference:—(a) 19 W.R. 359, R.

(48) Ss. 85, 161 (a)—Ejectment—Invalid sub-lease by raiyat—Sub-lease if an encumbrance. *Fakir Chandra Sinha Ray v. Banamali Sain*, 18 C.L.J. 252=21 Ind. Cas. 104. See Final Part, 1913, Col. 123.

(49) S. 86—Ejectment—Transferee of a portion of non-transferable holding—Surrender. *Askar Ali v. Gopi Mohon Roy Chowdhury*, 18 C.L.J. 257=21 Ind. Cas. 58=19 C.L.J. 313=18 C.W. N. 609. See Final Part, 1913, Col. 124.

(50) S. 87—Occupancy holding not transferable by custom—Transfer without landlord's consent—Effect—Rights of purchaser of portion—Holding if may be transferred apart from occupancy right. See OCCUPANCY, No. 2, 18 C.W.N. 971.

(51) S. 101 (2)—Under-tenure—Suit by purchaser for ejectment—Settlement Officer's remark that under-tenure is not binding—Effect. See ACT VII OF 1868 (BENGAL LAND REVENUE SALES), No. 1, 20 C.L.J. 40.

(52) S. 103-A—Draft record-of-rights, entries in, if admissible in evidence in rent suits.

Entries in a draft record-of-rights published under S. 103-A of the Bengal Tenancy Act,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

are not admissible in evidence in a suit for rent. It is not until the record-of-rights is finally published that the presumption of correctness arises. *Gulab Koer v. Ramratan Pande*, 18 C. W.N. 896.

NEWBOULD and RAY, JJ.

(53) Ss. 103-A, 105, 109-A—*Record-of-rights—S. 105, applicability of—S. 103-A, if precludes enquiry as to correctness of entry—S. 109-A, when bars an appeal—Jurisdiction.*

Where on an application by a landlord under S. 105 of the Bengal Tenancy Act for settlement of fair rent wherein he claimed enhancement against a tenant who was wrongly entered in the record as *korfa*, and the purpose of whose tenancy was described as residential, the special Judge enhanced the rent :

Held, that the decision of the Special Judge was without jurisdiction inasmuch as the tenancy was not governed by the Bengal Tenancy Act and the tenant was not estopped from raising this plea.

The provision of S. 103-A of the Tenancy Act that the publication of the record-of-rights shall be conclusive evidence that it has been duly made under the Chapter does not preclude a Court from enquiring as to the correctness of the resultant entry ; it only precludes the Court from going into the question whether the procedure under the Chapter has been followed.

S. 109-A of the Tenancy Act is no bar to an appeal in a case of settlement of rent in which a question of jurisdiction is definitely raised. *Ramdas Mukerjee v. Bipradas Pal Chowdhery*, 19 C.W.N. 35.

CHAPMAN and NEWBOULD, JJ.

(54) Ss. 103-B, cl. (5), 104-J—*Presumption—Rate and amount of rent—Relationship of landlord and tenant.*

The presumption which arises out of S. 104-J of the Bengal Tenancy Act merely refers to the rate and amount of rent. That rent may be payable by one person at one time and by another person at another time, but the mere fact that a certain rate of rent was found to be payable by the defendant's father to the plaintiff gives rise to no presumption that the sons are the plaintiff's tenants.

Where the defendants were recorded as *under-rajats* of the plaintiff in the Settlement Record.

Held, that there was a presumption under S. 103-B, cl. (5), that the relationship of landlord and tenant existed between the parties, but that the presumption could be rebutted. *Nadar Ali Howladar v. Asimaddi Sardar*, 28 Ind. Cas. 244.

HOLMWOOD and SHARFUDDIN, JJ.

(55) Ss. 103-B, 105, 105-A, 107—*Rent suit—Entry in Record of Rights—Presumption—*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Entry not conclusive even on failure of tenant to take proceedings to rebut presumption.

In proceedings taken on an application by the landlord under S. 105, Bengal Tenancy Act, prior to the enactment of S. 105-A, it was not open to the tenant to question the correctness of the entries in the record, though it was open to him to do so by a suit under S. 106 or by a declaratory suit in the Civil Court (a).

But under S. 103-B, the entries only give rise to a presumption, and neither the defendant's failure to take proceedings for the purpose of annulling or rebutting that presumption nor a decision under S. 105 prior to the enactment of S. 105-A can avail to make them conclusive. *Shashi Bhushan Hazra v. Denamoyee Das*, 23 Ind. Cas. 615.

TEUNON, J.

References :—(a) 35 C. 176=7 C.L.J. 103=12 C.W.N. 122 ; 7 Ind. Cas. 102=14 C.W.N. 897=12 C.L.J. 195, Rel.

(56) Ss. 103-B, 148 B (1), 153—*Second appeal—Decision of amount of rent annually payable—Rent suit below Rs. 100—Decree according to defendant's admission of rent—Presumption—Publication of Record of Rights—Admission of plaintiff in rent suit without statement of rental of tenancy according to Record of Rights—Duty of Court to require Collector to supply copy of statement.*

In a suit for rent valued at less than Rs. 100, the question at issue between the parties was the amount of rent annually payable by the tenant. The Lower Appellate Court decided that the plaintiff had not been able to prove his allegation as to the rate of rent, and the result was that the Court awarded the amount of rent annually payable which was admitted by the defendant :

Held, that there was a decision of a question of the amount of rent annually payable by the defendant within the meaning of S. 153 of the Bengal Tenancy Act, and that a second appeal lay.

Under S. 103-B of the Bengal Tenancy Act, the Record of Rights shall be presumed to have been finally published, unless such publication is expressly denied.

Under the proviso to S. 148-B (1) of the Act, in all cases in which a Court admits a plaintiff in a rent suit, which does not contain a statement of the rental of the tenancy according to the Records of Rights, the Court shall require the Collector to supply a certified copy of the Record of Rights relating to the tenancy. *Tarini Charan Majumdar v. Umar Malits*, 23 Ind. Cas. 416.

JENKINS, C.J., and D. CHATTERJEE, J.

(57) S. 104. See No. 54, *supra*.

(58) Ss. 104-E, 104-F, 104-H—*Settlement Rent Roll, entry in, correction of—Secretary of*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

State for India in Council, suit against—Notice—Civ. Pro. Code (1908), S. 80—Objection to the entry under S. 104-E, whether sufficient notice. **Haril Mohan Miera v. The Secretary of State for India in Council**, 18 C.L.J. 566=22 Ind. Cas. 86. See Final Part, 1913, Col. 129.

(59) S. 105—*Record of rights, correctness of, if can be impugned by landlord under S. 105—Unrecorded landlord, if can apply.*

The correctness of the record of rights can be impugned by the landlord in an application made under S. 105 of the Bengal Tenancy Act.

Issues mentioned in S. 105-A can be tried in a proceeding for settlement of rent under S. 105.

Where an applicant under S. 105 purchased a tenure in an estate of which he himself was the proprietor :

Held, that the mere fact that his name did not appear in the *Khatian* as owner of the tenure was no ground for holding that he was not entitled to apply under S. 105 of the Bengal Tenancy Act. **Upendra Nath Ghosh v. Jamini Mohan Pal**, 18 C.W.N. 268=21 Ind. Cas. 37.

CHATTERJEE and WALMSLEY, JJ.

(60) S. 105. See Nos. 28, 53 and 55, *supra*.

(61) Ss. 105, 106, 103, 158—*Record of rights—Land recorded as rent-free—Suit to contest entry—Decree by Revenue officer that land is liable to pay rent—Suit by proprietor to have fair rent settled, in ordinary Civil Court, if maintainable—Limitation—Cause of action when arises—Starting point to be calculated from decrees of Revenue Officer—Limitation Act (1877), Sch. II, Art. 120—Decree of Revenue Officer, if final—Liability to pay rent, question if can be raised again by defendant in present suit.* **Barhamdat Misir v. Krishna Sahay**, 20 Ind. Cas. 910=18 C.W.N. 466. See Final Part, 1913, Col. 131.

(62) Ss. 105, 188—*Joint landlords—Revenue paying estates—Lands falling under more than one estate—One estate sold for arrears of revenue—Purchaser bringing proceedings under S. 105, Bengal Tenancy Act (VIII of 1885)—Purchaser, whether joint landlord with proprietors of other estates.*

The defendants were in occupation of lands situated within three revenue paying estates. They were recorded in the Record of Rights as persons in occupation, without payment of rent of lands liable to assessment. The plaintiff, who was the purchaser of one of the estates which were sold for arrears of revenue and which comprised a one-fourth undivided share of the plots included within the various tenancies, sued for settlement of fair rents under S. 105 of the Bengal Tenancy Act :

Held, (1) that the purchaser of an entire estate sold for recovery of arrears due on account of the same was in no sense a representative-in-interest of the defaulting proprietor ;

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy) — (Contd.).

(2) that the view cannot be maintained that the purchaser of the estate which has been sold occupies the position of a joint landlord along with the proprietors of the estates which have not been sold in the same manner as the defaulting proprietor did ;

(3) that where the constituent members of an entire body of landlords do not all occupy the same status, i.e., where the rights of one in relation to the tenants are different from those of another, they cannot be held to constitute a body of joint landlords ;

(4) that S. 188 of the Bengal Tenancy Act does not, therefore, bar the present proceeding. **Askoran Satia v. Satish Chandra Bhattacharya**, 24 Ind. Cas. 281.

MOOKERJEE and BEACHCROFT, JJ.

(63) S. 105-A—*Letting out by one co-sharer—Jungle and waste land—Acquiescence.* See CO-SHARERS, No. 3, 19 C.L.J. 113.

(64) S. 106—*Record of rights—Dispute as to entry—Compromise decree—Preamble and enacting part.* **Keeshab Panda v. Bhobani Panda**, 18 C.L.J. 187=21 Ind. Cas. 538. See Final Part, 1913, Col. 132.

(65) S. 106, scope of—*Question of title between rival proprietors—Question of possession.* **Ram Chandra Bhanj Deo v. Nanda Nandananda Deb**, 20 Ind. Cas. 298=19 C.L.J. 197=18 C.W.N. 938. See Final Part, 1913, Col. 132.

(66) S. 106—*Grant burdened with service—Omission of words of inheritance—Grant whether hereditary—Services not required—Land, if can be assessed.* See GRANT, No. 2, 19 C.L.J. 241.

(67) S. 106. See Nos. 29 and 61, *supra*.

(68) Ss. 106, 109-A, cl. (3)—*Suit for amendment of entry in record of rights—Excess land in occupation of tenants—Court's inability to determine precise area—Evidence—Sale certificate—Purchase of holding in execution of money decree against tenant by landlord—Sale certificate whether admissible in evidence—Admission—Statement against interest—Evidence Act, Ss. 21, sub-cl. (1), 32—Decision of quantity of land—Second appeal.*

Where a Special Judge, in a suit under S. 106 of the Bengal Tenancy Act instituted by the tenants against their landlord for amendment of the Record of Rights as to an entry in respect of rent, finds that the tenants are in occupation of land not originally comprised within their tenancy, but is not able to determine the precise area of such excess land, it is open to him to amend the entry and to add a note to the effect that the tenants are in occupation of excess land. Such a decision is not a decision settling a rent within the meaning of S. 109 of the Bengal Tenancy Act, but rather a decision

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

on the question of the quantity of land comprised in the tenancy and is, therefore, appealable (a).

A landlord purchased the holding of his tenant at a sale in execution of a decree for money obtained by him against the tenants. In the sale certificate the area of the holding was 20 *bighas* in all;

Held, that the statement by the landlord that the tenant held under him 20 *bighas* of land was not a statement in his own favour but one against his proprietary interest, within the meaning of S. 92 of the Evidence Act and covered by sub-cl. (1) of S. 21 of the Act; and that the entry in the sale certificate might be used in evidence in favour of the landlord. **Manik Biswas v. Maharaja Jagindra Nath Roy Bahadur**, 24 Ind. Cas. 283.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 15 Ind. Cas. 332=16 C. L. J. 182, R.

(69) S. 107. See No. 55, *supra*.

(70) S. 109. See Nos. 28, 53, 61 and 68, *supra*.

(71) S. 111—*Suit for alteration of rent—Previous suit by new plaintiff against new defendant for khas possession—Rent receipt filed by defendant to show tenancy—Present suit for settlement of fair rent in excess of rent mentioned in rent receipts—Expiry of three months after publication of—Record of Rights—Case sent for re trial—Agreement by a party to abide by decision of Court whether binding when suit not maintainable under law.*

The plaintiffs' predecessor-in-title brought a suit against the defendants for *khas* possession of certain lands. The suit was dismissed on the ground that the defendants were tenants under the then plaintiff. In that suit, the defendants filed rent receipts which were believed by the Court, to show that they held the lands at a certain *jamma*. The plaintiffs subsequently instituted the present suit for settlement of fair and equitable rent for the lands which were the subject-matter of the previous suit, and they stated that the fair rent was in excess of the *jamma* mentioned in the rent receipts filed in the previous suit. The suit was dismissed as not being maintainable under S. 111 of the Bengal Tenancy Act:

Held, that the statement of the defendants in the previous suit that they held the lands at a certain rent was admissible in evidence; that, although there was no finding in the previous suit as to what rent was payable by the defendant, yet the rent receipts filed by the defendant, in the previous suit to show payment of a particular rent were believed by the Court, and the present suit being for determination of a higher rent was rightly considered as a suit for alteration of the rent; but as three months had already expired from the final

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

publication of the 'Record-of-Rights, this suit should not be dismissed under S. 111 (a).

The case was sent back for trial *de novo* on the merits.

When a suit is not maintainable under the law, an agreement by a party to abide by the decision of the Court cannot be binding upon him. **Hira Koer v. Lachuman Gope**, 21 Ind. Cas. 958.

CHATTERJEE and WALMSLEY, JJ.

References:—(a) 17 Ind. Cas. 490=17 C. L. J. 239=17 C.W.N. 408, *Rel*.

(72) S. 113. See Nos. 17 and 19, *supra*.

(73) S. 115. See Nos. 19 and 80, *supra*.

(74) Ss. 143 (2), 153—*Appeal—Order refusing to set aside ex-parte decree—Civ. Pro. Code (1908), O. XLI, r. 21, O. XLIII, r. 1, cl. (i)—Appeal, re-hearing of, application for—Application in suit—Suit.*

No appeal lies to the High Court under S. 153 of the Bengal Tenancy Act, from an order refusing to hear an application under O. XLI, r. 21, of the Code of Civil Procedure, to have an appeal from a decree in a rent suit valued less than Rs. 100, re-heard in the presence of the respondent. An application to rehear the appeal is an application in the suit (a).

The term 'suit' includes the appellate stage; it even includes the execution proceedings based on the final decree made in the suit (b).

Sub S. (2) of S. 143 of the Bengal Tenancy Act makes O. XLIII, r. 1, cl. (i) of the Code of Civil Procedure applicable, subject to the operation of the restrictive provision of S. 153 of the Bengal Tenancy Act. **Samed Sheikh v. Naba Nepal Ghose**, 19 C.L.J. 310=23 Ind. Cas. 12.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 25 C. 146=2 C.W.N. 137, R. (b) 3 C.W.N. 121; 4 C.W.N. 44; 27 C. 484=4 C.W.N. 269, R.

(75) Ss. 144 (1), 193—*Forest right, lease of—Money payable in respect of forest right—Suit where to be instituted—Suit, nature of—Provincial Small Cause Courts Act, Sch. II, Art. 8—'Rent.'*

The defendant executed a *kabuliat* in favour of the plaintiffs in respect of forest rights in a tract of land described by boundaries. The *kabuliat* stated that, for a period of one year, four months and twenty-one days, the executors would have the right to cut and take out of the forest all the *gajari* trees and all wild trees (with the exception of mango, jack-fruit, *tal*, *bel*, tamarind and *simul* trees) in close proximity thereto, of a circumference of more than 18 inches and one cubit above the ground, on the tract within the boundaries mentioned. The consideration for the lease was Rs. 450 out of which Rs. 150 paid in cash and

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

the balance was made payable in two equal instalments. The defendants felled and sold the forest trees, but withheld payment of rent, except a sum of Rs. 97 paid in two instalments. In a suit by the plaintiffs to recover the balance with interest :

Held, that the provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent would be applicable to such a suit for recovery of money payable in respect of forest rights, and under S. 144 (1) of the Act, the cause of action arose within the local limits of the jurisdiction of the Civil Court which would have jurisdiction in a suit for the possession of the trees (a).

That the suit was excepted from the cognizance of the Small Cause Court as what was payable by the defendants to the plaintiffs in respect of forest rights granted to them was in the nature of rent.

That the term 'rent' in Cl. (8) of the Second Schedule to the Provincial Small Cause Courts Act is used in a wide sense. *Bandi Ali Fakir v. Amud Sarkar*, 20 C.L.J. 227.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 24 C. 449, R.

(76) S. 147. See No. 16, *supra*.

(77) S. 148. See Nos. 42, 56, *supra*.

(78) Ss. 148-A, 158 B—*Landlord and tenant, meaning of—Nature of suit under S. 148-A—Usufructuary mortgagee if a landlord—S. 158-B—Co-sharer landlords, who are—Usufructuary mortgagee of a portion from a co-sharer if a co-sharer landlord—Decree for rent obtained by such mortgagee how to be executed—Civ. Pro. Code, 1908, O. 34, r. 14, if applies to such a decree—Revisional jurisdiction of the High Court, circumstances warranting the exercise of.*

The petitioner was a usufructuary mortgagee from a co-sharer landlord who was interested in the property to the extent of one-fourth, the opposite parties being entitled to the remaining three-fourths share. The petitioner as usufructuary mortgagee brought a suit for rent against the tenant under S. 148-A of the Bengal Tenancy Act and joined the proprietors of the three-fourths share as also the mortgagor as parties defendants. The co-sharers did not enter appearance and the plaintiff obtained a decree for rent and applied for execution under sub-S. (1) of S. 158-B of the Bengal Tenancy Act, whereupon the co-sharers appeared and objected that the execution could not proceed under S. 158-B. The objection was overruled by the Court of first instance, but the lower appellate Court directed the first Court to hold the sale not under sub-S. (2) of S. 158-B of the Bengal Tenancy Act, but in accordance with the Code of Civil Procedure.

Held—That the term "landlord" means a person immediately under whom a tenant holds, and the term "tenant" is defined to

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

mean a person who holds land under another person and is or, but for a special contract, would be liable to pay rent for that land to that person, and a usufructuary mortgagee is consequently a person immediately under whom a tenant holds and is in the position of a landlord and is entitled to sue for rent in his character as such.

That the co-sharer landlords are the entire body of persons who are entitled to collect rent, and a usufructuary mortgagee from one of the proprietors is in the position of a co-sharer landlord within the meaning of S. 158-B, sub-S. (1), Cl. (e) of the Bengal Tenancy Act.

That the plaintiff having sued for the recovery of what to his information was the whole arrear due, the suit was in essence a suit for rent due to all the co-sharers within the meaning of S. 148-A of the Bengal Tenancy Act, and the suit as framed was within the scope of that section, and the decree should be executed under S. 158-B, sub-S. (1), Cl. (e) of the Bengal Tenancy Act.

That r. 14 of O. 34 of the Civil Procedure Code had no application to the execution proceedings in the present case.

That the result of the decision of the District Judge was that the Court of first instance had to proceed to sell the tenure in accordance with the provisions of the Code of Civil Procedure which it had no jurisdiction to do, and to refuse to sell the tenure in accordance with S. 158-B of the Bengal Tenancy Act which it had jurisdiction to do, and the circumstance that this result followed from an erroneous interpretation of the scope and requirements of Ss. 148-A and 158-B of the Bengal Tenancy Act was clearly no bar to the exercise of the revisional jurisdiction of the High Court. *Brohmanaud Nath Deb Sarkar v. Hem Chandra Mitra*, 18 C.W.N. 1016 = 23 Ind. Cas. 981.

MOOKERJEE and BEACHCROFT, JJ.

(79) S. 148 (h). See CONTRIBUTION, No. 4, 20 C.L.J. 200.

(80) S. 153—*Second Appeal—Amount of annual rent—Decision—Whether contest on point necessary—Rent-suit—Defence that tenant evicted by title paramount—Whether good defence—Plea to be taken in time. Nourjani Sardar v. Bimala Sundari Gupta*, 18 Ind. Cas. 87 = 18 C.W.N. 552. See Final Part, 1918, Col. 135.

(81) S. 153—*Execution proceedings started against deceased judgment-debtor—Sale if may be set aside—Purchaser of occupancy holding if may apply—Appeal—Second appeal whether barred. See CIV. PRO. CODE (1908). No. 73, 18 C.W.N. 1266.*

(82) S. 153. See Nos. 86, 56, 74, *supra*.

(83) S. 153, proviso—*Suit for rent—Registration—Burden of proof—District Judge exercising appellate jurisdiction—*

2.—Bengal Acts—(Continued).**Act VII of 1885 (Bengal Tenancy)—(Contd.).**

Court's power of revision—Jurisdiction—Bengal Land Registration Act (VII B.C. of 1876), S. 78—Civ. Pro. Code (1908), S. 115.

The burden of proving that the plaintiff cannot sue for arrears of rent without her name being registered under the Bengal Land Registration Act is upon the defendant.

The jurisdiction of a District Judge under S. 153 of the Bengal Tenancy Act is of revisional and not of appellate character. Therefore, where a District Judge acting under that section fails to consider whether the primary Court had exercised a jurisdiction not vested in it or had acted in the exercise of its jurisdiction illegally or with material irregularity, and treats the matter before him as in substance an appeal from the decree of the primary Court, he, in essence, acts illegally and with material irregularity in the exercise of his jurisdiction, and the High Court will be justified to interfere with his orders. *Surangini Dasi v. Nekaraddi Mullick*, 23 Ind. Cas. 814.

ASUTOSH MOOKERJEE and BEACHCROFT, JJ.

(84) S. 155—*Compensation, measure of—Reasonable compensation—Nominal damages—Relief against forfeiture—Breach of covenant not to assign—Lease for 999 years.*

The compensation to be given, according to the terms of S. 155 of the Bengal Tenancy Act, is for the breach. To determine compensation for the breach of covenant, compare the position of the landlord immediately before the breach with his position after the breach, and the measure of compensation will be the extent to which he has been prejudicially affected by the breach and not the loss of privilege brought into existence by the breach. If he has not been prejudicially affected, reasonable compensation cannot be anything more than a nominal sum. *Keshab Lal Nag Majumdar v. Janendra Nath Ghose*, 20 C.L.J. 332=24 Ind. Cas. 538.

MOOKERJEE and BEACHCROFT, JJ.

(85) S. 158. See Nos. 61, 78, *supra*.

(86) Ss. 159, 161, 167—*Limitation Act (1908), Sch. I, Art. 121—Reg. VIII of 1819, S. 11, Cl. (1)—Putni taluk, sale of, for arrears of rent—Suit by purchaser for recovery of possession of lands within taluk brought within 12 years from date of purchase—Limitation—Applicability of Art. 121—Adverse possession prior to creation of putni, effect of—Cause of action—Adverse possession if arrested by creation of subordinate tenure when proprietor out of possession—Doctrine of possession following title, application of, where plaintiff has to prove possession at a particular point of time—Ancient documents showing exercise of right to property, consideration of, as presumptive evidence of possession—Sale under*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

S. 159, Bengal Tenancy Act, status of purchaser in—Encumbrance, meaning and annulment of.

The plaintiff, who was the purchaser of a *putni taluk* at a sale held in 1899 in execution of a rent decree under the Bengal Tenancy Act brought suits against the defendants within twelve years from the date of his purchase for declaration of his title to the lands held by them within the *putni taluk* and for recovery of possession thereof. There was ample evidence on the record that the adverse possession of the defendants and their predecessors commenced before the creation of the *putni*.

Held—That the suits were barred by limitation and Art. 121, Limitation Act, did not apply to them.

That the plaintiff not having established that the possession of the defendants commenced after the creation of the *putni* or that the proprietor of the estate was in possession at the time when the *putni* was granted, the interests acquired by the defendants could not be deemed to be an incumbrance within the meaning of Art. 121, nor was it an incumbrance within the meaning of S. 11, Cl. (1) of Reg. VIII of 1819.

That the cause of action did not arise on the date on which the plaintiff purchased the *taluk* at the sale held under the Bengal Tenancy Act.

That the adverse possession contemplated in the decisions (*a*) *Naffranchandra v. Rajendra Lal* (25 C. 167); *Woomsh Chanara Goopta v. Raj Narain Roy* (10 W.R. 15); *Khanto Momi Dassi v. Bejoy Chandra* (19 C. 187) and *Karim Khan v. Broja Nath Das* (22 C. 244) is possession which commences after the creation of the *putni* tenure. These cases are founded on the principle laid down in S. 11 of Reg. VIII of 1819, which is, that the purchaser of a *putni taluk* at a sale held under Reg. VIII of 1819 takes the *taluk* in the state in which it was initially created, and the judicial decisions above referred to lay down the doctrine that the purchaser takes the property, not free merely of all incumbrances that may have accrued upon the tenure by act of the defaulting proprietor, his representatives or assignees, but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the action of the defaulting proprietor. This doctrine is plainly limited in its application to cases where the adverse possession commenced after the creation of the *putni*.

That in a case like the present in which the proprietor of the estate is out of possession, he cannot, merely by the device of the creation of a subordinate *taluk*, arrest the effect of the adverse possession which has already commenced to run against him, and such possession would be effective not only as against the subordinate tenure-holder but also as against the superior proprietor.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

That the plaintiff before he could succeed must prove that the proprietor was in possession when the *putni* was created.

* That the doctrine that possession follows title has no application to a case like the present.

That as laid down by the Judicial Committee in *Runjeet Ram v. Gobordhan Ram* (b) (20 W. R. 25 (29)), the Court may, in the decision of the question of limitation if there is conflicting evidence on both sides, presume that possession was with the party whose title has been established, but it does not follow that, when the plaintiff has to establish possession at a particular point of time, he is entitled to call upon the Court to presume that, because his title has been established, possession must be presumed to have been with holder of the title at the specified period of time. This contention is clearly opposed to the decision of the Judicial Committee in *Mohima Chandra v. Mohesh Chandra* (16 L. A. 23 = 16 C. 473) (c).

That the plaintiff having made his purchase at a sale held in execution of a rent-decree under the Bengal Tenancy Act under S. 159 of the Act, he made his purchase with powers to annul the interests defined as encumbrance in S. 161; encumbrance as used in that section includes a statutory title acquired by a trespasser by adverse possession of the land of the defaulting tenure provided such act of possession commenced after the tenure had been created.

That even if he had succeeded in establishing that such adverse possession commenced after the creation of the *putni taluk*, before he could succeed, he would have to prove that under sub-S (1) of S. 167 he had annulled the encumbrances by service of notice within one year from the date of the sale or the date on which he first had notice of the encumbrance, and in the present case the plaintiff had failed herein.

Held (as to the contention that the grant of the *putni* tenure itself was evidence of possession)—That the principle that ancient documents produced from proper custody and by which any right to property purports to have been exercised may rightly be treated as presumptive evidence of possession has no application to the circumstances of the present case. *Kalikaiah Mookerjee v. Bipradas Pal Choudry*, 19 C.W.N. 18.

MOOKERJEE and BEACHROFT, JJ.

References:—(a) 25 O. 167; 10 W.R. 15; 19 C. 187; 22 C. 344, D. (b) 20 W.R. 25, R. (c) 16 C. 473 (P.C.), R.

(87) Ss. 159, 167—*Mortgage—Land mortgaged sold in execution of rent decree—Notice given by purchaser under S. 167—Bengal Tenancy Act—Whether mortgage extinguished—Ghatwali tenure held upon quit-rent payable to H and ghatwali service—Resumption of land by Government and settlement with zamindar who settled*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

with mortgagor—Condition of settlement that mortgagor would pay quit-rent payable to H and value of ghatwali service to zamindar—Suit by zamindar—Whether suit for rent or for money—Whether zamindar and H are joint landlords. Chandra Mohini Debi v. Kenaram Chiti, 19 Ind. Cas. 776 = 19 C.L.J. 394. See Final Part, 1913, Col. 138.

(88) S. 160 (g)—*Protected interest—Se-patni—General authority in dar patni patta to create se-patni whether sufficient.*

A general authority contained in a *dar-patni patta* expressly stating that the *dar-patnidar* may grant *se-patni* settlements is sufficient to protect from annulment a *se-patni* created by the *dar-patnidar* as a protected interest within the meaning of S. 160 (g) of the Bengal Tenancy Act and a special permission in each case is not required. *Bidhumukhi Chowdhurani v. Asmatulla*, 23 Ind. Cas. 399.

MULLICK, J.

(89) Ss. 160, 167—*'Plantation'—Betel leaf—Protected interest—'Date of sale' in S. 167, meaning of. Banko Behary Das v. Krishna Chandra Bhowmick*, 18 C.L.J. 170 = 21 Ind. Cas. 419 = 18 C.W.N. 349. See Final Part, 1913, Col. 138.

(90) S. 161. See Nos. 48, 86, *supra*.

(91) S. 167—*Sale of putni for arrears—Suit for khas possession by auction purchaser—Notices for annulment of encumbrances—Mode of service when addressed to several persons. See PUTNI, No. 1, 18 C.W.N. 269.*

(92) S. 167. See Nos. 86, 87, 89, *supra*.

(93) S. 169 (c)—*Rent accrued due between the date of sale and confirmation thereof—Liability whether judgment-debtor's or auction purchaser's—Liability of the surplus sale proceeds—Civ. Pro Code, 1908, S. 65. Bejoy Chand Mahtap v. Sashi Bhushan Bose*, 18 C.W.N. 136 = 23 Ind. Cas. 101. See Final Part, 1913, Col. 139.

(94) S. 170. See No. 3, *supra*.

(95) S. 170 (3)—*Notice—Third person applying to deposit money. Ram Nath Malty v. Rudra Mahanti*, 18 C. L. J. 142 = 21 Ind. Cas. 409. See Final Part, 1913, Col. 139.

(96) Ss. 170, cl. (3), 178, cl. (3)(d)—*Landlord and tenant—Non-transferable holding—Mortgage of portion, if operates as forfeiture—Mortgagee, if entitled to make deposit to prevent sale of holding in execution of rent decree—Passing of Act and commencement of Act, difference between—Contract of tenancy made after passing of Act but before commencement, effect of.*

Even if a holding is non-transferable, the transfer of only a portion thereof does not operate as a forfeiture of the tenancy (a).

Therefore, the mortgagee of a portion of a non-transferable holding has an interest in the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

holding which, if the holding is sold in execution of a rent decree, would be voidable within the meaning of S. 170, sub-S. (3) of the Bengal Tenancy Act (b).

Consequently such a mortgagee is entitled to deposit money under S. 170, sub-S. (3), to prevent the sale of the holding.

Sub-S. (3) of S. 178 of the Bengal Tenancy Act, refers to contracts made after the passing of the Act, that is, after March 14, 1885, and not those made after the commencement of the Act.

Therefore, a contract of tenancy executed between those two dates cannot be treated as operative in so far as it takes away the right of the *raiyat* to transfer his holding in accordance with local usage, under cl. (d) of sub-S. (3) of S. 178 of the Act. **Kumar Satish Kanta Roy v. Tufan Mullick**, 24 Ind. Cas. 9.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 1 C.W.N. 160; 1 C.W.N. 162, Rel. (b) 7 Ind. Cas. 477=12 C.L.J. 609; 13 Ind. Cas. 941=16 C.W.N. 622, Rel.

(97) S. 173 (3)—Rent sale set aside—Order setting aside sale itself set aside—Confirmation of sale on later date—Application by decree-holder to set aside sale on ground of benami purchase by judgment-debtor—Limitation. See LIMITATION ACT (1908), No. 153, 24 Ind. Cas. 366.

(98) S. 174—Rent sale—Application to set aside sale by deposit—Deposit made by judgment-debtor at the instance of prior purchaser and with money found by him—Subsequent withdrawal of application if to be allowed—Refund of money deposited and withdrawn, order for—Enforcement, as decree for money. **Nityanund Das v. Udal Narain Mondal**, 18 C.W.N. 175=22 Ind. Cas. 885. See Final Part, 1913, Col. 141.

(99) S. 178. See Nos. 11, 96, *supra*.

(100) Ss. 178 (i) (d), 194—Covenant by tenure-holders not to excavate tank—Breach of covenant by *raiyat*—*Raiyat* unaware of covenant—Who is liable. See LEASE, No. 13, 20 C.L.J. 551.

(101) S. 180. See No. 33, *supra*.

(102) S. 184—Sch. III, Art. 3—Bengal Tenancy Amendment Act I (B.O.) of 1907, S. 61 (3)—Suit for possession by *mokarari raiyat*—Effect of the Amending Act of 1907—Special limitation of two years if applicable to suits instituted after the passing of the Amending Act, but in which cause of action arose more than two years previous thereto—Right of suit, if a vested right—Construction of statute—Taking away of vested rights without saving—S. 184, scope and meaning of—Decision of Privy Council on the construction of a different Act, binding effect of.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

The plaintiff who had been dispossessed by his landlord in July 1903 sued in July 1909 for declaration of his title to, and possession of, a piece of land on the allegation that he had a *mokarari raiyati* right therein.

Held, that the suit was not barred by the special limitation of two years prescribed by Art. 3, Sch. III, of the Bengal Tenancy Act, and made applicable to all classes of *raiya*ts by S. 61 (3) of the Bengal Tenancy Amendment Act I (B.O.) of 1907 which was passed and came into operation on 11th May 1907.

That the plaintiff at the time when the Amending Act was passed had a vested right of suit and there is nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of that right. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot govern suits when such compliance was from the first impossible.

The facts in **Lala Soniram v. Kanhaiya Lal** (a) did not involve the position when a suit cannot be brought after the passing of the amendment, and the decision of the majority in **Manjhoori Bibi v. Akel Mahumed** (b) so far as it relates to that position, has not been affected by the judgment of the Privy Council in **Lala Soniram v. Kanhaiya Lal** (a).

A right of suit is a vested right, and it is an established maxim of construction that, though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature, unless it be expressed in unequivocal terms (c). **Gopeshur Pal v. Jiban Chandra Chandra**, 18 C.W.N. 804=19 C.L.J. 549=24 Ind. Cas. 37=41 C. 1125 (S.B.).

JENKINS, C.J., STEPHEN, WOODROFFE, HOLMWOOD and CHATTERJEE, JJ.

References:—(a) 17 C.W.N. 605=35 A. 227=40 I.A. 71, R. (b) 17 C.W.N. 889=17 C.L.J. 136, R. (c) L.R. (1903) A.C. 855; L.R. (1905) A.C. 369; 8 Ell. and Bl. 784 (1858), *Appl.*

(103) S. 184, Sch. III, Art. 6—Decree incapable of execution—Amendment of decree—Limitation—Time if runs from date of amendment.

A decree, which does not specify the reliefs granted, is incapable of execution and cannot be considered as time barred and legally dead, even though three years have elapsed from the date of the decree.

An application for execution of a decree for rent which was originally incapable of execution is not barred by limitation, although presented more than three years after the date of the decree, but within three years from the date of amendment of the decree making it

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

capable of execution. *Mohamaya Prosad Singh v. Abdul Hamid*, 18 C.W.N. 266=21 Ind. Cas. 615.

N. R. CHATTERJEE and WALMSLEY, JJ.

(103-a) S. 188. See Nos. 18, 35, 62, *supra*.

(103-b) S. 193. See No. 75, *supra*.

(103-c) S. 194. See No. 100, *supra*.

(103-d) S. 195. See Nos. 4, 39, 42, 43, *supra*.

(104) Sch. III, Art. (2) (a). See No. 37, *supra*.

(105) Sch. III, Art. 8—*Limitation—Special limitation—Landlord and tenant—Landlord assisting in dispossessing tenant—Attestation—Estoppel*.

Obitur dictum. Per Sharfuddin, J.—Where a landlord assisted the defendant in dispossessing a tenant, a plaintiff :

Held, that the special limitation of two years as provided by Sch. III, Art. 3, of the Bengal Tenancy Act, was applicable to the suit.

The question whether attestation of a document should be held to imply assent, is a question of fact, and must be determined with reference to the circumstances of each case (a). *Deno Nath Das v. Kotliwar Bhattacharya*, 21 Ind. Cas. 367.

SHARFUDDIN and RICHARDSON, JJ.

Reference.—3 C.W.N. 207, *Rel*.

(106) Sch. III, Art. 3—*Dispossession—Limitation*. *Rudra Narain Maiti v. Natobar Jana*, 18 C.L.J. 89=18 C.W.N. 353=21 Ind. Cas. 431=41 C. 52. See Final Part, 1913, Col. 142.

(107) Sch. III, Art. 3. See No. 102, *supra*.

(108) Sch. III, Art. 3 (a)—*Limitation—Period from which time runs—Lease—Agricultural year—Non-occupancy raiyat—Ejectment*. *Durbijoy Mandar v. Demar Bhagat*, 18 C.L.J. 597=22 Ind. Cas. 67. See Final Part, 1913, Col. 143.

(109) Sch. III, Art. 6—*Limitation—Raiyat—Agricultural land—Under-raiyat—Raiyat letting land for market—If Bengal Tenancy Act applicable to such land—Amendment of Art. 6, Sch. III of Bengal Tenancy Act—Suit instituted after amendment—Whether amended article applicable when causes of action arose before amendment*.

There is nothing in the Bengal Tenancy Act, confining its operation to agricultural land except the definition of a *raiya*, which means a person who acquires a right to hold land for the purpose of cultivating it. Thus the law governing *raiya*s must necessarily be concerned only with agricultural land. But the definition of an under-*raiya* has nothing to do with agriculture, but means merely a tenant who holds under a *raiya*. If, therefore, a *raiya* lets his land to an under-tenant for other purposes than cultivation, that does not take the land out of the operation of the Tenancy

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Act. An under-*raiya* is merely an interest carved out of a *raiya* and must be governed by the same laws.

A suit instituted after the amendment of Art. 6 of Sch. III of the Bengal Tenancy Act, is governed by the article as amended, even when the cause of action arose before the amendment (a). *Barhanuddin Chowdhury v. Lal Khan*, 21 Ind. Cas. 43.

COXE and RAY, JJ.

References :—(a), 19 Ind. Cas. 291=35 A. 227=13 M.L.T. 437=11 A.L.J. 389=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom. L. R. 489=25 M.L.J. 131=40 I.A. 74=17 C.W.N. 605; 17 C. 926; 3 Ind. Cas. 389=10 C.L.J. 469, *Rel*; 19 Ind. Cas. 316=17 C.W.N. 889=17 C. L.J. 316, *Not F*.

(110) Sch. III, Art. 6, as amended by S. 61, Act I of 1907 (B.C.)—*Application for execution—Limitation*. See LIMITATION, No. 2, 21 Ind. Cas. 113.

(111) Sch. III, Art. 6. See No. 103, *supra*.

Act IX of 1890 (Calcutta Port Act).

S. 91—*Liability of carriers for misdelivery of goods—Duty of consignee*. See CARRIERS, No. 1, 41 C. 703.

Act I of 1895 (Public Demands Recovery).

(1) S. 7—*Reg. VII of 1822—Enhancement of rent—Consent of tenant—Damages, claim for, whether certificate can issue in respect of—Certificate—Public Demands Recovery Act, S. 7—Refund—Amalgamation of agricultural and non-agricultural holdings without consent of tenant, if can be effected*.

Rents cannot be enhanced in a settlement made under Reg. VII of 1822 without the express consent of the tenant (a).

A claim for damages does not come within the purview of S. 7 of Act I (B.C.) of 1895, and, therefore, a certificate cannot issue in respect of it.

But where the tenant had notice of the increased demand made by the Settlement Officer, and was liable to a suit for reasonable damages for the use and occupation of certain non-agricultural lands, and it was found that the rate assessed by the Settlement Officer was fair and equitable, being only half the market rate, and this sum was realised by a certificate :

Held, that, as the tenant would be liable to pay damages at this rate, he was not entitled to a refund of the money.

Two holdings, one of agricultural and the other of non-agricultural lands, cannot be amalgamated without the consent of the tenant. *Abdul Rahim Chowdhury v. The Secretary of State for India in Council*, 22 Ind. Cas. 626.

STEPHEN and MULLICK, JJ.

References :—(a) 19 Ind. Cas. 675=17 C.W. N. 865, *Rel*.

2.—Bengal Acts—(Continued).**Act I of 1895 (Public Demands Recovery).—(Concluded).**

(2) Ss. 10, 21 (a) (b), (c)—*Certificate sale—Purchaser, right of—Adverse possession—Sale of original owner's property—Notice, non-service of, effect of—Serving officer's return of service, value of—Legal representative not brought on record, effect of—C.V. Pro. Code (1882), S. 310 (a)—Bopin Bensary v. Soal Bhuan Datta, 18 O.L.J. 628=22 Ind. Cas. 95=18 C.W.N. 766. See Final Part, 1913, Col. 145.*

(4) S. 21. See No. 2, *supra*.

Act III of 1899 (Calcutta Municipal).

(1) Ss. 223, 228—*Consolidated rate, arrears of, if a charge on premises in the hands of a purchaser—Charge if limited to arrears for one year—Bona fide purchaser for value without notice if bound by charge—Defence of bona fide purchase for value without notice, single defence—Onus of proof—Duty of foreclosing mortgagee and private purchaser to ascertain arrears due from Municipal authorities—Constructive notice.*

The operation of S. 228 of the Calcutta Municipal Act, which makes the consolidated rate, as it accrues due from time to time, a first charge on the property (subject to arrears of land revenue) is not controlled by S. 223 of the Act which provides only for the personal liability of the purchaser of the premises to the extent of the arrears for the year immediately prior to his purchase.

The charge under S. 228 cannot be enforced against a *bona fide* purchaser for value without notice.

It is for the purchaser to plead and prove that he is a *bona fide* purchaser for value without notice.

The plea that one is a *bona fide* purchaser without notice is a single defence, the onus of proving which is on him.

A mortgagee of property within the limits of the Calcutta Municipality foreclosing the mortgage acquires title by involuntary alienation.

Nevertheless, as such a person could ascertain the arrears of consolidated rate due, he is in the same position as a purchaser with notice of the arrears. *Akhoy Kumar Banerjee v. Corporation of Calcutta*, 19 C.W.N. 37.

MOOKERJEE and BEACHCROFT, JJ.

(2) S. 228. See No. 1, *supra*.

(3) Ss. 370, 375—*Application for approval of site and permission to build—Decision of Chairman and General Committee rejecting application, suit is lies against—Specific Relief Act, S. 45—Proper remedy. Prosad Ghunder De v. Corporation of Calcutta*, 17 C.W.N. 929=40 O. 886=22 Ind. Cas. 328. See Final Part, 1913, Col. 145.

(4) S. 375. See No. 3, *supra*.

(5) S. 557 (c) (d)—*Acquisition of bustee land—Mode of valuation—Future use of land if can*

2.—Bengal Acts—(Continued).**Act III of 1899 (Calcutta Municipal)—(Ctd).**

be considered—Evidence as to under-tenants and rents paid by them if relevant—Evidence as to sales of lands other than *bustee* lands in the neighbourhood if admissible—Meaning and effect of Cl. (c)—Nature of presumption under Cl. (d). See ACT I OF 1894 (LAND ACQUISITION), No. 19, 18 C.W.N. 884.

Act I of 1907 (Bengal Tenancy Amendment).

S. 61 (3)—*Suit instituted after the passing of the special limitation of 2 years if applicable, See ACT VIII OF 1895 (BENGAL TENANCY), No. 102, 18 C.W.N. 804.*

Act VI of 1908 (Chota Nagpur Tenancy).

(1) S. 47—*Property situate in Manbhum—Mortgage decree-sale—Validity—Estoppel of mortgagor. Lakshmi Bibi Kujrani v. Atal Behary Haldar*, 40 C. 534=21 Ind. Cas. 117. See Final Part, 1913, Col. 148.

(2) Ss. 68, 139, Cls. (2), (4) and (8)—*Suit for ejectment by raiyat against under-raiyat—Whether jurisdiction of Civil Court barred.*

The word "decree" in S. 68 of the Chota Nagpur Tenancy Act is not to be read with the words "passed under this Act."

In a suit brought under the provisions of the general law for the ejectment of an under-raiyat by a raiyat, the jurisdiction of the Civil Courts is not barred either by Cl. (4) or by Cl. (8) of S. 139. *Bhola Nath Mandal v. Chhota Gunaram Mighi*, 23 Ind. Cas. 407.

TEUNON, J.

(3) S. 85—*Revision—High Court—Indian High Courts Act, (24 and 25, Vict. O. 104), S. 15—Fair rent, settlement of—Revenue Officer—Appeal, relief by.*

The superintendence vested in the High Court by S. 15 of the Indian High Courts Act, can be exercised only over Courts which are subject to the appellate jurisdiction of the High Court. The Court of a Revenue Officer in which a proceeding for settlement of fair rents has been instituted under S. 85 of the Chota Nagpur Tenancy Act is not a Court subject to the appellate jurisdiction of the High Court, but is subordinate to the Commissioner.

For the purposes of the application of the power of superintendence vested in the High Court under S. 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to the High Court in the very proceeding in which the power of superintendence is involved; in fact, if the party aggrieved is entitled to relief by way of appeal, it is not necessary for him to invoke the exercise of the power of superintendence.

Cases under Act X of 1859 distinguished *Uma Charan Mondal v. Midnapur Zemindari Co.* 19 O.L.J. 300=18 C.W.N. 782=23 Ind. Cas. 896.

MOOKERJEE and BEACHCROFT, JJ.

References:—5 A. 406; 36 C. 252=9 O.L.J. 126; 17 C.L.J. 593=40 O. 518, D.

2.—Bengal Acts—(Concluded).**Act VI of 1908 (Chota Nag. Tenancy)—(Old).**

(4) S. 139. See No. 2, *supra*.

(5) Ss. 208, 211 (1)—*Decree for rent against some only of registered tenants—Exemption from sale of share of persons not represented in suit—Decree if, maybe executed as rent decree against remaining share—Bengal Rent Recovery Act (VIII of 1865, B.U.), sale under, nature of. Chandra Nath Tewari v. Protap Udai Nath Sahl, 18 C.W.N. 170=23 Ind. Cas. 105. See Final Part, 1913, Col. 149.*

(6) S. 211. See No. 5, *supra*.

Act VI of 1914 (Bengal Medical).

Ss. 27, 33—*Rules framed under the Act by Local Government if ultra vires—Specific Relief Act, S. 45—Mandamus—Omission of qualified candidate's name from Election Roll—Mistake of returning Officer—Jurisdiction of High Court to interfere.*

The petitioner was a Licentiate in Medicine and Surgery of the University of Calcutta and as such was admittedly entitled to be registered under S. 4 of the Bengal Medical Act. The petitioner's name was omitted from the preliminary list of persons qualified to vote at the first elections under the Act published by the Returning Officer appointed by the Local Government. His name was also omitted from the final Election Roll. The Petitioner's application to the Returning Officer to have his name entered was not considered by that Officer. The petitioner applied to the High Court under S. 45 of the Specific Relief Act for an order compelling the Returning Officer to include and publish his name in the final Election Roll.

Held—that the High Court had no jurisdiction to interfere.

Under r. 16 of the rules framed by the Local Government under the Bengal Medical Act, the decision of the Local Government on any question that may arise as to the intention, construction or application of the rules shall be final, and under S. 27 of the Act no suit or other legal proceedings shall lie in respect of any act done in the exercise of any power conferred by the Act on the Local Government or the Council or the Registrar.

The act which is referred to in S. 27 is not one done by the Local Government, but done in exercise of any power, conferred by the Act on the Local Government.

Per Choudhuri J.—It is quite clear that under S. 33 of the Bengal Medical Act the Local Government has power to make rules for the purpose of carrying out the Act and the rules framed and published were not *ultra vires*.

Per Woodroffe and Coxe, JJ.—Even assuming that the rules were *ultra vires* the application must fail; for it was based on the assumption that the rules were not *ultra vires* but that they were valid rules which had not been given effect to in one particular by the Returning Officer. *Narendra Nath Basu v. Mr. H.L. Stephenson, 19 C.W.N. 129.*

WOODROFFE and COXE, JJ.,

3.—Bombay Acts.**Act V of 1862 (Bombay Bhagdari).**

(1) Unrecognised sub-division of a bhag—Viladnan patia—Agreement discovered to be void—Payment of compensation. See. CONTRACT ACT, No. 53, 16 Bom. L.R. 62.

(2) S. 3—*Bhag—Unrecognised sub-division of bhag—Permanent tenant of sub-division before the Act came into force—Alienation of his right by the tenant—Alienation not prohibited under the section—Collector's powers to set aside alienation.*

S was a permanent tenant of certain Bhag lands before the passing of the Bhagdari Act in 1862. The lands formed an unrecognised sub-division of a Bhag under the Act. In 1907 S sold his interest in the lands to the plaintiffs. The Collector set aside the alienation in 1909 on the ground that it was void under S. 3 of the Act, and put the defendant (the owner of the entire Bhag) in possession of the lands. The plaintiffs sued to recover possession; but the lower Courts non-suited them on the ground that the Collector's order was proper. The plaintiffs having appealed:

Held, decreeing the plaintiffs' suit, that the alienation by S of his rights as a permanent tenant of the lands to the plaintiffs was not prohibited under S. 3 of the Bhagdari Act and that the Collector was wrong in dispossessing the plaintiffs.

Per Beaman, J.—Where rights are found to have existed before the Bhagdari Act, in persons not themselves Bhagdars or Narwadars, but the locus of whose rights falls within what are called the Bhags or shares in the Bhagdari and Narwadari village, these rights are not "any portion of such Bhags or shares of Bhagdari or Narwadari village" within the meaning of S. 3 of the Act; and the prohibitions against alienations contained in the section have no applicability to the alienation of such rights. *Venidas Narandas v. Bai Hari, 16 Bom. L.R. 571=38 B. 679.*

BEAMAN and HAYWARD, JJ.

Act II of 1863 (Summary Settlement).

(1) S. 12—*Inam lands—Alienation—Settlement made before the coming into force of the Act—Commutation of service—Payment of Nazarana Reg. 16 of 1827—Hereditary Offices Act (Bom. Act III of 1874)—The Act does not apply to settlement effected under or within the purview of Bom. Act II of 1863—Probate Court—Decision—The decision cannot be destroyed by adjudication in a regular suit.*

The Sar Desai of Navalgund was granted an inam by the Peishwas. The services of the Desai as a revenue officer were not made use of during the British rule and he was informed in 1848 that the services would not be required of him. As a result of the investigation regarding claims to inam lands, the Desai was offered the option of commuting his service by payment of an annual sum in the nature of a

3.—Bombay Acts—(Continued).

Act I of 1863 (Summary Settlement)—(Ctd).

quit-rent for the lands held by him on service tenure or by occasional payments in the nature of fines. In 1862, the Government passed a resolution sanctioning the treatment of Naval-gund Desai's "potgee" as a personal holding continuable to the holder on the terms of the summary settlement. The Desai accordingly accepted the offer that the commutation payment should be in the nature of an annual Nazarana or quit-rent. The last of the Désais made a will prohibiting his widow from making an adoption and bequeathing the whole of his property to charity. The will was propounded for probate in the District Court and was duly admitted to probate. The grant was confirmed by the High Court. The widow made an adoption and filed the present suit for a declaration that the testator had no power to make the will, as the land which was service land was inalienable and that the adoption was valid.

Held (1) that the settlement made by Government with the Desai in 1862 was a settlement valid and binding upon the Government, under S. 12 of Bom. Act II of 1863.

(2) That the Desai was no longer liable to render any service in respect of the lands held by him and that they were therefore no longer held upon a service tenure.

(3) That the lands in question were not inalienable by reason of family custom (which was not proved).

(4) That the lands were not inalienable by express legislative provision. The lands were not inalienable up to the Reg. XVI of 1827 and the Vatan Act of 1874 did not change their character, for the provisions of the Act did not apply to the settlement of the land in 1862 which was within the purview of Act II of 1863; and the holder under the settlement was no longer a hereditary officer holding for service.

(5) That the lands might be treated as the property of an ordinary Hindu land-owner, subject to the payment of the agreed quit-rent to Government; and in the absence of co-parceners, he could dispose of the lands by will.

(6) That it was not competent to the Court to go into the validity of the adoption, since its determination might involve destruction of the conclusion reached by the Probate Court.

In the case of service land, which, in practice at all events, is not usually alienated, it is difficult to establish a family custom, which should have any effect, as distinct from the ordinary incidents of a service tenure, and evidence that land has remained in a family for a long period of years, and descended by the rule of primogeniture where it is service land, is more consistent with the fact of its being held for service than with the theory of any special family custom. Moreover when the service has come to an end, the last holder, if he have no sons or co-parceners, can put an end to a tenure

3.—Bombay Acts—(Continued).

Act II of 1863 (Summary Settlement)—(Ctd).

based upon family custom. *B. A. Brendon v. Shrimant Sunderabai*, 16 Bom. L. R. 164 = 38 B. 272 = 23 Ind. Cas. 221.

SCOTT, C. J. and BEATON, J.

Act XIV of 1869 (Bombay Civil Courts).

(1) S. 16—Suit under Divorce Act—Power of District Judge to refer to Assistant Judge for trial. See ACT IV OF 1869 (DIVORCE), No. 4, 16 Bom. L. R. 754.

(2) S. 16—Land acquisition case—Second appeal when not allowed. See ACT I OF 1894 (LAND ACQUISITION), No. 28, 16 Bom. L. R. 72.

(3) S. 32—Decree passed by Sub-Judge—Addition of Court of Wards as party after decree—Execution proceedings can be entertained by the Sub-Judge. See CIV. PRO. CODE (1908), No. 64, 16 Bom. L. R. 527.

Act III of 1874 (Hereditary Offices).

Applicability to settlement effected under or within the purview of Bom. Act II of 1863. See BOM. ACT II OF 1863 (SUMMARY SETTLEMENT), No. 1, 16 Bom. L. R. 164.

Act V of 1879 (Bombay Land Revenue Code).

(1) S. 37—Waste lands—Grant of patta—Confirmation of rights of ownership of possession—Collector not competent under S. 37 as it stood prior to the amendment Act of 1912 to decide question of title—Continuance of possession—Presumption under S. 114, Evidence Act, as to Entry in revenue records behind owner's back does not affect title—Letting out to stranger—Dispossession—Suit for declaration of ownership within 12 years of—No bar—Institution more than one year after Collector's order regarding title—Arts. 141, 142, Limitation Act.

By a patta granted in 1867 to the plaintiff's father, the Collector allowed the father to continue in possession of certain lands, some under cultivation and some not, on payment of a lump sum of money as assessment which was subject to revision when survey and settlement should be made. In 1883, the uncultivated lands were entered in the Revenue records as Government waste, the entry having been made behind the plaintiff's back, and in 1903 the Government let out the lands to others. In 1908, the Collector made an order purporting to be passed under S. 37, Bombay Land Revenue Code, giving occupancy rights in the waste lands to strangers. Plaintiff instituted, more than one year from the date of the said order, a suit against the grantees of the occupancy rights and the Secretary of State for declaration that he was the owner of the lands.

Held that Art. 14 of the Limitation Act did not apply and the suit was in time because the Collector's order was *ultra vires* and so cannot be called an order in his official capacity.

S. 37 of the Land Revenue Code as it stood in 1908 before it was amended in 1912 gives

3.—Bombay Acts—(Continued).**Act V of 1879 (Bombay Land Revenue Code)**
—(Concluded).

the Collector power to dispose of ownerless lands, but it does not give him the power to decide whether any land has owner or not. The power to decide questions of title vests in Civil Courts (a).

Held, also, that, under the patta, plaintiff's father was confirmed in his proprietary rights over the lands and that his title was not destroyed by the entry in the Revenue Register made in 1885.

Where evidence about acts of ownership does not exist and cannot reasonably be expected, it is usual to presume that the owner's possession once proved continued till it is shown to have been interrupted. (*Vide* S. 114, Evidence Act) (b).

Held also, that the plaintiff lost possession in 1903 and that, under Art. 142 the suit is in time as plaintiff's possession has been shown to have continued till 1903, i.e., within 12 years of suit. *Secretary of State for India in Council v. Mushtakeingh*, 7 S.L.R. 169=24 Ind. Cas. 813.

HAYWARD, J.C., and BOYD, A.J.C.

References:—(a) 15 B. 424; 24 B. 435; 6 S. L.R. 210; 25 B. 337, R. (b) 9 C. 744; 9 C. 802, R.

(2) Ss. 56, 70—Assessment, non-payment of—Forfeiture of land—Re-grant of land—Previous incumbrances on the land wiped out by the re grant. *Yedu Shival v. Kalu Ukhardu*, 15 Bom. L.R. 827=21 Ind. Cas. 310=37 B. 692. See Final Part, 1913, Col. 152.

(3) S. 70. See No. 2, *supra*.

(4) Ss. 79 A, 202—Issue of notice of summary eviction by Talukdari Settlement Officer—Suit against him—Notice whether necessary. See CIV. PRO. CODE (1909), No. 119, 16 Bom. L. R. 766.

(5) S. 83—Right to cut trees planted by tenant. See TRANSFER OF PROPERTY ACT, No. 94, 16 Bom. L. R. 595.

(6) S. 202. See No. 4, *supra*.

Act I of 1880 (Bombay Khoti Settlement).

(1) Ss. 9, 10—Evidence Act, S. 116—Khoti lands—Occupancy tenant—Resignation of occupancy for consideration—Resignation amounts to transfer—Transfer not valid unless assented to by all Khots—Lease synchronous with such resignation—Tenants can show defect in the Khot's title in a suit on the lease—Estoppel—Act of legislature.

The defendant, an occupancy tenant of Khoti lands, resigned on the 29th April, 1905, his occupancy rights in the lands for consideration to the plaintiff, who was one of the Khots. On the same day and as part of the same transaction, the defendant attorned to the plaintiff by executing a lease of the lands for a term of five years. After the expiry of the term, the plaintiff sued the defendant to recover possession of the lands and rent for three years preceding

3.—Bombay Acts—(Continued).**Act I of 1880 (Bombay Khoti Settlement)**
—(Concluded).

the suit. The defendant contested the validity of his resignation and claimed the lands as his. The lower Court held that the resignation was not valid, and that the defendant possessed as before occupancy rights in the lands. The plaintiff having appealed:—

Held (1) that the resignation in question must be regarded as a transfer which was not valid under S. 9 of the Khoti Act, as the consent of all the Khots had not been obtained;

(2) that the transaction could not be regarded as a resignation under S. 10 of the Act, since it was accompanied by consideration;

(3) that the foundation of plaintiff's title in 1905 was illegal and the plaintiff was not entitled to estop the defendant from showing the illegality of the title so founded.

There is no estoppel against an Act of Legislature. *Shridhar Balkrishna Valdia v. Babaji Mula Agarya*, 16 Bom. L.R. 586=38 B. 709.

BEAMAN and HAYWARD, JJ.

(2) S. 10. See No. 1, *supra*.

Act XX of 1881 (Sind Encumbered Estates).

(1) S. 28—Landholder to whom land was restored—Reference to arbitration—Award and consent decree transferring land to creditor in discharge of debts—Only life-interest transferred—Powers of arbitrator—Transfer under award and decree—Effect—Compensation—Creditor not entitled to—Contract Act, S. 65.

Where a landholder, to whom an estate was restored under the Encumbered Estates Act, empowered certain arbitrators to decide dispute between a creditor and himself, consented to an award being made against him by which certain land was transferred to the creditor in discharge of the debts, and to a decree of Court being passed on the basis of that award:

Held, that the creditor acquired only a life-interest in the land transferred to him.

Per Crouch, A. J. C.—When a person is in possession of property in respect of which his rights of alienation are limited under S. 28 of Act XX of 1881, he cannot, by a reference to arbitration, confer on the arbitrator an authority to alienate a more extensive interest in the land than he himself has. The powers of an arbitrator are strictly limited to the authority which has been duly delegated to him by the parties through the reference. He cannot by his award accomplish a legal act beyond the powers of those from whom he receives his authority. If the award be made a decree of the Court, it does not thereby acquire a wider operation.

An involuntary alienation through the Court could not effectively transfer an interest which the judgment-debtor had no power to transfer.

3.—*Bombay Acts—(Continued).*

Act XX of 1881 (Sind Encumbered Estates) —(Concluded).

The dictum in 7 S.L.R. 55, that S. 28, Sind Encumbered Estates Act, does not include an involuntary alienation through the Court, doubted.

Hayward, J.C.—The arbitration proceedings were merely a collusive endeavour to avoid the limitations imposed by law upon the ownership of the land-holder. The alienation, therefore, being an alienation by the land-holder and not an involuntary alienation through the Court, could have no effect on the land after the Zemindar's death, in view of the provisions of S. 28, Encumbered Estates Act.

S. 65 of the Contract Act does not apply to the case and the creditors are not entitled to compensation for the moneys lent by them (*a*). *Mir Mahomed Khan v. Pohumal Motimal*, 8 S.L.R. 86.

HAYWARD, J.C. and CROUCH, A.J.C.

Reference :—(*a*) 7 S.L.R. 58, R.

(2) S. 28—*Alienation by means of collusive decrees—Effect*—S. 6-A, Act X of 1897 (*General Clauses*)—*Repeal of statute—Whether interests revived*. *Mir Mahomed Khan Walad Hayat-khan v. Pohumal Motumal*, 7 S.L.R. 55=21 Ind. Cas. 514. See Final Part, 1913, Col. 153.

(3) S. 28—*Alienation when void—Acquiescence in void transaction—Effect—Estoppel by misrepresentation of fact and not of law*—S. 115, *Evidence Act*—S. 65, *Contract Act*—*Applicability to void transactions*. *Mir Mahomed v. Khubomal*, 7 S.L.R. 58=21 Ind. Cas. 517. See Final Part, 1913, Col. 153.

Act III of 1888 (City of Bombay Municipal).

Ss. 299, 293—*Vesting of public streets in Municipality—Laying of Railway lines under statutory authority over such streets—Land need not be acquired*. See ACT IX OF 1890 (RAILWAYS), No. 1, 16 Bom. L.R. 104.

Act VI of 1888 (Guzarat Talukdars).

(1) S. 29-B—*Decree against Talukdar—Talukdar's estate under management by Talukdari Settlement Officer—Notice to submit claims—Non-submission of claim owing to pending proceedings of Court—Inability of the creditor—Sufficient cause*.

The plaintiff sued the defendant for a decree upon a mortgage; but the Subordinate Judge granted him a personal decree and held that the mortgage was invalid under the provisions of the Gujarat Talukdars' Act. The plaintiff filed an appeal on the 27th September 1905. On the 21st November 1905, the Talukdari Settlement Officer took over the management of the estate. He received notice of the appeal on the 24th idem. He issued, on the 28th December, a notice, under S. 29-B of the Act, calling upon claimants to submit their claims within six months of the date of the notification. On the 14th March 1906, the District Court decided

3.—*Bombay Acts—(Continued).*

Act VI of 1888 (Guzarat Talukdars)—(Ctd.).

the appeal in favour of the plaintiff, holding that he had a valid mortgage upon the property of the defendants. The Talukdari Settlement Officer appealed against the decree in July 1906; but the appeal failed in August 1907. The plaintiff thereafter applied, under S. 29-B of the Act, for a certificate in order that he might proceed with the execution of the decree. The officer declined to grant the certificate on the ground that as the plaintiff had not submitted his claim within six months of the date of the publication of notice under S. 29-B, his claim was deemed to have been fully discharged. The plaintiff next applied to the Court for execution. The lower Courts dismissed the application as having been barred under S. 29-B (3). The plaintiff having appealed :

Held, (1) that the plaintiff was unable to put forward his real claim at the date of the Notification, and that at the date of the notice he was unable to comply with it within the meaning of S. 29-B (3) of the Gujarat Talukdar's Act, 1888 ;

(2) that the inability of the applicant having continued during the expiration of the six months from the date of the Notification, the plaintiff was not barred by S. 29-B from prosecuting the proceedings in Court.

The word "unable" in S. 29-B of the Gujarat Talukdars' Act is not confined to physical inability on the part of the claimant. *Manilal Popatlal v. Khodabhai Sartansing*, 16 Bom. L.R. 511=38 B. 604.

SCOTT, C.J., and BATCHELOR, J.

(2) S. 33 (2) (cc)—*Issue of notice of summary eviction by Talukdari Settlement Officer—Suit against him—Notice whether necessary*. See CIV. PRO. CODE (1909), No. 119, 16 Bom. L.R. 766.

Act III of 1901 (Bombay Dt. Municipalities).

(1) Ss. 82, 83—*House-tax—Arrears, non-payment of—Bill, presentment of—Statutory requirements of S. 82 not specified in the bill—Notice of demand—Distress warrant—Payment of arrears under protest—Suit to recover the amount*.

To recover the arrears of house-tax, a Municipality served upon the plaintiff a bill, which did not specify the time within which an appeal might be preferred, as required by S. 82 (2) (b) (ii) of the District Municipalities Act, 1901. On failure to pay the arrears, the Municipality issued a notice of demand, and followed it up by the issue of a distress warrant. When the warrant was executed, the plaintiff paid up the amount of the arrears. He next filed a suit to recover it back from the Municipality ;—

Held, awarding the claim, that the procedure followed by the Municipality in recovering the amount of arrears was not a legal procedure inasmuch as the bill did not fulfil the statutory requirements of S. 82 (2) (b) (ii) of the Act; and

3.—Bombay Acts—(Continued).

Act III of 1901 (Bombay Dt. Municipalities) —(Continued).

the right of distress depended upon the observance of the statutory formalities, it being a right conferred only by the statute upon those conditions. **The Surat City Municipality v. Chhabildas Dharamchand**, 16 Bom. L. R. 749.

SCOTT, C. J. and DAVAR, J.

(2) S. 88. See No. 1, *supra*.

- (3) Ss. 92 (1), 96 (2)—*Erecting a new building—Permission of the Municipality—Permission requiring owner to keep a strip of land in front of her house unbuild upon for widening street—Regular line of street not prescribed—Condition not valid—Owner building upon the space directed to be kept vacant cannot be asked to remove building.*

The plaintiff, who owned a house at Rander applied to the Rander Municipality on the 25th April 1911 for permission to rebuild it. On the 5th June 1911, the Municipality granted her permission on condition, among others, that she should in re-building her house keep an open space of 5 feet 8 inches in front of her house so as to widen an existing road from 8 feet 4 inches to 14 feet. It appeared that the Municipality had not determined any regular line either for the existing street or for the future as contemplated in S. 92 of the Bombay District Municipalities Act, 1901; but the condition in question was prescribed presumably under S. 96 (2) of the Act. The plaintiff disregarded the condition and built upon the space in question. The Municipality having threatened her to pull down the building, the plaintiff filed a suit to restrain the Municipality from doing so. The lower Courts refused to grant the injunction prayed for. The plaintiff appealed:

Held (1) that the power of the Municipality under S. 96 to prescribe the location of the building was given in relation "to any street existing or projected as they think proper," whereas the Municipality had prescribed the location of the building in relation, not to the existing street, but to a street which might come into existence in the future but was not yet projected.

(2) That, if the condition of the permit were complied with, the plaintiff would have to give up or keep vacant and unproductive a considerable portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of S. 92 which contemplated that, when a set back was determined upon, compensation should be paid to the owner.

(3) That the plaintiff was, therefore, entitled to the injunction sought by her. **Sai Fatma v. The Rander Municipality**, 16 Bom. L. R. 529 = 38 B. 597.

SCOTT, C. J., and DAVAR, J.

(4) S. 96. See No. 3, *supra*.

3.—Bombay Acts—(Concluded).

Act III of 1901 (Bombay Dt. Municipalities) —(Concluded).

(5) Ss. 113, 122—*Municipality—Public street—Projection—Encroachment upon public street—Power to remove encroachment—Encroachment existing for upwards of twelve years, no defence.* **The Dakore Town Municipality v. Anupram Haribhai Travadi**, 15 Bom. L. R. 833 = 21 Ind. Cas. 313 = 38 B. 15. See Final Part, 1913, Col. 156.

(6) S. 122. See No. 5, *supra*.

Act I of 1905 (Bombay Court of Wards).

(1) Decree passed by Sub-Judge—Addition of Court of Wards as party after decree—Execution proceedings can be entertained by the Sub-Judge. See CIV. PRO. CODE (1908), No. 64, 16 Bom. L. R. 527.

(2) S. 32—Retrospective effect—Construction. See CIV. PRO. CODE (1903), No. 316, 16 Bom. L. R. 30.

4.—Burma Acts.

Act III of 1898 (Burma Municipal).

Ss. 46 (1) (A) and 46 (4)—*Valuation of premises containing machinery—Principle of valuation.*

Machinery placed for use in the building is liable as such to taxation under S. 46 (1) (A) (a) of the Burma Municipal Act. (2) Machinery which is on the premises to be rated and which is there for the purpose of making and which makes the premises fit as premises for the particular purpose for which they are used is to be taken into account in ascertaining the rateable value of such premises. It is not all things on the premises, or that are used on the premises which are to be taken into account, but things which are there for the purposes of making and which do make them fit as premises for the particular purposes for which they are used. **Rangoon Electric Tramway and Supply Co. Ltd. v. Rangoon Municipality**, 7 Bur. L. T. 44 = 21 Ind. Cas. 395 = 7 L. B. R. 119.

HARTNOLL, OFFG. C. J. and TWOMEY, J.

References:—18 Q. B. D. 81; L. R. A. C. (1906) 43, F.

Act IV of 1898 (Lower Burma Town and Village Lands).

Ss. 15 (2), 41—*Jurisdiction—Jurisdiction of Civil Courts.*

Ss. 41 (a) and 15 (2) of the Lower Burma Town and Village Lands Act do not debar a Civil Court from adjudicating the rights of two private persons litigating over land which is at the disposal of Government. **Nallan Chetty v. Muthusawmy Pillai**, 23 Ind. Cas. 961.

HARTNOLL, OFFG. C. J. and ORMOND, J.

Act XIII of 1898 (Burma Laws).

13 (2). See MAHOMEDAN LAW (GIFT). 7, 7 Bur. L. T. 75.

4.—Burma Acts—(Concluded).

Act V of 1900 (Lower Burma Courts).

(1) S. 30—Second appeal—Question of fact when can be raised—Contest between verbal sale and registered deed of sale—Sale and agreement to sell—Mixed question of law and facts. See CIV. PRO. CODE (1908), No. 145, 22 Ind. Cas. 803.

(2) S. 30—Power of Chief Court to treat a second appeal as a revision petition. See LIMITATION ACT (1908), No. 101, 7 L.B.R. 138.

5.—Central Provinces Acts.

Act XVIII of 1881 (C.P. Land Revenue).

(1) S. 65 A—Joint Hindu family—Certificate of protected status issued in the name of one member of the family—Rights of other members—Effect of the Amending Act of 1898.

P., his brother and nephew formed a joint Hindu family. In 1891 a certificate of protected status under S. 65-A. of the Land Revenue Act was issued in the name of P. The family was joint in mess, residence and estate in 1891, and enjoyed the profits of the *thekadari* village jointly in that year. In 1905, a village O was purchased in the name of one of P's sons from the savings of the income derived from the *thekadari* village.

The present suit was for a declaration that P's nephew F had no share in the recently purchased village. Held that the certificate of protected status did not create a new right personal to P alone, and that P's nephew had a share in the village newly purchased.

Held, also that the rights of P or his nephew F were not affected by the Amending Act of 1898. Property which is joint property and enjoyed as such does not cease to be joint property merely because a subsequent statute does not recognize a partition. *Fagwa v. Budhram*, 10 N.L.R. 64 = 24 Ind. Cas. 855.

MITTRA and FRIDEAUX, OFFG. A.J.C.S.

References:—9 C.P.L.R. 134; 4 C.P.L.R. 57; 9 M. 477; 15 B 247; 10 A 272; 22 M. 383; 34 A. 65; 9 M. I. A-543; (1904) 74 L. J. Ch. 800, R.

(2) S. 65-A, sub-S. (4) (b), proviso 1st—Rule of primogeniture, be efit of—Joint with thekadar—Meaning of "joint." *Sukdeb Blawal v. Balla Blawal*, 20 Ind. Cas. 28 = 19 C.L.J. 255. See Final Part, 1913, Col. 159.

Act IX of 1883 (C. P. Tenancy).

(1) Transfer of occupancy holding by tenant—Law before Act IX of 1883 (C. P. Tenancy)—Right of landlord. See OCCUPANCY, No. 7, 10 N.L.R. 146.

(2) S. 33 (2)—Mortgage—Provision for payment of debt by enjoyment of usufruct and by delivery of grain—Instalments—Default—Interest thereafter—Notice to landlord—Necessity to give how determined—Money value of usufruct at the time of mortgage—Interest—Payable—meaning of the terms.

5.—Central Provinces Acts—(Continued).

Act IX of 1883 (C.P. Tenancy)—(Concluded).

Where a mortgage-deed recited that the mortgagor took rupees two hundred, in lieu of which the mortgagor agreed to deliver 20 *manis* of *pisi* wheat by instalments of 2 *manis* each year, the usufruct of the land being taken at 1 *mani* a year and an additional *mani* was to be personally delivered by the mortgagor and in default, the instalments were to carry 50 per cent. per annum compound interest.

Held, that the mortgage was one which involved the payment of interest, though it is not easy to determine the rate of interest (a).

The ward 'interest' in S. 33 (2) of the Tenancy Act was not intended to be restricted to a re-payment in cash. It means compensation for the use of money or grain.

The word 'payable' in S. 33 should be construed to be equivalent to 'receivable' by the mortgagee out of the usufruct (b).

Held, also that, in the present case, the question whether notice to landlord under S. 33 (2) is required must be determined with reference to the estimated money value, at the date of the mortgage, of the usufruct of grain. *Raghunath v. Ganpat*, 10 N.L.R. 21 = 23 Ind. Cas. 213.

MITTRA, OFFG. A.J.C.

References:—(a) 11 C.P.L.R. 127, R. (b) 15 C.P.L.R. 1, R.

Act XI of 1898 (C. P. Tenancy).

(1) Proprietary body—Appointment of agent—Implied appointment—Competency to appoint stranger—Lambardar—Presumption. See LAMBARDAR AND CO-SHARERS, No. 4, 10 N.L.R. 93.

(2) Ss. 44, 56 (2)—Nethersole Settlement Khasra Public record—Certified copy produced at late stage—Evidence, acceptance as—Burden of proof to show entry incorrect—Record of Rights—Occupancy right—Village service lands.

The Khasra of the Nethersole Settlement in Sambalpur is a public record.

A certified copy of it produced by the plaintiff before the witnesses for the defendant were examined may properly be accepted in evidence though filed at a late stage.

The burden of proof is upon the party who alleges that a certain entry in a Record of Right is incorrect.

Under S. 44 of the Central Provinces Tenancy Act, occupancy rights cannot be acquired in village service lands, and under S. 56, sub-S. (2), any sub-lease of such lands for a period not exceeding one year is void. *Bhuban Sahu v. Lal Sunder Jhankar*, 23 Ind. Cas. 604.

TEUNON and MULLICK, JJ.

(3) S. 46 (3)—holding—Decree for sale of—Unregistered documents registered prior to the date of decree.

5.—Central Provinces Acts —(Concluded).**Act XI of 1898 (C.P. Tenancy)—(Concluded).**

S. 46 (2)—Illegality of the decree—Point raised for the first time in second appeal—Legality.

Under the provisions of S. 46 of the Tenancy Act, no sale decrees can be passed in respect of an occupancy holding on an unregistered document executed prior to the commencement of the Act.

S. 46 (2) of the Act has retrospective effect.

*The point that the decree of the lower Court contravenes the provisions of S. 46 (2) of the Act may be raised for the first time on second appeal. *Myasaheb v. Champalal*, 10 N.L.R. 42=23 Ind. Cas. 888.

MITTRA, A.J.C.

(4) *Ss. 46, 47, 48; 60, 70, 71, 72—Lease for a period exceeding one year granted by tenant to sub tenant—Validity—Tenant whether barred from pleading the proviso to S. 60 in a civil suit.*

According to S. 60 of the C.P. Tenancy Act, a lease granted to a sub-tenant by an occupancy or an ordinary tenant shall not be valid for a period exceeding one year. Therefore a sub-tenant cannot after the expiry of a year from its commencement plead, as a ground for resisting a suit for eviction, a sub-lease for a period exceeding one year (a).

Ss. 46 to 48 and 70 to 72 are no bar to a tenant pleading the proviso to S. 60 in a civil suit. *Vishwanath v. Sitaram*, 10 N.L.R. 159.

BATTEN, O. J. C.

Reference:—(a) 8 N.L.R. 22, R.

(5) *S. 47.* See No. 4, *supra*.

(6) *S. 48.* See No. 4, *supra*.

(7) *S. 56.* See No. 2, *supra*.

(8) *S. 60.* See No. 4, *supra*.

(9) *S. 70.* See No. 4, *supra*.

(10) & 71. See No. 4, *supra*.

(11) *S. 72.* See No. 4, *supra*.

(12) *S. 85.* See LANDLORD AND TENANT, No. 29, 10 N.L.R. 129.

6.—Madras Acts.**Act XXVIII of 1860 (Madras Surveys and Boundaries).**

S. 25—Boundaries Settlement—Officer—His decision that certain lands do not form part of Zemindari—Failure to contest by suit under S. 25—Res judicata—Civ. Pro. Code, S. 11—Matters substantially though not formally in issue—Applicability of principle to—Madras Act II of 1864 (Revenue Recovery), S. 58—Claim for refund of proportionate peishcush—Courts whether precluded from deciding it.

Where the plaintiff sued to recover certain lands, which she alleged to form part of her

6.—Madras Acts—(Continued).**Act XXVIII of 1860 (Madras Surveys and Boundaries)—(Concluded).**

Mitta and to have been wrongfully taken possession of by the Government, and in the alternative for a reduction of the *peishcush* paid by her for Fasli 1817 proportionate to the rent of the lands which had been taken from her, and where the boundaries of the Mitta and the adjoining Government lands were delineated under the Boundaries Act (XXVIII of 1860) in the year 1880 when the Boundary Settlement Officer found that the lands in question never formed part of the Mitta, and the proprietor of the Mitta did not contest his decision by filing a suit under S. 25 of the Act.

Held, that the decision of the Boundary Settlement Officer that the lands in question did not form part of the *zemindari* is *res judicata* (a).

*Quere:—*Whether the Court is precluded by the terms of S. 58 of the Madras Revenue Recovery Act (II of 1864) from entertaining the plaintiff's claim for a return of proportionate *peishcush* for the Fasli in question.

Per Seshagiri Iyer, J.—The general principles enunciated in S. 11, Civ. Pro. Code, are of universal application. The question under that section will be whether a matter was substantially in issue and not whether it was formally in issue. The plea of *res judicata* or estoppel is available not only as regards the final conclusion of the Court or officer, but also regarding all findings necessary for arriving at that conclusion, whether they are given on formal issues raised in the case or are referable to the points which must have been the basis of the final determination (b). *Muthammal v. The Secretary of State for India in Council*, 27 M.L.J. 539=16 M.L.T. 432.

WALLIS, C.J., AYLING and SESHAGIRI
AIYAR, JJ.

References:—(a) 11 M. 309, F. (b) 2 I.A. 283 (286); (1747) 3 Atk. 626=26 E.R. 1160; 28 M. 338; 6 Bom. L.R. 288; (1873) 9 Ch. A. 1 (25), R.

Act II of 1864 (Revenue Recovery).

(1) *Ss. 1, 42—Sale for arrears of water cess—Conveyance, free of incumbrances—'Public revenue'—Whether includes water cess—Madras Act VII of 1865 (Irrigation cess)—Yeeranan Ambalam v. Karuppayya Pillai*, 24 M.L.J. 511=19 Ind. Cas. 386=37 M. 49. See Final Part, 1913, Col. 161.

(2) *S. 42—Cess—Land Revenue—All patta land liable—Liability as between mortgagor and mortgagees—S. 2, Act VII of 1865.*

Government revenue due upon other lands contained in the same patta issued in the mortgagor's name is the revenue due upon the mortgaged land also. Though, for the sake of convenience, separate amounts are entered as the revenue due upon separate numbers held under a single patta, the demand of the Sizar and the liability of the landholder is a

6.—Madras Acts—(Continued).

Act II of 1864 (Revenue-Recovery)—(Concl'd).

consolidated demand, and the land of the landholder is security for all the land revenue payable by him. The mortgagee is bound to pay, under S 76 (c) of the Transfer of Property Act, the Government revenue accruing due in respect of property other than the mortgaged property included in the same pattah.

Madras Act II of 1864, S. 42, applies to sales for irrigation cesses charged upon land. Irrigation cesses are part of public revenue due on the land. Section 2 of Act VII of 1865 must be treated as superfluous and not as restricting or modifying or repealing the provisions of S. 42 of Act II of 1864 as regards sales for arrears of irrigation cesses.

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. **Gunnam Dorayya v. Vadapalli Ayyama Charulu**, 16 M.L.T. 226 = (1914) M.W.N. 648 = 27 M.L.J. 295.

SADASIVA AIYAR and NAPIER, JJ.

(3) S. 42. See No. 1, *supra*.

(4) S. 58—Mitta—Peishchush—Claim for proportionate reduction—Whether Court precluded from entertaining the same. See MADRAS ACT XXVIII OF 1860 (SURVEYS AND BOUNDARIES), No. 1, 27 M.L.J. 529.

(5) S. 59—Mortgagor taking benami in revenue sale—Applicability of S. 59. See MORTGAGE (GENERAL), No. 46, (1914) M.W.N. 916.

Act VII of 1865 (Madras Irrigation Cess).

(1) *Water cess—Act III of 1905—Source of irrigation—River belonging to Government—Permanent sanad—What it conveyed—Onus—Limitation Act, 1877, Art. 131. The Secretary of State for India v. Kannappalli Janakiramayya*, 13 M.L.T. 235 = (1913) M.W.N. 225 = 24 M.L.J. 365 = 18 Ind. Cas. 770 = 37 M. 322. See Final Part, 1913, Col. 164.

(2) S. 1—R. 5 of Rules under the section—'Taken'—Meaning—Irrigation of land through a second pipe—Not authorised by Government—Liability to pay water-rate—Insertion of the pipe not proved by whom done—Presumption of user by owner of land irrigated.

Where the irrigation of the plaintiff's lands was actually effected by means of the water of a channel passing through two pipes, the second of which had been inserted without the authority or the approval of the Public Works Department, held that the water was 'taken' from an unauthorised source of supply within the meaning of r. 5 of the rules framed under S. 1 of Act VII of 1865 and that the plaintiff was liable to pay the penal water-rate collected from him.

Per Aiyangar, J.—The Act makes no distinction between the use of Government water with or

6.—Madras Acts—(Continued).

Act VII of 1865 (Madras Irrigation Cess)—(Concluded).

without the active co-operation of the owner of the land irrigated (a).

The meaning of the word "taken" discussed.

Per Tyabji, J.—Where it is proved that a certain piece of land is irrigated by water coming from a certain source, in the absence of some explanation being offered, it may well be considered that the water has been taken (within the terms of the rule), by the person whose land is irrigated. **Kopalil Krishna Row Garu v. The Collector of Kistna on behalf of the Secretary of State for India in Council**, 26 M.L.J. 210 = 22 Ind. Cas. 692.

AYLING and TYABJI, JJ.

Reference:—(a) 34 M. 21, R.

(3) S. 1—Meaning of 'Engagement'—Construction of Act—Ratification of acts done by public servants. **Kandalam Rajagopalacharyulu v. The Secretary of State for India**, (1913) M.W.N. 937 = 14 M.L.T. 454 = 22 Ind. Cas. 107. See Final Part, 1913, Col. 166.

(4) S. 2—Scope. See ACT II OF 1864 (MADRAS REVENUE RECOVERY), No. 2, 16 M.L.T. 226.

Act VIII of 1865 (Madras Rent-Recovery).

(1) *Varam pat'a—Utilization of portion of nanjai holding as seed bed—Landlord's right to claim damages for non cultivation of the Nathankal plots—Burden on landlord.*

Prima facie, the utilization as seed bed of a reasonable portion of a nanjai holding, is a proper use of the land, and *prima facie* the ryot will get all he can out of his holding; it lies therefore on the Zamindar to show that the Nathankal plots were wrongly used as such or that the ryot might and ought to have grown a crop to maturity on the same plots after removing the seedlings.

In the absence of such evidence, the Zamindar cannot make out a claim for damages for non-cultivation of the Nathankal plots. **Ramakrishnam Pillai v. Robert Fischer**, 27 M.L.J. 414.

MILLER, J.

(2) *Varam agreement—Condition that ryot should cultivate the land in due season—Validity—Breach of condition—Measure of damages.*

A condition in a pattah which obliges the ryot to cultivate the land in due season cannot be said to be unreasonable in a varam agreement, provided it is not read as insuring the rent in all seasons.

In a case of failure to observe the condition, the average yield of neighbouring land would be a proper measure of damages. **Southarama Iyer v. Robert Fischer**, 27 M.L.J. 416.

MILLER, J.

6.—Madras Acts—(Continued).

Act VIII of 1865 (Madras Rent Recovery) —(Continued).

- (3) S. 40—*Suit to set aside rent sale—Purchaser, only necessary party—Landlord, not a necessary party—Limitation Act, Art. 12—Receiver representing landlords added as party after one year—Suit not barred by reason of such delay.*

In a suit by a tenant to set aside a rent sale held at the instance of a receiver who represented the Melvaramdars of certain lands, under S. 40 of the Rent Recovery Act, held, the only necessary party defendant to the suit is the purchaser at the rent sale; and neither the receiver nor the Melvaramdars are necessary parties, and that such a suit ought not to have been dismissed as barred by limitation on the ground that the Receiver was added as a party more than a year after the rent sale under Art. 12 of the Limitation Act. **Annamalal Velan v. Murugappa Velan**, (1914) M.W.N. 236=26 M.L.J. 238=22 Ind. Cas. 826.

SADASIVA AIYAR and SPENCER, JJ.

Reference:—9 C. 271; 25 C. 833; 28 B. 11, F.

- (4) S. 69—*Second appeal to the High Court—Practice—Civ. Pro. Code, 1892, Ss. 584, 595—Finding of fact in first appeal when not dependent solely on construction of documents.*

A second appeal lies to the High Court from a decree of the District Court passed on appeal under S. 69 of the Madras Rent Recovery Act, 1865 (a).

In a summary suit instituted under S. 9 of the Madras Rent Recovery Act, 1865, by a Zemindar against his tenant to enforce the acceptance by the tenant of a patta based on the Asara or produce-sharing system, the sole question was whether the substitution of the Veesabadi (money payment) for the Asara system in Fasli 1283 was permanent.

The Court of First Instance relying on the *Muchilikas* executed by the tenant since that year and other evidence found that the conversion of the Asara rates into cash payments in Fasli 1283 was a permanent arrangement, and held that the Zemindar was not entitled to impose on his tenant the patta tendered on the Asara basis. That decision was affirmed by the First Appellate Court but the High Court in second appeal relying on the *Muchilikas* alone held that, on their true construction, the patta tendered on the Asara basis was a proper patta, and that the tenant must accept it.

Held, that the question in issue was a question of fact, with which the first two Courts alone were competent to deal; that the *Muchilikas* were only a part of the evidence on which those Courts acted in arriving at their conclusions; and that, in view of Ss. 584 and 585 of the Code of Civil Procedure, 1892, the High Court acted without jurisdiction in setting aside the concurrent finding of the Court below (b).

6.—Madras Acts—(Continued).

Act VIII of 1865 (Madras Rent Recovery) —(Concluded).

Yeeraraghavulu v Sri Raja Bomma Devara Venkata Narsimha, (1914) M.W.N. 695=16 M.L.T. 262=27 M.L.J. 451=20 C.L.J. 375=37 M. 443=16 Bom. L.R. 853=19 O.W.N. 97 (P.C.)

LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

References:—(a) 26 M. 518, Appr. (b) 17 I.A. 122, F.

Act VIII of 1869 (Inams).

(1) Enfranchisement—Effect upon pre-existing rights of Zemindars. See GHATTUTHU-MULU CESS, No. 1. (1911) M.W.N. 373.

(2) Naidu's inam—Effect of onfranchisement. See INAM, No. 6, 24 Ind. Cas. 377.

Act III of 1873 (Madras Civil Courts).

(1) S. 14. See ACT VII OF 1887 (SUITS VALUATION), No. 2, 26 M.L.J. 578.

(2) S. 16—Scope—Moplahs of North Malabar—Whether governed by Marumakkathayam law or Mahomedan Law—Custom—Proof—Validity of custom—Courts whether can take judicial notice of custom—Value of previous decisions on the enforceability of custom. See MOPLAHS, No. 1, 16 M.L.T. 17.

Act I of 1876 (Madras Land Revenue Assessment).

Separate registration—Permanent grantee at favourable rent.

Regulation XXVI of 1802 does not affect the validity of transfers by zemindars but only saves the rights of Government. Prior to Act I of 1876 provision was made in Reg. XXVI only for the separate registration of portions of settled estates sold in Court auction, but no specific legislative provision existed as to how separate registration was to be enforced in other cases.

A permanent lease of a zemindari is not a transfer of proprietary right within the meaning of S. 8 of Reg. XXV of 1802. A permanent grant at a favourable rent of the nature of *jodi*, *kattubadi* or *poruppu* is not a transfer of ownership, and the grantees are not liable to have their lands separately registered under Act I of 1876 and separate assessment imposed on them. **Manya Sultan v. The Collector of Vizagapatam**, 1914 M.W.N. 610=27 M.L.J. 278.

WALLIS, OFFG. C.J. and KUMARASAMI, SASTRI, J.

Act V of 1878 (Madras Municipal).

§. 104—*Profession of Vakil, etc.—Basis of tax—Powers of High Court.* **C V. Sundaram Sastry v. President of the Municipal Commission, Madras**, (1913) M.W.N. 982=22 Ind. Cas. 287. See Final Part, 1913, Col. 168.

6. Madras Acts—(Continued).

Act I of 1885 (Madras City Municipal).

Profession Tax—Test—Liability of gross or net income. Subramaniam v. The President Municipal Commission, Madras, (1913) M.W. N. 935—22 Ind. Cas. 278. See Final Part, 1913, Col. 169.

Act IV of 1884 (Madras District Municipalities).

(1) S. 21. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 1, 27 M.L.J. 284.

(2) S. 53—*Meaning of 'money lender'—Building used for stabling Devasthanam coaches and horses—Whether exempt from tax as used for a public purpose.*

The word 'money lender' is not expressly defined in the District Municipalities Act, but a person who casually or intermittently invests his surplus funds on mortgage or on personal security need not necessarily be considered to follow the calling of a money lender. The money lending transactions must be so numerous, continuous and systematic that it might appropriately be called the trade or business of money lending (a).

In this case a building was used for stabling the Tirupathi Devasthanam coaches and horses. Some of the horses were used to carry drums in the temple processions and others were used by respectable pilgrims to whom such an honour was shown by the Mahant. Held that such uses are for public purposes and the building is entitled to be exempted from tax as used for a public purpose. *The Municipal Council of Tirupathi v. Sree Mahant Prayag Dassjee Varu*, 15 M.L.J. 93—27 M.L.J. 231.

SADASIVA IYER and TYABJI, JJ.

References:—(a) (1911) 1 M.W.N. 111 (119), F.; 11 M. 253, D.

(3) Ss. 53 and 60—*District and Sessions Judge of Cuddalore—Stay for over 60 days in Kodaikanal—Payment of profession tax in Kodaikanal—Liability to pay in Cuddalore.*

S. 53 of the District Municipalities Act draws a distinction between 'holding' and 'exercising' and divides persons into 2 classes: (1) persons holding appointments and (2) persons exercising certain avocations. A man holds office whether he discharges the duties of the office or not (a).

No distinction can be drawn between the administrative and judicial duties a District and Sessions Judge has got to perform.

Where the District and Sessions Judge of Cuddalore spent his vacation in Kodaikanal and paid profession tax there, he is not liable to pay profession tax again at Cuddalore and can claim the benefit of S. 60 of the District Municipalities Act. *Henry Moberly v The Municipal Council of Cuddalore*, (1914) M.W. N. 171—23 Ind. Cas. 398.

SANKARAN NAIR and AYLING, JJ.

Reference:—(a) 17 M. 453, Diss.

(b) S. 60. See No. 8, *supra*.

6.—Madras Acts—(Continued).

Act V of 1884 (Madras Local Boards).

(1) S. 51—*Powers of local bodies to sue in respect of trust properties in the absence of trustees—S. 26, Act IV of 1894, Madras District Municipalities.*

S. 51 of the Local Boards Act is identical with S. 26 of the District Municipalities Act, and the ruling in 81 M. 111 is clear authority for the proposition that the local body, to which the powers of the Board of Revenue were transferred under S. 51 of the Local Boards Act, is invested with the rights of management as well as superintendence, and that the former include the right to sue for the recovery of the trust property, in the absence of the trustees entitled to sue. *Bhimavarapu Buchi Reddi v. The President of the Taluk Board of Guntur*, 27 M.L.J. 284.

AYLING and TYABJI, JJ.

*Reference:—*31 M. 111, F.

(2) S. 73—*Mortgagee with possession—Intermediate landholder—Tenant's right to pay him.*

A mortgagee with possession is as much a landholder as any lessee and is intermediate between the proprietor and landlord and his tenants.

'Under-tenure holder' means a person who has acquired from a proprietor a right to hold land for the purpose of collecting rent or establishing tenants on it. This would cover a usufructuary mortgagee also.

Under S. 73 of the Local Boards Act as amended by Act VI of 1900, tenants are entitled to pay the cess to the intermediate landholder. This is irrespective of whether the intermediate landholder is bound to reimburse the proprietor or not.

The rights of parties to a contract are to be judged by their intention at its date and by that law by which they intended or may justly be presumed to have bound themselves. This principle can only affect the parties. It cannot affect strangers to the contract or deprive them of statutory rights.

That judgments *in rem* or *in personam* establishing a relation between the parties to them are conclusive even against third parties in the absence of fraud can only apply to adjudications which would be *res judicata* between the parties to them.

A mortgagee with possession is an intermediate landholder within the meaning of S. 73 of the Local Boards Act and the tenants' right to pay him recognised in that section cannot be abrogated by a contract to which they were not parties.

Tyabji: J.—The liability of the intermediate landholder and tenants is dependent on the amount paid or payable by the landholder. The recovery of half the cess is not dependent on the landholder's liability to pay it.

6.—Madras Acts—(Continued).**Act V of 1884 (Madras Local Boards)—(Old.).**

The notion of transfer of property is not an ingredient in the notion of an intermediate landholder. The right of the intermediate landholder to collect from the tenant is not dependent on his paying to his landlord; that might form the subject of an express or implied contract.

Quere:—Whether the legislature left no power to the parties to contract so as to bring about a relationship corresponding in other respects to that of an intermediate landholder without annexing to that relationship the rights under S. 73, Local Boards Act. *Jagan-nalkulu v. The Manager of Nandigam*, (1914) M. W. N. 939.

OLDFIELD and TYABJI, JJ.

Act VII of 1892 (Madras City Civil Courts).

Ss. 9, 9. See COURT FEES ACT, No. 5, 24 Ind. Cas. 316.

Act III of 1895 (Madras Hereditary Village Officers).

Ss. 5, 4 (3)—*Inams in proprietary estates—Emoluments of hereditary offices—Applicability of S. 5. Kandappa Achary v. Pathipati Vengama Naidu*, 25 M.L.J. 42 = (1913) M.W.N. 600 = 14 M.L.T. 146 = 20 Ind. Cas. 634 = 37 M. 548 (F.B.). See Final Part, 1913, Col. 173.

Act I of 1900 (Malabar Compensation for Tenants' Improvements).

(1) Ss. 3, 5—*Improvements, value of, right to receive—'Tenant,' definition of—Mortgage decree—Purchaser in execution—Lease subsequent to mortgage—Tenants entitled to value of improvements.*

Tenants holding under a mortgagor are entitled to get the value of improvements made by them on eviction by the purchaser in execution of the mortgage decree obtained by the mortgagee, even though the lease to the tenants might be subsequent to the creation of the mortgage.

The word 'tenant,' as defined by S. 9 of Madras Act I of 1900, includes persons other than those included in the word as defined in the Transfer of Property Act, and includes persons who did not enter into possession under any agreement with, or with the consent of, the persons entitled to obtain possession of the property. *Churyayi Karnayan v. Thattaral Chirutha*, (1914) M.W.N. 221 = 26 M.L.J. 183 = 15 M.L.T. 149 = 23 Ind. Cas. 321 (F.B.).

WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ.

(2) S. 5. See No. 1, *supra*.

(3) Ss. 5, 6 and 19—*Contract made prior to 1886—Terms less favourable to tenant than those of Ss. 5 and 6—Not binding—Tenants entitled to repudiate the contract.*

Where a contract made prior to the 1st January 1886 regulates the rates of compensation claimable by the tenant for improvements

6.—Madras Acts—(Continued).**Act I of 1900 (Malabar Compensation for Tenants' Improvements)—(Concluded).**

or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in Ss. 5 and 6 of the Malabar Compensation for Tenants' Improvements Act), but does not expressly refer to the tenants' right to make improvements.

Held, by the Full Bench, that the contract is not binding on the tenant if such a contract is less favourable to him than Ss. 5 and 6 of the Act, and that he is entitled to repudiate the contract and to claim compensation according to the provisions of the Act.

Held, also, that having regard to the question which the Court had to decide in 32 M. 1, there is no inconsistency between the decision in that case and those in 34 M. 61 and 22 M.L.J. 221. *Yathiadath Ahmad Kutti Haji's daughter and Kandar Madathil Assanar's wife Kochu Rabia v. Yadake Thalakkal Ahmad's son Abdurahman*, 15 M.L.T. 353 = 26 M.L.J. 523 = 24 Ind. Cas. 106 (F.B.).

WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ.

References:—32 M. 1; 34 M. 61; 22 M.L.J. 221, R.

(4) S. 6. See No. 3, *supra*.

(5) S. 10—*Plants sown or planted, meaning of—Transfer of Property Act, S. 108, cl. (i)—Tenant's rights—Common law, principle.*

Sadasiva Iyer, J.—In S. 10, Malabar Improvements Act, "plants" sown or planted includes paddy also.

A kanom lessee has the rights of an ordinary lessee and something higher.

S. 108, cl. (i) of the Transfer of Property Act is, in principle, also the common law of this country. A lessee of uncertain duration is entitled on the determination of the tenancy, for no fault of his own, to carry away all the crops raised or sown by him.

Spencer, J.—It is doubtful if "plants" in S. 10 will include annual crops such as paddy.

S. 108, cl. (i), is in accordance with the common law rights of the tenant. *Narayanan Nambudripad v. Krishna Patter*, (1914) M.W.N. 160 = 15 M.L.T. 160 = 26 M.L.J. 348 = 22 Ind. Cas. 515.

SADASIVA IYER and SPENCER, JJ.

Reference:—13 M. 15, D.

(6) S. 19. See No. 3, *supra*.

Act I of 1902 (Madras Court of Wards).

(1) S. 45—*Mortgage decree against person of proprietor—Not in accordance with S. 89—Transfer of Property Act—Effect—Propriety cannot be questioned in execution—Estate under Court of Wards—Exclusion of time—Limitation. See CIV. PRO. CODE (1908), No. 92, 27 M.L.J. 25.*

6.—Madras Acts—(Continued).

Act I of 1902 (Madras Court of Wards)—(Ctd.).

- (2) S. 49 (1)—*Suit "relating to the person or property" of a ward, meaning—Suit for money whether such a suit—Demand for payment whether amounts to notice of suit.*

A suit for money is a suit "relating to the property" of a ward within the meaning of S. 49 (1) of the Court of Wards Act (a).

A mere demand for payment cannot be said to amount to a notice of suit. *P. Venkateshachelapathy v. Sri Rajah Bommavara Satyanarayana Yaraprasada Siva Row Naidu Bahadur, Zamindar Garu*, 37 M. 283.

WHITE, C.J., and SANKARAN NAIR, J.

References :—(a) 33 M. 494, D. ; (1886) 33 Ch. D. 172, R.

Act III of 1904 (Madras City Municipal).

Ss. 33, 52, 413—Objection to inclusion of applicant's name in list of candidates for Municipal election—Rejection by President of Corporation—Objection upheld by Presidency Magistrate on revision but applicant's name not directed to be removed—Application for continuance of name on the list—Right to mandamus. See SPECIFIC RELIEF ACT, No. 34, 26 M.L.J. 310.

Act III of 1905 (Land Encroachment).

(1) Gramanatham—Storing straw ricks—Possession and enjoyment—Whether adverse to the title of the true owner. See ADVERSE POSSESSION, No. 5, 16 M.L.T. 48.

(2) S. 2—Ownership of beds of streams, etc.—Presumption in favour of Government—Burden of proof. See EASEMENTS, No. 3, 15 M.L.T. 247.

(3) Ss. 5, 14—*Title denied and notice to quit given by Government—Declaratory suit—Cause of action—Limitation.* *Devaguptapu Bhaskaradu v. Pamarty Subbarayudu*, 14 M.L.T. 572=21 Ind. Cas. 840=(1914) M.W.N. 53=26 M.L.J. 60. See Final Part, 1913, Col. 175.

(4) S. 14. See No. 3, *supra*.

Act I of 1908 (Madras Estates Land).

- (1) *Institution of suit in Civil Court prior to the Act—Commencement of trial after the Act came into force—Jurisdiction of Civil Court not ousted—Return of plaint for presentation to proper Court—Appeal—Appellate order directing plaint to be taken on file—Effect—Incompetency of lower Court to question it.*

Where a suit for damages for having cultivated his land without his permission was instituted by the landlord against certain tenants on the 30th June, 1908, i.e., one day prior to the date when the Estates Land Act came into force, held that the fact that the trial of the suit had to be commenced after the new Act came into force did not take away the jurisdiction of the Civil Courts to try the suit and that the Civil Courts must try it in all its stages (a).

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

The plaintiff's remedy in a suit should ordinarily be restricted to the cause of action with which he comes into Court. The events that transpire since will not enable him either to add to his reliefs nor will they cut down his rights.

Where a District Munsif returned a plaint filed in his Court for presentation to the proper Court, and where on appeal the Subordinate Judge held that the District Munsif had jurisdiction to entertain the suit. Held that the District Munsif was bound by the order of the appellate Court and that it was not open to him to go behind it. *G. Narayanaswamy Naidu v. Kanuru Ramayya*, 16 M.L.T. 244=(1914) M.W.N. 713=(1914) M.W.N. 870.

OLDFIELD and SESHAGIRI IYER, JJ.

References :—(a) (1898) A.C. 469 ; (1861) 10 C.B.N.S. 191 ; (1877) 2 Q.B.D. 269 ; 20 C.L.J. 107 ; 12 M. 136 ; 21 M. 288, R.

(2) *Suit for rent—No exchange of patta and muchilika—Not maintainable under old Rent Recovery Act.* *Maharaja of Vizianagram v. Tirumalraya Bunchi Yenkeyya*, (1913) M.W.N. 639=21 Ind. Cas. 58. See Final Part, 1913, Col. 175.

(3) *Estates Land Act—Suit for ejectment—Jurisdiction of Civil and Revenue Courts.* *Ardajeri Rama Reddi v. Karpi Sivaga*, (1913) M.W.N. 971=21 Ind. Cas. 916. See Final Part, 1913, Col. 175.

(4) *Land for pasturing—Holder not a tenant—Agriculture does not include sericulture or pasture—Jurisdiction of Civil Court.* *Rajah of Venkatagiri v. Jayampu Ayyapareddi*, (1913) M.W.N. 919=14 M.L.T. 405=25 M.L.J. 578=21 Ind. Cas. 532. See Final Part, 1913, Col. 176.

(5) *Suit for rent after Estates Land Act came into force—Non-tender of patta whether a good defence.* See GRANT, No. 1, 15 M.L.T. 361.

(6) S. 3—*Inam granted prior to Permanent Settlement—Neither 'estate' nor 'part of an estate' under the Act—Suit for rent in respect of such inam—Maintainability in Courts.*

An inam granted by a former Maharajah, before the issue of the Permanent Settlement sanad of the Maharajah of Vizianagram, is not an 'estate' or 'part of an estate' nor are the inamdars 'landholders' within the definitions of those terms contained in the Madras Estates Land Act (a) ; and therefore the jurisdiction of Civil Courts has not been lost over a suit for rent by such an inamdar. *Billa Sanyasi Naidu v. Agnihotram Venkatacharyulu*, 26 M.L.J. 258=(1914) M.W.N. 318=23 Ind. Cas. 96.

SADASIVA IYER, J.

Reference :—(a) 24 M.L.J. 659, R.

(7) S. 8. See No. 24, *infra*.

(8) S. 3 (2)—*Part of an estate, also an estate—Owner—Landholder—Jurisdiction of Revenue Courts.*

6.—*Madras Acts—(Continued).*Act I of 1908 (Madras Estates Land)—(*Ctd.*).

The Estates Land Act is not intended to be confined in its operation only to estates in their entirety which fall under one of the five clauses of S. 3 (2). Parts of an estate are also within the scope of the Act. Where the tenants of a part of an estate set up occupancy rights in defence to an action of ejectment by the landholder Revenue Courts alone have jurisdiction. *Chipurapalli Appayya v. Sri Rajah Kakarlapudi Ramchandra Raju Bahadur Garu*, (1914) M.W.N. 763=16 M.L.T. 362=27 M.L.J. 490.

WALLIS, OFFG. C. J. and SESHAGIRI IYER, J.

(9) S. 3 (2)—Eternal waste granted 30 years back—Presumption. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 1, (1914) M.W.N. 367.

(10) S. 3 (2) (d)—Grant of inam village—Presumption as to grantees being owner of kudivaram at the time of grant—Party seeking to oust jurisdiction of Civil Court must establish his right to do so.

The party seeking to oust the jurisdiction of the ordinary Civil Courts must establish his right to do so. This rule is founded on clear and general considerations, and distinct reasons must be required to justify departure from it.

Where an inam is granted, there is no presumption that the grantee was not the owner of the kudivaram at the time of the grant. *Srimath Kidambi Jagannathacharyulu Ayyavarlu v. Piddipiti Kutumbarayadu*, 27 M.L.J. 233.

OLDFIELD and NAPIER, JJ.

References :—(1910) M. W. N. 639 ; 24 M. L. J. 659, F. ; 26 M.L.J. 99, 235 and 585, R.

(11) S. 3 (2) (d)—Old grant—Kudivaram right—No presumption as to absence of the right in grantee—Burden of proof.

In deciding whether a village falls within the scope of S. 3 (2) (d), Madras Estates Land Act, there is *ab initio* no presumption that the grantees were not possessed of the Kudivaram at the time of the grant. This has to be proved by the party alleging it. *Ravulapati Papi Reddi v. Nandari Peda Yenkatacharyulu*, 16 M.L.T. 247=(1914) M.W.N. 794=27 M.L.J. 567.

AYLING and NAPIER, JJ.

(12) S. 3, cl. 2 (d)—“Estate,” meaning of—Inam of part of village, whether estate—Suit for rent—Civil Court—Jurisdiction.

All inamdars are not landholders under the Estates Land Act and the mere fact that the landlord is an inamdar and the tenant has got the permanent occupancy right, will not bring the inam lands within the definition of an “estate” (a).

A few acres of inam land forming part of a village, the whole of which village had not been

6.—*Madras Acts—(Continued).*Act I of 1908 (Madras Estates Land)—(*Ctd.*).

granted in inam, do not form part of an estate within the meaning of S. 3, cl. 2 (d) of the Estates Land Act.

The Civil Courts do not lose jurisdiction over a suit for rent brought by an inamdar unless it is also shown that the inam lands come within the definition of estate or part thereof. *Mohanambal v. Davoodsa Rowther*, 23 Ind. Cas. 859.

SADASIVA AIYAR, J.

References :—(a) 14 Ind. Cas. 215 ; 20 Ind. Cas. 769=24 M.L.J. 659=(1913) M.W.N. 782, R.

(13) Ss. 3 (2) (d) and 8—Land forming part of inam village—Waste at the time of grant—No occupancy right acquired by tenant—Tenant holding under lease for a year after expiry of term—Suit for ejectment—Jurisdiction of Civil or Revenue Courts—Effect of abandonment or surrender.

Plaintiff was the inamdar of the suit village, the inam grant having been made so long ago as 1748. The suit related to 60 acres out of the 300 acres in that village. These 60 acres were lying as immemorial waste at the time of the inam grant to plaintiff's ancestors. These lands were afterwards given by the inamdar for cultivation from time to time to different sets of tenants without occupancy rights. In 1907 plaintiff changed the tenant who was in possession prior to that time and leased the lands in suit to the defendants for only a year. The lease having expired in 1908, this suit was brought to eject the defendants in the Civil Court. *Held*, that the suit lands formed part of an ‘Estate’ and the suit was cognisable by the Revenue Courts and not by the Civil Courts.

Per Sadasiva Iyer, J.—Where the Government or a Zemindar grants a whole village, some lands in which are lying waste, but most of the lands in which are under cultivation, the usual presumption prevails that the grant of the village in general terms means only the grant of the melwaram in the whole village lands including the waste lands. The inamdar, so far as the waste lands are concerned, cannot be considered to have the kudivaram right in them, though he could create kudivaram interest in a waste land by letting it to a cultivator and could have (before the Estates Land Act) converted it into a private land by cultivating it through his home-farm servants and thus got the kudivaram right vested in himself (a).

If, however, it is proved that, at the time of the grant of a whole village in inam, all the lands in that village were lying waste, or if it is proved that, at the time of the grant of certain defined extent of lands in a village (such a grant being called a minor inam grant), that extent of lands so granted as minor inam was lying waste, the grant might be deemed in either case to be not of the melwaram alone in such waste lands but of the

6.—*Madras Acts*—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

kudivaram also. In such a case, of course, even the whole village so granted will not fall under the definition of "Estate" in S. 3, cl. 2 (d), because that section relates to cases where the grant was of the melwaram alone. Where the entire lands themselves in the village, as they were lying waste, were granted in inam, it cannot, of course, be said to be a grant of the melwaram alone (b).

The plaint lands were ryoti lands and not the private lands of the inamdar landholder at the time of, and immediately after, the inam grant.

When the inamdar afterwards granted the lands for cultivation, without giving the cultivators permanent occupancy rights (but only the rights to occupancy for one year or from year to year or a specified number of years), and when he changed the cultivators from time to time, it cannot be said that thereby the inamdar himself got any permanent occupancy or kudivaram right in the land, if there is no evidence to prove that he let them expressly as his private or home-farm lands.

So far as ryoti lands are concerned, a suit for ejectment of a tenant by a landholder on any ground could be brought only in the Revenue Court (c).

Per Seshagiri Iyer, J.—Till the Legislature makes a departure, Courts are bound to proceed on the assumption that the right in the soil is in the Government. *Prima facie* the grant of the soil comprises all there is in it. In this view, it must be held that the grant of the village in 1748 included the right to such revenue or rent as the grantor had in the village plus the full rights in those unoccupied portions of the village in which the tenants had no permanent rights of occupancy. Thus in 1748 the grantees acquired both the kudivaram and melwaram rights in the 60 acres, and the rights of the melwaramdar alone in the remaining 240 acres. Even in this view, the village must be held to be an estate under the Estates Land Act.

In order to bring a case within S. 3, cl. 2 (d), all that need be proved is (1) that the entire land revenue or rent which the grantor was entitled to in the village must have been transferred; and (2) the grantees should not have been the owner of the kudivaram of the village as a whole.

Surrender *ipso facto* is not a mode of acquisition and has not the same effect in conferring rights as transfer or succession. Consequently the word 'otherwise' in S. 8 of the Act will not include a surrender, as it will be obnoxious to the principle of construing words *eiusdem generis* (d). *Yenkata Sastrulu v. Sitaramudu*, 25 M.L.J. 585=24 Ind. Cas. 224.

SADASIVA IYER and SESHAGIRI IYER,
JJ.

6.—*Madras Acts*—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

References:—(a) 27 M.L.J. 235, Cons.; 26 M.L.J. 99; 2 O.L.J. 570; 8 O.L.J. 324; 6 B. 598 (608); 29 B. 420, R. (b) 20 M.L.J. 290, R. (c) 25 M.L.J. 617; 21 Ind. Cas. 916, R. (d) 23 M. 818, R.

(14) Ss. 3 (2), 6 (1), 8—Agraharamdars—Suit to eject tenants—Jurisdiction—Presumption—Land revenue alone granted—Terms of grant—Evidence—Tenants whether affected—Meaning of "acquired" in exception to S. 8. See AGRAHARAMDARS, No. 1, 26 M.L.J. 99.

(15) Ss. 3 (2), 55—Mirasi tenure in Chingleput District—Conversion of Mokhasa into Shrotriem—Rights of tenants—Jurisdiction of Civil or Revenue Courts—Meaning and incidents of 'Kudivaram,' 'Ulkadī Payakari,' 'Shrotriem Tenure,' 'Mokhasa,' 'Thunduvaram,' 'Mirasi,' 'Ekabhogam,' etc. See MIRASI TENURE, No. 1, 26 M.L.J. 169.

(16) S. 3 (5)—Party unwilling to join as plaintiff—May be impleaded as defendant. *Mangalassami Thevar v. Sathayappa Povandan*, (1913) M.W.N. 696=25 M.L.J. 351=21 Ind. Cas. 334. See Final Part, 1913, Col. 178.

(17) Ss. 3, sub-S. (5) and 6—Cowledar under proprietor, entitled to collect rent paying profit to proprietor—Such cowledar landholder and not ryot—Tenant under him, entitled to occupancy rights.

Where the proprietor of an estate within the meaning of the Estates Land Act, granted a cowle to another person, whereby the latter was to be in possession of the land, pay the kist due to Government, bear the charges of establishment, etc., and pay the proprietor a "profit" of Rs. 800 per annum, held, the cowledar is a 'landholder' within S. 3, cl. (5) and not a tenant; and that the person let in as a tenant under him is a 'ryot' and acquires occupancy rights under S. 6 of the Estates Land Act. *Tungala Mallanna v. Gothumukala Ramaraju*, (1914) M.W.N. 345=15 M.L.T. 401=23 Ind. Cas. 531.

SANKARAN NAIR and AYLING, JJ.

(18) Ss. 3, 6—Widow of landholder—Grantee from widow—Status of tenant introduced by the grantee—Grant of occupancy in waste lands—Presumption—Onus of rebutting.

Where the widow of a Zemindar, who had herself only a life-interest, granted a mokhasa pattah to a certain person for an indefinite period, a tenant introduced into the land by the grantee is a ryot within the meaning of S. 3 (15) of the Act, though the grant may not be binding on the reversioner. The fact that the widow could not have made a grant for a period extending beyond her life does not affect the question whether it is a grant (a).

Such a tenant is entitled to the benefit of S. 6 of the Act.

The decision in *Cheekati Zamindar v. Ranasoru Dhora* (b) establishes that, by virtue of

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

repeated proof of the fact that in zemindari the prevailing terms of tenancy include the right of permanent occupancy in favour of the tenant, the Courts are in a position to take judicial note of the existence of such terms and to presume that they exist. And so, the burden of proof rests on the person alleging that, in a particular zemindari, the prevailing terms of tenancy do not include the right of permanent occupancy.

- If the presumption (based on conformity with general experience no less than on the policy of law and the history of land tenures) is that a ryot who comes into possession of land ready for cultivation is let in on terms of permanent occupancy, then the presumption would be stronger in the case of one who is let in on the understanding that he will make waste lands cultivable which were previously incapable of being cultivated. In such a case principles of even wider applicability form the support of the presumption. *Brundavanachandra Horis-chandra Raja v. Ramayya*, 26 M.L.J. 600.

TYABJI and SPENCER, JJ.

References:—(a) 25 C. 1, R. (b) 23 M. 318, *Expl.*

(19) Ss. 3, 6, 23, 153, 157—*Land when is not 'old waste'—Acquisition of occupancy right—Burden of proof.* *Sree Balusu Buchi Saravagardu Garu v. Kovvuri Venkata Raju*, 25 M.L.J. 617=21 Ind. Cas. 913. See Final Part, 1913, Col. 176.

(19-a) Ss. 3 and 8, 185—*Ryoti land when becomes private land—Proof—Speeches in the Legislative Council—Construction of S. 185—Proviso an exception to S. 8.*

Speeches made in the Legislative Council during the passing of the Bill cannot be looked to interpret a section. What the Court has to see is "whether the wording of the section bears the interpretation."

Retrospective enactments must be strictly construed.

Actual conversion of ryoti into private land should be proved by very clear and satisfactory evidence. The burden is on the Zemindar to show that the suit lands come within the definition of S. 3 of the Estates Land Act as forming part of his domain or home-farm lands. Once it is shown that the lands were ryoti down to a certain date, the effect of S. 8 of the Estates Land Act is that, even if the Zemindar subsequently acquired the kudivaram right, that would not of itself convert it into private land. Neither calling the lands *kamattam* and letting them on terms which negative occupancy right with a view to prevent the assertion of such rights is sufficient to convert them into private land within the meaning of the definition. A private land must have that character from prior to the Permanent Settlement except in certain cases.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—²(Ctd.).

The first part of S. 185 deals with the determination of the question whether a particular field is ryoti or *kamattam* where nothing is known about its origin; if it was originally ryoti the rule of evidence contained in the first part of S. 185 can have no application, because that would practically abrogate the principle enunciated in S. 8, cls. 1 and 3. The proviso to S. 185 is really an exception to S. 8, cl. 3. The object of the proviso is to enable the landlord to say that, although the land was *seti*, he has by his own servants or by hired labour cultivated the lands for 12 years preceding the Act, and that consequently it should be regarded as his home-farm land. An irrebuttable presumption is to be drawn from such a conduct. *Zemindar of Chellapalli v. Rajalapati Somayya*, 16 M.L.T. 576=27 M.L.J. 718=(1915) M.W.N. 1.

WALLIS, C.J. and SESHAGIRI IYER, J.

(20) S. 4—*Scope—Landlord's right to collect rent for all land in ryot's occupation—Amount of rent payable—Intention of parties—Basis of calculation—Rent charged on extent cultivated prior to Act—Whether liable to alteration—Chap. III of the Act.*

S. 4, Madras Estates Land Act, says that the landlord is entitled to collect rent in respect of all ryoti land in the occupation of a ryot. *Prima facie*, it is so, but if the evidence shows that it was the intention of the parties that he should collect rent only in respect of the land in fact cultivated by ryot, of course, the intention of the parties overrides the provisions of the Act. This section merely lays down the general rule which can be displaced by evidence as to what the parties meant and intended (*Per White, C.J.*).

Per Tyabji, J.—S. 4 gives the right to the landholder to collect rent in respect of all the ryoti land in the occupation of a ryot. That section by itself does not suffice for the determination of the total amount of rent that has to be collected. The way in which the rate of rent is to be calculated is fixed by Chap. III of the Act. The provisions of that chapter lay down explicitly that the basis on which the rate of rent is to be determined is to be presumed to be the same as that on which it has been recovered by the landlord in the previous *Faslis*.

If the mode in which the amount payable was determined in the past was by reference not to the extent of all the land in the occupation of the tenant but the extent of land cultivated, there is nothing in the Act which makes it necessary to alter this method of determining the rent payable. Nor does the Act provide that the landholder may exact a higher rent from the tenant for the same piece of land, because he is entitled to obtain rent in respect of all the land in occupation of the ryot. *Saga*.

6.—*Madras Acts—(Continued).*

Act I of 1908 (Madras Estates Land)—(Old.).

Rowthen v. Muthu K. R. V. Alagappa Chetty, 26 M.L.J. 269 = (1914) M.W.N. 340 = 32 Ind. Cas. 834.

WHITE, C.J., and TYABJI, J.

- (11) Ss. 4, 27—
- Calculation of rent on the cultivated area—Custom not illegal.*

S. 4 of the Estates Land Act must be read subject to the provisions of S. 27. A customary condition that the rent for the whole holding in any particular fasli should be calculated only on the cultivated area is not against the statutory provision in S. 4 of the Act, as that section, by its opening clause, saves such and similar conditions. *A. L. A. R. M. Arunachellam Chettiar v. Muthayana Thevar*, 26 M.L.J. 575.

AYLING and TYABJI, JJ.

- (21-a) S. 6. See Nos. 14, 17, 18, 19,
- supra*
- .

- (22) Ss. 6, 8—
- Landlord and tenant—Landlord purchasing tenant's right—No occupancy right acquired by the landlord—Ryot in possession acquires such right.*

Where the landlord bought the tenants' interest at a rent sale in 1878, the land continues to be ryoti land under S. 8 of the Estates Land Act, and a person in possession at the time the new Act was passed acquires occupancy rights under S. 6 of the Act. *Markappuli Reddier v. Thandara Kone*, (1914) M.W.N. 798.

AYLING and SESHAGIRI IYER, JJ.

- (23) Ss. 6 (1), 8 (1)—
- Purchase of tenant's interest by landlord for arrears of rent—Tenant continuing in possession at the time of the passing of the Act—Tenant whether can claim occupancy right and liable to be ejected—Right to Kudivaram interest as between rival claimants whether affected by S. 6 (1).*

Defendants were tenants of the plaintiff, a Zemindar. Plaintiff purchased not only the Zemindari from the former Zemindar but he also purchased the *Kudivaram* right in the plaintiff ryoti lands which the former Zemindar had purchased in rent auction-sale of 1900. Plaintiff sued for ejecting the defendants as purchaser of the *Kudivaram* right from the rent auction-purchaser. Defendants continued in possession, at the date of the passing of the Act, notwithstanding the auction sale.

Held, that the defendants in this case were ryots in possession of ryoti land not being old waste, continued in possession of such land at the commencement of the Act, and that, therefore, according to S. 6 (1) of the Act, they obtained a permanent right of occupancy in such holding and they could not be evicted.

The rights to the *Kudivaram* interest as between rival claimants thereto (other than the landlord who is debarred by S. 8 from claiming such interest) are not intended to be affected

6.—*Madras Acts—(Continued).*

Act I of 1908 (Madras Estates Land)—(Old.).

by S. 6 (1). *Shivapada Mudali v. Pitty Thyagaraja Chettiar*, 27 M.L.J. 665.

SADASIVA AIYAR and HANNAY, JJ.

- References:—(1914) M.W.N. 798; 36 M. 439 = 21 M.L.J. 31 (F. B.),
- F*
- .

- (24) Ss. 6, 8 (7)—
- S. 6 whether retrospective—Meaning of "final decree" in S. 8 (7). Raja of Venkatagiri v. Mukku Narasayya*
- , 8 M.L.T. 258 = 7 Ind. Cas. 202 = 37 M. 1. See Final Part, 1910, Col. 171.

- (25) Ss. 6, 8, 153, 157, 163—
- Tenant on an inam having no occupancy right—Presumptive—Land not an 'estate'—Eviction of tenant in Civil Court—Meaning of 'acquire' in S. 8—Meaning of 'admitted as ryot' in S. 163—Non-occupancy ryots of old waste holding under expired leases—Right of landlord—Jurisdiction of Civil and Revenue Courts.*

Per Miller, J.—When it is found that a tenant has no occupancy right in his holding, and the land is not private land, the presumption is that the occupancy right is in the landholder either by the original grant or by prior or subsequent acquisition. It need not be shown that the landholder acquired the occupancy right in some particular way (a). In either case the land is not an 'estate' and the tenant is liable to eviction in a Civil Court.

The word 'acquire' in the exception to S. 8 of the Act includes acquisition by surrender or abandonment. The meaning of the word should not be restricted when the context does not compel us to do so (b).

Per Spencer, J.—The proviso to S. 153 of the Act has the effect of taking the case of non-occupancy ryots holding under an expired lease granted before the Act out of the jurisdiction of the Collector's Court, and the landlord can enforce his rights against them in the Civil Courts.

S. 153 is not exhaustive of all possible cases of eviction.

S. 157 is designed to prevent tenants of old waste from contracting themselves out of their right to remain in possession so long as they have not given cause under other provisions of the Act to their landholder to eject them (c).

S. 157 does not nullify the proviso to S. 153. It only prohibits a tenant of old waste being elected 'as such,' even if he has signed an agreement to quit.

The meaning of admitting a person to the possession of ryoti land appears from the explanation to S. 6 of the Act to mean the acceptance by the landholder of any portion of the rent fixed for such land. *Ponnusamy Padayachi v. Karuppudayan*, 26 M.L.J. 285 = 15 M.L.T. 299 = 24 Ind. Cas. 217.

MILLER and SPENCER, JJ.

- References:—(a) 24 M.L.J. 402; (1910) M.W.N. 556; 6 B. 598; 10 B. 112; 29 B. 415,
- R*
- . (b) 26 M.L.J. 99,
- R*
- . (c) 21 M.L.J. 402,
- R*
- .

6.—*Madras Acts—(Continued).***Act I of 1908 (Madras Estates Land)—(Ctd.).**(26) *Ss. 6 and 153—Scope of.*

It is not permissible to cut down the occupancy rights conferred by S. 6 by inferences drawn from another section which deals exclusively with ejectment suits of non-occupancy ryots. **Rajavelukoti Muthukrishna v. Raju Chetty**, (1914) M.W.N. 496=24 Ind. Cas. 865.

SANKARAN NAIR and AYLING, JJ.

(27) S. 8. See Nos. 13, 14, 19-a, 22, 23, 25, *supra*.

(28) *Ss. 8, cls. (1), (2), (3) and (4), 19, 77 (1) and 189—Landlord purchasing occupancy right prior to the Act—Tenants in possession before and at the time of the Act—Suit for rent—Applicability of S. 8, cl. 4, to such tenants—Suit maintainable in Revenue Courts only.*

Under S. 8, cl. (3), Madras Estates Land Act, merger of the occupancy right by transfer or succession under cls. (1) and (2) has not the effect of converting ryoti land into private land. But under cl. (4), in cases where such merger takes place by transfer for valuable consideration before the passing of the Act, the landholder has the right of admitting any person to the possession of land on terms that may be agreed upon between them.

But tenants who were not let into possession after the Act was passed, but were admittedly in possession before and at that time, do not come within the provisions of S. 8, cl. 4.

Therefore a suit for rent against such tenants by a landholder, who had purchased the kudivaram right before the Act, can be instituted only in Revenue Courts.

To such cases S. 19 does not, and *Ss. 77 (1) and 189* do apply. **A. S. F. L. V. Veerappa Chetty v. Mudali**, 26 M.L.J. 373=24 Ind. Cas. 375.

SANKARAN NAIR, J.

(29) *Ss. 9, 151, 153. See LANDLORD AND TENANT*, No. 30, 16 M.L.T. 442.

(30) *Ss. 11, 151—Holding for agricultural purposes—Using holding for other purposes—Effect of contract or custom. Mura Kasiam Rowther v. G.F.F. Foulkes*, 23 M.L.J. 352=16 Ind. Cas. 420=(1913) M.W.N. 137=37 M. 432. See Final Part, 1912, Col. 148.

(31) S. 19. See No. 28, *supra*.(32) S. 23. See No. 19, *supra*.

(33) S. 26—Effect upon the general law as to consideration in Contract Act. See **CONTRACT ACT**, No. 49, 16 M.L.T. 184.

(34) S. 27. See No. 21, *supra*.

(35) *Ss. 30, 40—Commutation of rent—Discretion—Enhancement of rent—Limit of enhancement—Not applicable to commutation.*

In fixing cash rent in commutation of grain rent, the Collector need not confine himself to the considerations set out in cl. (3) of S. 40 of the Act.

6.—*Madras Acts—(Continued).***Act I of 1908 (Madras Estates Land)—(Ctd.).**

The limit prescribed in S. 30, cl. (1) (b) of the Estates Land Act for enhancement of rent does not apply to the commutation of rent fixed under S. 40 of that Act. **Challakkutti Udayan v. H. H. The Prince of Arcot**, 23 Ind. Cas. 984.

SADASIVA AIYAR and SESHAGIRI IYER, JJ.

(36) S. 40. See No. 35, *supra*.

(37) S. 42—*Applicability—Provision in lease for enhancement of rent on excess are a found on measurement—Collector's order for recovering excess rent when necessary. Sivaganga Zamindari v. Chidambaram Chetty*, 14 M.L.T. 396=(1913) M.W.N. 926=25 M.L.J. 641=21 Ind. Cas. 556. See Final Part, 1913, Col. 179.

(38) S. 52, cls. 2 and 3 and S. 143—S. 143 applies only to contract for more than one year—Road-cess at one anna not claimable—Mamool presents.

Cls. 2 and 3 of S. 52 of the Madras Estates Land Act make it clear that the object of the Legislature was that, where there has been a consolidated contract for more than a year, there should be no sudden change in the relationship of the parties and there should be a year of grace before the new conditions come into force.

Where in a patta the landlord claimed one anna as road-cess instead of the half anna statutorily allowed, it cannot be considered to be part of the rent payable by the tenant and so must be disallowed. Where it is stipulated that the rent on the land shall be the first charge on the produce, it cannot be allowed if it is meant to take more than what is given to the landlord by S. 5, cl. (1) of the Act.

Where a patta stipulated for some mamool presents to be made to the landlord, such a thing cannot be considered as rent and must be disallowed. Even if it is part of the rent and so lawfully payable under the contract between the landlord and the tenant, it is rendered unlawful by S. 143 of the Madras Estates Land Act. **Yaddadi Jagunnadh Bhupathi Deo Garu v. Paddala Appalasamy**, (1914) M.W.N. 426=23 Ind. Cas. 576.

SADASIVA IYER and SESHAGIRI IYER, JJ.

(39) S. 53—*Landlord whether bound to tender pattach before suing for rent—Excessive distraint—Whether can be set aside altogether.*

The general principle of the legislation is that, in suits for rent, the landlord is not bound to tender a pattach before he sues to recover it. But if he wants to adopt the exceptional remedy of distraint, in which he takes upon himself the functions of the Court, although he has to conduct the proceedings with the assistance of the Revenue Officials, he must have tendered a pattach in order that the Revenue Officials may have some tangible proof of the landlord's claim.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

A distraint for an excess amount should not be avoided altogether, but must be sustained in respect of the amount lawfully recoverable. **C. Raghunath Row Sahib Ayl. v. Vellamoonji Gownden**, 16 M.L.T. 440=27 M.L.J. 597.

OLDFIELD and SESHAGIRI IYER, JJ.

References.—10 M. 229; 23 M. 268; 26 M. 260; 31 M. 22; 35 M. 139, R.

(40) S. 53—*Form of tender of pattah—Offer of pattah is not proper tender—No affixing to house but only to land allowed.* **Ramalinga Varaguna Pandia Chinnatambiar v. Micheal**, (1913) M.W.N. 965=14 M.L.T. 423=25 M.L.J. 608=21 Ind. Cas. 587. See Final Part, 1913, Col. 180.

(41) S. 55. See No. 15, *supra*.

(42) S. 60, *Schedule Part A. Art. 8—Arrears of rent—Limitation—Time runs from end of fasli—Suit for possession—Limitation not saved.*

For a suit for arrears of rent under the Madras Estates Land Act, limitation begins to run from the end of the fasli, when, in the absence of any contract to the contrary, the rent becomes payable. The pendency of a suit for possession does not save limitation for the rent suit. **Bhavaraju Yenkata Subba Rao v. Venumala Mallu Dora Garu**, 23 Ind. Cas. 942.

SANKARAN NAIR and SESHAGIRI IYER, JJ.

(43) S. 77. See No. 28, *supra*.

(44) Ss. 111, 115—*Sale of holding under—Failure of landlord to apply to Collector for sale within 45 days—Suit to set aside the sale—Maintainability in Civil Court.*

A suit for a declaration that the sale of the plaintiff's holding under S. 111 of the Madras Estates Land Act, was legally void and liable to be set aside in consequence of the landholder's failure to apply to the Collector for sale within the period of 45 days prescribed by S. 115, is maintainable in a Civil Court. **Chidambaram Pillai v. Muthu Ammal**, 15 M.L.T. 340=23 Ind. Cas. 524.

AYLING, J.

References.—27 M. 94; 27 M. 483; (1914) M.W.N. 55, R.

(45) S. 115. See No. 44, *supra*.

(46) Ss. 131, 189, 213—*Suit to set aside sale on ground of fraud—Jurisdiction of Civil Courts not barred.* **Gouse Moldeen Sahib v. Muthialu Chettiar**, 14 M.L.T. 523=21 Ind. Cas. 762=(1914) M.W.N. 55=26 M.L.J. 36. See Final Part, 1913, Col. 181.

(47) S. 143. See No. 38, *supra*.

(48) Ss. 146 (2), 147 (3). See OCCUPANCY, No. 5, 16 M.L.T. 192.

(49) S. 147. See No. 48, *supra*.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

(50) S. 151—*Tenant not in possession—Suit for joint possession or for partition and possession of half-share—Maintainability in Revenue Courts.* See JURISDICTION OF REVENUE COURTS, No. 1, 26 M.L.J. 435.

(51) S. 151. See Nos. 29 and 30, *supra*.

(52) S. 153. See Nos. 19, 25, 26, 29, *supra*.

(53) S. 157. See Nos. 19, 25, *supra*.

(54) S. 163. See No. 25, *supra*.

(55) S. 185—*Private land—Determination—Onus—Evidence.*

S. 185 of the Estates Land Act enacts rules to determine whether any particular land is private land. The presumption is that it is not, and in determining the question the Court is to have regard to the local custom and to the question whether the land was before the 1st day of July 1908 specifically let as private land, and to any other evidence that may be produced. Letting as private land after 1st July 1898 is not to be taken into account. **Chintamreddi Sanyasi v. Sri Rajasagi Appala Narasimha Raja Garu**, (1914) M.W.N. 766.

WALLIS and AYLING, JJ.

(55-a) S. 185. See No. 19-a, *supra*.

(56) S. 189. See Nos. 28 and 46, *supra*.

(57) S. 195—*Scope—Suit for rent—Pleas which could be raised in defence—Duty of Collector to adjudicate upon the pleas—Tender of pattah whether a necessary precedent to suits for rent.* **Raja of Karvetnagar v. Pandur Govinda Mudali**, 14 M.L.T. 535=21 Ind. Cas. 858=27 M.L.J. 238. See Final Part, 1913, Col. 182.

(58) Ss. 210 and 211—*Suit for rent due for faslis prior to passing of the Act—Whether governed by that Act or by Limitation Act.* **Rajah Saheb Meharban-i-Distan Sri Raja Row Yenkatakumara Mahipathi Surya Row Bahadur Garu, Raja of Pittapore v. Gani Yenkatasubba Row**, 14 M.L.T. 427=(1913) M.W.N. 989=21 Ind. Cas. 595. See Final Part, 1913, Col. 182.

(59) S. 211. See No. 58, *supra*.

(60) S. 213. See No. 46, *supra*.

(61) *Schedule Part A, Art. 8—“Ascertainment of rent,” meaning of—Inter-pleader suit as to who is entitled to water cess; whether suit for ascertainment of rent, Limitation Act, 1908, S. 15—Stay by injunction—Injunction order set aside—Time, whether excluded.*

In order to entitle a landlord, in a suit for arrears of rent, to deduct the time taken in prosecution of a previous suit between himself and the tenant, the suit must be one relating to the ascertainment of rent within the meaning of Art. 8, Part I, of the Madras Estates Land Act.

An interpleader suit by tenant against landlord and Government merely to determine

6.—Madras Acts—(Concluded).

Act I of 1908 (Madras Estates Land)—(Old). which party is entitled to collect water-cess from the tenants, is not a suit for ascertainment of rent within the meaning of Art. 8 Part I, of the Estates Land Act.

A party cannot claim to exclude, under S. 15 of the Limitation Act, 1908, the time during which no injunction staying a suit was in force against him. **Doraisami Reddi v. Yenkatachallam Pillai**, 27 M.L.J. 734=26 Ind. Cas. 267.

SESHAGIRI AIYAR and KUMARASAWMY SASTAI, JJ.

References:—27 M. 143 (P.C.)=6 Bom. L.R. 241=14 M.L.J. 1=8 O.W.N. 162=31 I.A. 17; 14 M. 441 (F.B.)=1 M.L.J. 661; 27 M. 65; 31 M. 62=17 M.L.J. 601=3 M.L.J. 186; 8 Ind. Cas. 491=8 M.L.T. 345=34 M. 439; 8 Ind. Cas. 1091=9 M.L.T. 82=20 M.L.J. 927=36 M. 438; 29 M. 556=16 M.L.J. 486=1 M.L.T. 315; 20 Ind. Cas. 205; 14 Ind. Cas. 343=9 A.L.J. 540=34 A. 486, R.

Act I of 1914 (Hindu Transfers and Bequests).

S. 2—Retrospective operation of the Act. See **HINDU LAW (WILL)**, No. 6, 27 M.L.J. 681.

7.—N.W.P. Acts.**Act XII of 1881 (N.W.P. Rent).**

Daughter succeeding to her father's holding while Rent Act of 1881 was in force—Rights of daughter's son. See **ACT II OF 1901 (AGRA TENANCY)**, No. 4, 23 Ind. Cas. 100.

Act III of 1899 (U.P. Court of Wards).

(1) *Court of Wards Act, Rules made thereunder—Court of Wards Manual—District Officer or Special Manager, power of—Grant of land for hundred years for planting a grove.*

Held, that there is nothing in the Court of Wards Act or in the rules made thereunder which are contained in the Court of Wards Manual which gives any power to District Officers or to a Special Manager to make any grant of land out of an estate under the management of the Court of Wards for a hundred years for the planting of a grove. **Ram Nath v. Raja Bindeshuri Prasad Singh**, 17 O. C. 291.

KENDAL, J. C.

(2) *S. 48—Property attached by Court of Wards in execution of decree—Whether property of the Ward—Notice.*

Where the Court of Wards acting on behalf of a Ward puts a decree in execution and attaches certain property as the property of the Ward's judgment-debtor, and certain persons object to the attachment and bring a suit for declaration of their right without giving the Court of Wards two months' notice required by S. 48, Act III of 1899 (U.P.) **held**, that the suit does not relate to the person or property of the

7.—N.W.P. Acts—(Continued).

Act III of 1899 (U.P. Court of Wards)—(Contd.). Ward and no notice is necessary. **Lal Singh v. The Collector of Etah**, 12 A.L.J. 486=36 A. 331.

RICHARDS, C.J., and BANERJI, J.

(3) *S. 48—Notice to sue duly given—Amendment—No change in cause of action—Fresh notice.*

Notice was given to the Collector as Manager of the Court of Wards that a suit will be brought on a promissory note dated 1909 executed by a Ward named Pokhar Singh. When the suit was brought the defence was that the note was executed after the estate was taken over by the Court of Wards. The plaintiffs, thereupon, applied for amendment of the plaint so as to enable them to fall back upon a previous promissory note of 1907. The application was granted. **Held** that the cause of action as set forth in the amendment was sufficiently stated in the notice and the amendment was properly allowed and a fresh notice under S. 48 of the Court of Wards Act was not necessary (a).

The object of S. 48 is to give the Collector time to consider the nature of the claim against the Ward in order that a defence, if necessary, might be raised. **Baldeo Prasad v. The Collector of Pilibhit**, 12 A.L.J. 1119.

RICHARDS, C.J., and TUDBALL, J.

Reference:—(a) 38 C. 797, R.

Act I of 1900 (U.P. Municipalities).

(1) *Ss. 2, 91—Right of Municipal Board to close a drain.*

S. 2 of the Municipalities Act cannot be construed in such a way as to prevent a Municipal Board from exercising for all times the powers conferred by S. 91. Where the plaintiff obtained a decree from a Civil Court against his neighbour for maintenance of a drain which discharged into the Municipal drain, and the Municipality ordered the closing of that drain on the ground that it was injurious to public health. **Held** that the Municipality was entitled to pass the order. **Chauli v. The Municipal Board of Muzaffarnagar**, 12 A.L.J. 1102.

CHAMIER, J.

(2) *Ss. 87, 152—Permission to repair not granted—Appeal against the order disallowing repairs—Appellate order final—Civil suit—Maintainability of.*

The plaintiff applied to Municipal Board for permission to repair a certain gallery. The Board refused to grant permission asked for. The plaintiff, thereupon, brought a Civil suit claiming a perpetual injunction, restraining the Board from interfering with the repairs he wanted to make and for damages.

Held that the only way in which an order of a Municipal Board refusing to grant permission for repairing a house can be questioned is by way of appeal, but he is not entitled to maintain a suit questioning the right of the Board

7.—N.W.P. Acts—(Continued).

Act I of 1900 (U.P. Municipalities)—(Concl'd.).

to refuse permission. **Abdul Samad v. Municipal Board, Meerut**, 12 A.L.J. 445=36 A. 929.

RICHARDS, C.J., and BANERJI, J.

(3) S. 91. See No. 1, *supra*.

(4) S. 152. See No. 2, *supra*.

(5) S. 187. *Validity of election cannot be questioned by suit.*

The validity of a Municipal election can only be questioned by a 'petition' presented in accordance with the rules made by the Local Government under S. 187 of the Municipalities Act, a regular suit will not lie. **Muhammad Imam-ul-haq v. Muhammad Ahsan**, 21 Ind. Cas. 655=12 A.L.J. 459 (F.B.).

RICHARDS, C.J., BANERJI and TUDBALL, JJ.

(6) S. 187 (1) (h)—*Rules framed by the Local Government for regulating Municipal election—Validity of appeal from decision declaring an election invalid* **Nand Ram v. Chotey Lal**, 11 A.L.J. 945=35 A. 578=21 Ind. Cas. 575 (F.B.). See Final Part, 1913, Col. 186.

Act II of 1901 (Agra Tenancy).

(1) Expropriatory tenancy—Whether can be acquired by adverse possession. See ADVERSE POSSESSION, No. 1, 12 A.L.J. 93.

(2) S. 4, cl. 3—*Lease to cut grass—Suit for arrears of lease money—Jurisdiction—Civil and Revenue Courts.*

The defendant executed a lease in favour of the plaintiff, zemindar, to cut and graze grass on land belonging to the plaintiff for a period of five years. The plaintiff brought this suit for recovery of arrears of money in the Court of Small Causes. *Held* that the suit was a suit for recovery of rent within the meaning of S. 4 (3), Agra Tenancy Act, and the Court of Small Causes had no jurisdiction to hear the suit. **Manchar Lal v. Gauri Rantain**, 12 A.L.J. 36=22 Ind. Cas. 16.

RYVES, J.

References:—32 A. 842; 1 A.W.N. 162, D.

(3) S. 10—*Expropriatory tenant—Contract to pay a higher rate of rent—Expropriator cannot contract himself out of his rights.*

Where a proprietor alienates his proprietary rights in a zemindary and becomes, under S. 10 of the Agra Tenancy Act, an expropriatory tenant with a right of occupancy in his *Sir land*, he cannot contract himself out of such rights. A contract, therefore, to pay rent in excess of the rent fixed by S. 10 is contrary to law. **Prag v. Sital**, 12 A.L.J. 136=36 A. 155=22 Ind. Cas. 965.

RICHARDS, C.J., and BANERJI, J.

(4) S. 22—*Succession—Daughter's son—Daughter succeeded to her father's holding while Rent Act of 1881 was in force.*

B, a tenant of a holding under a permanent lease, died while the Rent Act of 1881 was in

7.—N.W.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

force, and was succeeded by his daughter S who died, after the Tenancy Act of 1901 came into operation, leaving a son D:

Held, that D was entitled to succeed to the holding. **Deoki Rai v. Musammat Parbati**, 23 Ind. Cas. 100.

RICHARDS, C.J., and BANERJI, J.

(5) S. 22—*Grove, land let out for—Whether given for agricultural purpose—Suit for possession in Civil Court—Jurisdiction.*

Land held as a grove is not land held for agricultural purposes. Where, therefore, land was given by the Zemindars to plant a grove, and the grantees died without leaving any heirs who were joint in cultivation with them, and their other heirs sued for possession in Civil Court, *held* that the Civil Court had jurisdiction to entertain the suit and the provisions of S. 22 of the Agra Tenancy Act were not applicable. **Habibullah v. Kalyan Das**, 12 A.L.J. 1080.

SUNDAR LAL, J.

References:—11 A.L.J. 649; 11 A.L.J. 236, F., 55 Ala. 468 (486), R.

(6) S. 22—*Hindu son adopted in another family—Right to succeed his natural brother—Occupancy holding.*

Once a Hindu boy is adopted in another family, he ceases to be the lineal descendant of his natural father within the meaning of S. 22 of the Agra Tenancy Act. Where, therefore, a Hindu, who had been adopted in another family, claimed the occupancy holding of his natural brother as against the latter's illegitimate son, *held* that he was not entitled to succeed. **Thamman Singh v. Gal Singh**, 12 A. L. J. 1231.

RICHARDS, C.J., and TUDBALL, J.

References:—34 A. 688; Select Decisions. Board of Revenue, 1904, No. 5, *Foll.*; 34 A. 414, *Distd.*

(7) S. 32—*Suit for partition of joint Hindu family property—Occupancy holding included in suit—Effect—Mode of division.* See HINDU LAW (PARTITION), No. 3, 12 A.L.J. 696

(8) S. 32—*Joint family property including occupancy holding—Mode of partition.* See HINDU LAW (PARTITION), No. 6, 24 Ind. Cas. 235.

(9) Ss. 58, 95, 167—*Civ. Pro. Code, 1908, S. 11—Specific Relief Act, S. 42—Suit for declaration by land-holder that lease granted by his agent was without authority—Jurisdiction of Civil or Revenue Court—Res judicata.*

The defendant was a non-occupancy tenant under the plaintiff. In 1908 the defendant executed a *kabuliat* and the plaintiff's *mokhtear-i-am* a lease for 10 years. The former was, while the latter was not, registered.

7.—N.W.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

In 1909 the plaintiff sued, under S. 58 of Act II of 1901, to eject the defendant. The defendant resisted the suit by setting up the said lease and *kabuliat*, the execution of both of which the plaintiff did not challenge, but said that those documents were executed without his knowledge and consent and that his *mukhtear-i-am* had no authority to grant a lease or accept a *kabuliat* for ten years. The Assistant Collector rejected the lease as unregistered, but acting on the *kabuliat* dismissed the plaintiff's suit on the ground that the term of the lease had not expired. This decision was upheld by the Commissioner on appeal. In 1912 the plaintiff sued in the Civil Court for declaration that the said lease and *kabuliat* were null and void as having been granted by his *mukhtear-i-am* without the plaintiff's knowledge, consent or authority. In bar of the plaintiff's suit the defendant relied on Ss. 95, 167 of Act II of 1901, S. 11 of the Civ. Pro. Code, and S. 42 of the Specific Relief Act:

Held, per Rafique, J. (Piggott J., dissenting),

(1) that, as the relief now claimed by the plaintiff could not be sought in a Revenue Court under S. 56 or 95 of the Tenancy Act, it could not be said that the plaintiff's present suit was of such a nature as to be exclusively within the jurisdiction of a Revenue Court;

(2) that the question of the authority of the *mukhtear-i-am* to grant a ten years' lease could not be decided and was not directly decided by the Revenue Court (a);

(3) that as the authority of the *mukhtear-i-am* was neither in issue in the Revenue Court nor was that Court competent to try that question, any incidental expression of opinion on the point would not operate as *res judicata* and that the suit was, therefore, maintainable. *Ram Singh v. Rao Gijraj Singh*, 23 Ind. Cas. 705.

RAFIQ and PIGGOTT, JJ.

References:—(a) A.W.N. (1901) 49; 2 A.L.J. 334, F.

(10) S. 95—Landlord and tenant—Compromise to nature of tenancy—Binding effect.

There was a dispute between a *zemindar* and his tenants as to the nature of the tenancy in a certain holding; the tenancy claimed to be fixed rate tenants while the *zemindar* asserted that they were occupancy tenants. Proceedings were taken under S. 95 of the Agra Tenancy Act, to ascertain the real nature of the tenancy. The parties compromised:

Held, that the compromise was not illegal. It was binding on the successors-in-interest of the *zemindar*. *Babu Kesho Das v. Doolar Ram*, 22 Ind. Cas. 124.

RICHARDS, C.J., and BANERJEE, J.

Reference:—8 A.L.J. 518=A.W.N. (1906) 19=29 A. 747, D.

7.—N.W.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

(11) S. 95—Proceedings under—Rent neither fixed nor agreed upon—Effect of.

In proceedings under S. 95 of the Tenancy Act, the Court has no power to fix the amount of rent where no rent had been fixed or agreed upon. The section only empowers the Court to ascertain what the amount of rent payable was. *Ram Charan Lal v. Kairmunissa Bibi*, 12 A.L.J. 1131.

RICHARDS, C.J., and TUDBALL, J.

(12) S. 95—Suit for declaration that plaintiff sole occupancy tenant—Zemindar no party—Jurisdiction—Civil Court.

The plaintiffs brought this suit for declaration that they are the sole occupancy tenants of the land in dispute and that the defendant is not joint with them in the said holding. *Held*, that this was a matter in respect of which a suit might have been brought under S. 95 of the Agra Tenancy Act and the Civil Court had no jurisdiction to entertain it, even if the *zemindar* was not a party. *Dewan Singh v. Kaudhera*, 12 A.L.J. 1322.

KNOX, J.

(13) S. 95. See No. 9, *supra*.

(14) Ss. 95, 167—Suit for ejectment of tenant from year to year—Dismissed as the tenant held under lease—Suit in Civil Court to set aside lease—Res judicata.

Plaintiffs sued the defendant in the Revenue Court for ejectment on the ground that he was non-occupancy tenant from year to year. The defendant set up a lease which the plaintiffs said was given by their *Karinda* without any authority. The Revenue Court went into the question and held that the lease was given by the *Karinda* who had authority to do so and dismissed the suit. The plaintiffs brought this suit in the Civil Court for a declaration that the lease was given without authority and did not bind them. *Held*, that the Revenue Court in a case of ejectment had jurisdiction to go into the question of validity or invalidity of the lease, that the Court must have regard to the substance of the relief and not merely to the form of the suit and that the present suit was not maintainable. *Ram Singh v. Gijraj Singh*, 12 A.L.J. 1252.

RICHARDS, C.J., and BANERJI, J.

References:—(1901) A.W.N. 49, Appr.; 25 A. 188, Dist.

(15) Ss. 95 and 167 and Sch. IV, Group C, Item 34—Occupancy tenancy—Death of occupancy tenant—Marriage of alleged wife denied by the landlord—Suit by widow for declaration of legal status—Jurisdiction of Civil Courts, barred. *Ram Charitra Rai v. Jinal Ahiriz*, 11 A.L.J. 1022=36 A. 48=21 Ind. Cas. 859. See Final Part, 1918, Col. 191.

(16) S. 97 (3)—Endorsement of document by Revenue Officer—Effect of—Registration Act, S. 47.

7.—N.W.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

An instrument endorsed by a Kanungo or Revenue Officer under S. 97 of the Agra Tenancy Act is to be as valid in all respects as if it had been taken to the Registration Office and registered under the Registration Act and takes effect from the date on which it was executed. An occupancy tenant executed a sub-lease in favour of the defendant Khubi Ram but before it was registered, another lease was executed by him of a part of that property in favour of the plaintiff and registered on the same day. A few days later he had the former lease endorsed by a Kanungo under the provisions of S. 97, Agra Tenancy Act. *Held*, that the first lease took priority over the second. **Danwar Lal v. Khubi Ram**, 12 A.L.J. 1265.

CHAMIER and PIGGOTT, JJ.

(17) S. 167. See Nos. 9, 14 and 15, *supra*.

(18) S. 167 and Group A—Suit for arrears of rent by assignee—Jurisdiction—Civil and Revenue Courts—Second appeal.

A Civil Court has no jurisdiction to entertain a suit for arrears of rent assigned to the plaintiff by certain occupancy tenants to whom it is payable. Such a suit is purely and simply a suit to recover from the defendant a sum of money which is alleged to be due on account of the rent of his holding and is a suit of the nature contemplated by Sch. IV of the Tenancy Act. Under S. 167 of the Act only the Revenue Court can take cognizance of it.

Such a suit not being cognizable by Court of Small Causes, S. 102 of the Code of Civil Procedure does not bar a second appeal (a). **Kanhai Ram v. Sukhdeo**, 12 A.L.J. 98=22 Ind. Cas. 337.

TUDBALL, J.

References :—(a) 9 A. 249 ; 7 A. 256, *Not F.*

(19) S. 177 (e)—Proprietary title—Appeal to District Judge—Jurisdiction—Same proprietary question raised both in Court of first instance and that of Appeal.

In order than an appeal may lie, under S. 177 (e) of the Agra Tenancy Act, to the District Judge, it is necessary that there should be a question of title which was in issue both in the Court of first instance and also in the appeal. The question need not necessarily be the same but must at least have been involved in issue as to proprietary title which was raised in the Court of first instance. **Ramcharan Lal v. Faizullah**, 21 Ind. Cas. 870.

RICHARDS, C.J., and BANERJI, J.

(20) S. 177(e)—Suit for ejectment in Revenue Court—Plaintiff denied that defendant entitled to possession as proprietor—Question of proprietary title—Appeal.

The plaintiff sued to eject the defendant in a Revenue Court on the allegation that he (the plaintiff) was the occupancy tenant of the plot in question and the defendant was his sub-tenant. The defendant pleaded that he was in

7.—N.W.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

possession not as a sub-tenant of the plaintiff but was himself a proprietor and the plot was his *Khuṭkasht*.

Held, that the plaintiff, although not denying that the defendant was a co-sharer, denied that he was entitled to possession as proprietor, and a question of proprietary title was in issue in the case within the meaning of S. 177 (e) of the Agra Tenancy Act, and an appeal lay to the District Judge and not to the Commissioner. **Bindesri Pandi v. Gokul**, 12 A.L.J. 251=36 A. 183=22 Ind. Cas. 964 (F.B.).

RICHARDS, C.J., BANERJI and RYVES, JJ.

References :—2 A.L.J. 176, R. ; 35 A. 521=11 A.L.J. 812, *Overruled*.

(21) S. 177, Sch., Group B—Valuation of suit—Appeal—Suits Valuation Act, S. 8—Landlord and tenant—Rent payable—Court Fees Act amended by Act VI of 1905, S. 7, cl. XI (cc)—Value for the purpose of Court fee.

A suit by a landlord for recovery of immoveable property from a tenant has to be valued at the rent payable for the year next before the date of presenting the plaint, and the valuation for purposes of jurisdiction is the same as for the purpose of Court-fee (S. 8, Suits Valuation Act).

Where a landlord sued an expropriatory tenant for ejectment and valued the suit at Rs. 44, the rent payable for the year preceding the suit, *held* that the suit was correctly valued and the valuation being less than Rs. 100 no appeal lay from the order of the Assistant Collector. **Nandan Singh v. Deb Dini**, 12 A. L. J. 933.

SUNDAR LAL, J.

References :—15 A. 63 ; 15 A. 363 ; 6 A.L.J. 905, R.

(22) S. 180—Question of jurisdiction—Second appeal to District Judge.

A second appeal lies in a suit of the kind mentioned in S. 180 of the Tenancy Act, to the District Judge, in which a question of jurisdiction had been decided at any time. **Kesho Das v. Murat Pandey**, 12 A.L.J. 367=23 Ind. Cas. 820.

RYVES, J.

References :—Unreported S. A. No. 518 of 1908, and Unreported S.A. No. 78 of 1910, R.

(23) S. 194—Lambardar—Rights of—Suit for ejectment of tenant by—Other co-sharers, not joined.

A lambardar in a lambardari village can maintain a suit for ejectment of a tenant without joining all the co-sharers as parties.

It is extremely improbable that S. 194 of the Tenancy Act was intended to apply to the case of a lambardari village (a).

7.—*N.W.P. Acts*—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

Rights of lambardars in a lambardari village discussed. *Gulzari Mal v. Jai Ram*, 12 A.L.J. 606=36 A. 441=24 Ind. Cas. 178 (F.B.).

RICHARDS, C.J., BANERJI and TUDBALL, JJ.

Reference:—(a) 34 A. 98, R.

(24) S. 194—*Suit for ejectment of non-occupancy tenant—Joint Khata of co-sharers—Lambardar alone cannot sue. Gulzari Mal v. Jai Ram*, 11 A.L.J. 742=21 Ind. Cas. 38. See Final Part, 1913, Col. 191.

(25) Ss. 196 and 197—*Landlord and tenant—Suit for ejectment—Jurisdiction—Defendant an agricultural tenant—Civil Court—Denial of tenancy.*

An agricultural lease can only be determined by the lessor taking proceedings under the Tenancy Act. A mere denial of his lessor's title by the lessee does not determine the lease so as to make the lessee a trespasser. A Civil Court has no jurisdiction to eject an agricultural tenant as a trespasser.

The provisions of S. 196 of the Tenancy Act apply to suits in which an appeal lies in any event to the District Judge or High Court, whether they be instituted in the first instance in the Civil Court or the Revenue Court. Where a suit for ejectment of a tenant was filed in the Civil Court dismissed by that Court on the ground that it had no jurisdiction, held that the provisions of S. 196 of the Agra Tenancy Act did not apply. *Bachu Sahu v. Nandram Das*, 12 A.L.J. 902=24 Ind. Cas. 700.

PIGGOTT, J.

References:—3 A.L.J. 226, F.; 2 A.L.J. 119, Doubled.

(26) S. 197. See No. 25, *supra*.

(27) S. 199—*Jurisdiction—Appeal—Question of proprietary right—Plaintiff claiming to be an occupancy tenant—Defendant claiming the land as his khudkast. Udit Tewari v. Bilhari Pande*, 11 A.L.J. 812=35 A. 521=21 Ind. Cas. 460. See Final Part, 1913, Col. 192.

(28) Group C. No. 32—*Suit for possession of fixed rate tenancy—Zemindar, a defendant—Relief, possession of tenancy—Jurisdiction.*

A suit by a tenant against the zemindar for possession of a fixed rate tenancy and mesne profits, on the ground that he is the reversionary heir of the last tenant and is entitled to possession without being obstructed by the zemindar, is a suit under Group C, No. 32, Sch. IV of the Tenancy Act, and is cognizable by the Revenue Court and must be brought within six years of dispossession.

The test is to ascertain what in substance and reality is the relief sought; if that relief can be obtained on a properly worded plaint presented to a Revenue Court, then the jurisdiction of

7.—*N.W.P. Acts*—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

the Civil Court is barred. *Badri Kasaudhan v. Sarju Misar*, 12 A.L.J. 29=36 A. 55=22 Ind. Cas. 669.

RYVES and PIGGOTT, JJ.

(29) Ch. X—*Rent-free groves—Suit for resumption—Jurisdiction.*

The predecessors-in-title of the plaintiff had made a rent-free grant of a grove in favour of the defendants. The plaintiff sued in the Revenue Court for assessment of rent on the grove, and the Court dismissed the suit on the ground that it was not cognizable by it. The plaintiff thereupon sued in the Civil Court and, on appeal, the District Judge dismissed the suit on the ground that the Civil Court had no jurisdiction.

Held, that the suit lay in the Civil Court. *President, Kayastha Pathahala v. Sheo Balak*, 12 A.L.J. 449=24 Ind. Cas. 98.

KNOX, J.

Reference:—11 A.L.J. 236, F.

(30) Sch. IV, Group C, Item 34. See No. 15, *supra*.

Act III of 1901 (U. P. Land Revenue).

(1) S. 32 (d)—*Land held revenue free by the Government—Part of the revenue paying mahal.*

S. 32, cl. (d) of the Land Revenue Act contemplates cases where, in the same Mahal, there may be persons holding land revenue free and yet the land so held may form part of the Mahal. Where the Government holds certain land revenue free in a revenue paying Mahal, the land so held by the Government does not cease to be a part of the Mahal. *Abdul Rahim Khan v. Ahmad Khan*, 12 A.L.J. 303=36 A. 231.

RYVES and PIGGOTT, JJ.

(2) S. 35—*Proceedings under—Applicability of O. XXXII, r. 7, Civ. Pro. Code—Compromise without Court's permission—Registration. See CIV. PRO. CODE (1908), No. 395, 12 A.L.J. 998.*

(3) Ss. 107, 110, 111 and 112—*Perfect partition—Hindu widow in possession in lieu of maintenance—Whether a co-sharer—Cannot claim perfect partition. Kalishahi Kunwar v. Badri Prasad*, 11 A.L.J. 849=21 Ind. Cas. 49=35 A. 548. See Final Part, 1913, Col. 193.

(4) Ss. 107, 111—*Joint Hindu family—Widow in possession in lieu of maintenance—Widow recorded as co-sharer merely for her consolation—Widow's right to claim partition. Pema v. Jas Kunwar*, 35 A. 527=11 A.L.J. 838=21 Ind. Cas. 449. See Final Part, 1913, Col. 193.

(5) S. 110. See No. 3, *supra*.

(6) Ss. 110, 111 and 238 (k)—*Suit by tenant for declaration that he was proprietor of certain plots from which he was sought to be ejected—Applicability.*

Acts—(Continued).**Act IV of 1901 (U.P. Land Revenue)—(Ctd.).**

The provisions of S. 233 (k) of the Land Revenue Act apply only to the case of recorded co-sharers who are parties to the partition proceedings, or who should have been made parties thereto and whose claims could be heard under Ss. 111 and 112 of the Act. Where the plaintiffs were recorded as tenants of certain plots in a village which had been the subject of partition and were not parties to partition proceedings and in a suit for ejectment filed by the co-sharer to whom their plots were allotted they set up their proprietary rights and were referred to Civil Court and filed a suit for declaration of their rights, *held* that the suit was not barred by the provisions of S. 233 (k) of the Land Revenue Act. **Shambhu v. Chetram**, 12 A.L.J. 1017.

SUNDAR LAL, J.

References :—23 A. 432; 4 A.L.J. 662, R. ; Unreported S.A. 211 of 1912, D.

- (7) S. 111—*Jurisdiction—Title of objections relating to, raised in the course of partition in a Revenue Court—Civil Courts to satisfy themselves if the conditions and qualifications annexed to grant of jurisdiction complied with.*

When a Statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

Held, that Civil Courts are invested with jurisdiction of a two-fold character in respect of objections relating to title which have been put forward in the Revenue Court within the time specified in the proclamation. In the case specified in cls. (a) and (b) of sub S. 1 of S. 111 of the Land Revenue Act, the jurisdiction conferred is original.

In cases under cl. (a) there is no rule of limitation other than that which would apply under the ordinary law relating to civil suits.

In cases under cl. (b) the jurisdiction must be invoked within the period of 3 months from the date upon which the objector is referred to the Civil Court. In cases under cl. (c) the Civil Court has an appellate jurisdiction only.

Held further, that the jurisdiction being conferred on the Civil Court by Statute and not by the Revenue Court order, the Civil Courts when their jurisdiction is invoked must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied with. **Mukhtar Ahmed v. Barati Lal**, 17 O.C. 224.

LINDSAY and STUART, J. CS.

- (8) S. 111—*Revenue Court referred the plaintiff to Civil Court—Suit accordingly filed within the time allowed—Subsequently withdrawn with permission to bring a fresh suit—Fresh suit filed after the time fixed by the Revenue Court—Second suit a continuance of the first suit—Vendor and purchaser—Liability of the former.*

7.—N.W.P. Acts—(Continued).**Act III of 1901 (U.P. Land Revenue)—(Ctd.).**

Randhir Singh v. Bhagwan Das, 11 A.L.J. 746 = 35 A. 511 = 21 Ind. Cas. 654. See Final Part, F918, Col. 195.

- (9) S. 111. See Nos. 3, 4 and 6, *supra*.

- (10) Ss. 111, 112—*Order of Assistant Collector referring parties to Civil Court—Not a decree—No appeal.*

An order of an Assistant Collector referring the parties to the Civil Court is not a decree within the meaning of sub-S. 8 of S. 111 of the U.P. Land Revenue Act, and hence no appeal lies to the District Judge from such an order. **Babu Ram Dube v. Ramjas Dube**, 23 Ind. Cas. 656.

RAFIQUE and PIGGOTT, JJ.

- (11) Ss. 111, 114—*Partition proceeding, preparation of—Objection as to land held in severalty—Proprietary title—Appeal—Jurisdiction.*

A mere claim to hold certain land in a mahal in severalty is not an objection raising a question of title, such as requires to be dealt with under S. 111 of the Land Revenue Act (a).

Where, in a partition proceeding, an Assistant Collector orders a particular land, claimed by the objector as held by him in severalty, to be allotted to him, an appeal lies to the Collector and not to the District Judge, the question being one appertaining to the preparation of partition proceeding. **Nand Ram v. Brahm Khayal**, 22 Ind. Cas. 949.

RYVES and PIGGOTT, JJ.

Reference :—6 Ind. Cas. 833 = 32 A. 523 = 7 A.L.J. 553, R.

- (12) Ss. 111, 114—*Jurisdiction of Civil and Revenue Courts—Compromise, petition of, filed in mutation proceedings—Estoppel—Mutation proceedings, whether evidence of title—Consent to entry of one's name in revenue papers, effect of—Admission, gratuitous, withdrawal of—Revenue Court's decision on questions of title raised in partition proceedings bars Civil Court from re-opening those questions—Procedure, proper, not adopted by Revenue Court in deciding titular questions, effect of—Objection to partition filed beyond time fixed by Revenue Court whether entertainable, if partition not yet granted—Partition, complete, effect of—Appeal from order of Revenue Court disallowing objection to partition on ground of opposite party being recorded co-sharer, forum of.*

Where, in a mutation proceeding, the parties had filed a petition of compromise whereby the plaintiffs agreed to the substitution of the defendants' names in respect of a certain property :

Held, that the petition did not estop the plaintiffs from subsequently suing the defendants for recovery of possession of the property, because it did not purport to convey any title

7.—N.W.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

to the defendants or to induce them to alter their position on the strength of the mutation proceeding (a).

* There might be a withdrawal of any gratuitous admission, unless there is some obligation not to withdraw it, and a mere consent to the entry of the name of another in the revenue papers does not create any such obligation (b).

A Revenue Court being competent under S. 111 of the U. P. Land Revenue Act to decide a question of title raised in the course of a partition proceeding, its decision upon such question, on becoming final, operates as a bar to the re-opening of the same matter in the Civil Court. The mere fact that the Revenue Court did not adopt the procedure, as laid down in the said section, does not detract from its value as a decision of a competent Court (c).

A Revenue Court acting under S. 114 of the U. P. Land Revenue Act is not precluded from dealing with an objection filed beyond the time fixed by it for filing objections, if it has not up to that time taken any action under that section (d).

A complete partition has the effect in law of vesting title in the party in whose favour partition has been carried out, and a Civil Court has no jurisdiction to go behind it (e).

Where a Revenue Court disallowed an objection raising a question of title merely on the ground that the opposite party was a recorded co-sharer in possession.

Held, that the order was appealable to the District Judge or to the Judicial Commissioner, although it did not specifically deal with the question of title in the right spirit (f). **Kall Pershad v Thakur Del**, 23 Ind. Cas. 965.

KANHAIYA LAL, A.J.C.

References:—(a) 26 C. 81=25 I.A. 161=2 C.W.N. 737, R. (b) 2 A.L.J. 225; 1 Ind. Cas. 166=12 O.C. 288=13 C.W.N. 274 (P.C.)=11 Bom. L.R. 69=6 A.L.J. 100=9 C.L.J. 151=5 M.L.T. 167=31 A. 73=19 M.L.J. 123=36 I.A. 38, R. (c) 29 A. 604=4 A.L.J. 578=A.W.N. (1907) 196; 1 Ind. Cas. 696=31 A. 41=A.W.N. (1908) 274, R. (d) 18 A. 210=A.W.N. (1896) 30, R.; (e) 9 O.C. 76; 11 Ind. Cas. 531=14 O.C. 153, R. (f) 4 O.C. 289, R.

(13) S. 212. See Nos. 3 and 10, *supra*.

(14) S. 114. See Nos. 11 and 12, *supra*.

(15) S. 233 (k)—*Partition—Application for partition—Subsequent suit in Civil Court for joint possession of certain plots—Jurisdiction—Civil Court barred from apportioning lands to share-holders pending partition in Revenue Court.*

Once an application for partition has been instituted before a Revenue Court, the apportionment of the various lands of the *mahal* amongst different co-sharers becomes a matter peculiarly within the jurisdiction of that Court; and a suit in the Civil Court, for joint possession

7.—N.W.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

or declaration of joint possession of particular plots of land, on the allegation that certain co-sharers have wrongfully secured possession in severalty of those plots, is barred by S. 233 (k) of the Land Revenue Act. **Ganesh Tewari v. Salik Pande**, 12 A.L.J. 949.

PIGGOTT, J.

Reference:—29 A. 604, R.

(16) S. 233, cl. (k)—*Partition of mahal—Jurisdiction of Civil and Revenue Courts—Suits for declaration that plaintiff is entitled to land allotted to defendants in partition—Civil Court, power of, to rectify errors in partition by Revenue Court—Revenue Court, order of, referring object or in partition proceedings to Civil Court, effect of—Second appeal, fresh case set up, entertainability of—Practice—Pleadings.*

A suit for possession, by a declaration that the plaintiff is entitled to a portion of the land wrongly allotted to the defendants in partition by the Revenue Court, does not lie in the Civil Court, in view of the exclusive provisions of S. 233 (k) of the U.P. Land Revenue Act. It is clearly a matter relating to the partition of a *mahal*, for the plaintiff's claim cannot be decreed without affecting the partition come to by the Revenue Court (a).

When, on an objection being raised in a partition proceeding, the Revenue Court referred the objector to the Civil Court for his relief:

Held, that it could not be argued therefrom that the partition was made subject to the decision of the Civil Court upon the point objected to (b).

A case not set up in the Courts below cannot be allowed to be raised in second appeal. **Sonwal Singh v. Bhikhari**, 23 Ind. Cas. 860.

LINDSAY, J. C.

References:—(a) 11 Ind. Cas. 531=14 O.C. 153; 9 Ind. Cas. 475=8 A.L.J. 244=33 A. 440; 1 Ind. Cas. 696=A.W.N. (1908) 274=31 A. 41 R. (b) 1 Ind. Cas. 166=12 O.C. 288=13 C.W.N. 274 (P.C.)=11 Bom. L.R. 69=6 A.L.J. 100=9 C.L.J. 151=5 M.L.T. 167=31 A. 73=19 M.L.J. 123, D.

(17) S. 233 (k)—*Plots wrongly entered in Khasra—Mistake not known—Suit instituted on discovery of mistake—Estoppel.*

In a perfect partition of a village, two *Mahals* D and G were prepared and D was assigned to plaintiffs. Certain plots which were subsequently numbered as 981 belonging to *Mahal* D and 797 belonging to *Mahal* G were marked in the Map in the right places, but by some mistake in the *Khasra* 797 was shown as being in D and 981 in G. The parties were not aware of the mistake. The plaintiff afterwards obtained a proprietary right to a part of *Mahal* G. R, a co-sharer, in the *Mahal*, applied for partition of *Mahal* G and made the plaintiff a party. The Revenue Court made a division of the

7.—N. W. P. Acts—(Concluded).

Act III of 1901 (U. P. Land Revenue)—(Old.).

Mahal on the basis of the entries in the Khaara and assigned 981 to the defendant. The defendant took proceedings against the tenants of 981 whereupon the mistake was discovered. The plaintiff thereupon brought the present suit for declaration that No. 981 belonged to his Mahal and that the proceedings instituted by R did not affect his rights. *Held* that, on the application of R, the Revenue Court had no jurisdiction to partition any property situate in the Mahal other than the one for the partition of which an application was made. It had, therefore, no jurisdiction to divide the property situate in Mahal D and the present suit was not barred by S. 233 (k) of the Land Revenue Act (2).

Held also, that the plaintiff was not estopped from setting up his right in the present case. **Dharam Singh v. Ram Dial Singh**, 12 A.L.J. 1126.

SUNDER LAL, J.

References:—(a) 8 A.L.J. 244; (1900) A.W. N. 11, R.

(18) S. 233 (k)—*Partition of mahal—Objections overruled—Subsequent proceedings in Revenue Court for fixing of rent—Proprietary title set up—Agra Tenancy Act (II of 1901)*, S. 199—*Revenue Court's actions under*. **Rasal v. Maha Ram**, 11 A.L.J. 686=21 Ind. Cas. 229. See Final Part, 1913, Col. 196.

(19) S. 233 (k)—*Partition proceedings—Order by Revenue Court to file a suit—Civil Court seized of the case*. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 4, 12 A.L.J. 989.

(20) S. 233 (k). See No. 6, *supra*.

Act II of 1903 (Bundelkhand Land Alienation).

S. 9—*Suit for foreclosure—Defendants' plea that they are members of agricultural tribe—Reference to Collector—Collector's finding that defendants not members of agricultural tribe—Case returned to Civil Court—Power of that Court*.

Where, in a suit for foreclosure on a mortgage, the defendants pleaded that they were members of an agricultural tribe, and the Court, after passing the preliminary decree and on an application for a decree absolute, referred the case to the Collector under S. 9 (3) of the Bundelkhand Land Alienation Act, and the Collector dealt with the case of one set of defendants and returned the case of the other sets of defendants to the Civil Court as he was of opinion that they were not members of an agricultural tribe, *held* that the Civil Court had no option but to continue the proceedings before it, independently of the provisions of the Bundelkhand Land Alienation Act, and to pass a decree absolute. **Gobind Rao v. Kamta Prasad**, 12 A.L.J. 503=36 A. 376.

RAFIQ and PIGGOTT, JJ.

8.—Oudh Acts.

Act XXVI of 1866 (Oudh Sub-Settlement).

(1) Rr. 2, 10. See UNDER-PROPRIETARY RIGHTS, No. 1, 22 Ind. Cas. 125.

Act I of 1869 (Oudh Estates).

(1) *List No. 6—Award and relinquishment, construction of—Performance of one's part under arrangement made impossible, effect of—Status quo ante—Entry of name of only one of two brothers, effect of—Hindu Law—Joint family partition—Separation of Hindu father from sons remaining joint, unusual—Objection as to right to sue as sole plaintiff, not by interested but by uninterested defendants, effect of—Interest—Penalty*.

An award stated that A and B both were owners of equal shares, that B was to remain in possession of the whole property and collect rents but pay a certain sum to A as profits. Subsequently, by a deed A relinquished to B, every right except that to the sum of profits. It was, therefore, contended that A surrendered his title to the property:

Held, that, putting the award and the relinquishment at their highest, A at most consented to limit his claim to that particular sum in respect of profits and also not to alienate his share so long as he was paid that sum.

A person, who, by his own action, makes it impossible for himself to carry out his part under an arrangement, must allow the other person bound by it to return to the state of affairs existing before it.

Where the name of only A out of the two brothers, A and B, appeared in List No. 6 of grantees under Act I of 1869, while the names of both of them were all along recorded in the *khewat* as owners of equal shares:

Held, that the omission of A's name in the list proved merely that B's name was entered in his capacity as managing member of the family, and did not affect A's right.

The separation of a Hindu father while leaving his sons united is a most unusual thing.

When the right of a plaintiff to sue alone was not questioned by those defendants who had an interest in the subject-matter of the suit, but by those subsequently found as having no interest in it.

Held, that such an objection, as coming from persons not in a position to plead it, must be disregarded (a). Interest at an enhanced of rate Re. 1 per cent. per mensem is penal (b). **Chhote Lal v. Badli Singh**, 22 Ind. Cas. 129.

SABONADIÈRE and KANHAIYA LAL, A.J.CS.

References:—(a) 11 Ind. Cas. 676=14 O.C. 170, D. (b) 34 C. 150=4 A.L.J. 109=11 C.W. N. 249=5 C.L.J. 106=17 M.L.J. 48=9 Bom. L. R. 304=2 M.L.T. 75=34 I.A. 9, F.

8.—Oudh Acts—(Continued).**Act I of 1869 (Oudh Estates)—(Concluded).**

(2) *Ss. 8, 10—Presumption under S. 10, applicability of, to non-talukdari property—Oudh Estates Act, S. 8—Family custom appertaining to a Talukdar, relevancy of, with reference to non-talukdari property—Local custom and family usage, difference between.* **Yasin Ali Khan (Babu) v. Murtuza Hussain Khan (Babu)**, 16 O.C. 290=22 Ind. Cas. 577. See Final Part, 1913, Col. 200.

(3) *S. 10.* See No. 2, *supra*.

(4) *S. 14—“Estate,” definition of—Property transferred under S. 14 of the Oudh Estates Act, whether to be deemed an “Estate” in the hands of the transferee.* **Asghari Khanam v. Raj Bibi**, 16 O.C. 277=22 Ind. Cas. 267. See Final Part, 1913, Col. 200.

Act XVIII of 1876 (Oudh Laws).

(1) *S. 3.* See **MAHOMEDAN LAW (GIFTS)**, No. 3, 17 O.C. 60.

(2) *S. 9—Relationship, meaning of.*

Held, that the relationship contemplated in S. 9 of the Oudh Laws Act is a legitimate relationship. **Durga v. Man**, 17 O.C. 250.

KENDALL, A.J.C.

(3) *S. 9, cl. (2) — Pre-emption, right of—Sharer in the mahal being related to the vendor, preferential right of, over sharer not so related.*

Where certain lands held in under-proprietary tenure situate in a village consisting of only one Mahal within the meaning of S. 9 of Act XVIII of 1876 were sold to persons who owned a proprietary share in the village but not related to the vendors, and a suit for pre-emption was instituted by the appellants who also owned a proprietary share in the village and were also related to the vendors, *held*, that the appellants could claim pre-emption as co-sharers in the Mahal under cl. (2) and as they were related to the vendors while the vendees were not related to the vendors, the appellants had a right preferential to that possessed by the vendees. **Bakkha Singh v. Gaya Din Singh**, 17 O.C. 389.

STUART, J.C.

(4) *Ss. 9, 13—Transfer in lieu of dower—Right of pre-emption when arises.* See **PRE-EMPTION**, No. 4, 21 Ind. Cas. 60.

(5) *S. 10—Sale clothed as mortgage—Right of pre-emption.* See **EVIDENCE ACT**, No. 63, 21 Ind. Cas. 69.

(5-a) *S. 10.* See **PRE-EMPTION**, No. 28-b, 17 O.C. 379.

(6) *S. 13.* See No. 4, *supra*.

(7) *S. 15—Pre-emption decree—Order dismissing pre-emption suit for non-payment of purchase money within time, appealable as decree—Revision against such order, application for, not entertainable by second appellate Court—Proper Court.*

8.—Oudh Acts—(Continued).**Act XVIII of 1876 (Oudh Laws)—(Concluded).**

A decree, in so far as it declares that in default of payment of the amount specified therein the suit shall stand dismissed with costs becomes a decree for dismissal on the happening of such default.

Hence such an order of dismissal is appealable as a decree to the proper Court and an application in revision against it cannot be entertained by the second appellate Court. **Bhola v. Sheo Darshan Singh**, 24 Ind. Cas. 109.

LINDSAY, J.C.

References :—21 Ind. Cas. 193=17 O.C. 14, *F*.

(8) *S. 15—Order dismissing pre-emption suit for non-payment of purchase money within time—Whether appealable as a decree.* See **OIV. PRO. CODE (1908)**, No. 5, 21 Ind. Cas. 193.

(9) *S. 59—Pre-emptors and vendees both occupying position of a co-sharer—Effect.* See **PRE-EMPTION**, No. 23, 17 O.C. 242.

Act XXII of 1886 (Oudh Rent).

(1) *Occupancy tenant's right to plant trees—Planting trees without permission of the landlord.* **Mohamed Ali Khan v. Lalta Singh**, 16 O.C. 341=21 Ind. Cas. 744. See Final Part, 1913, Col. 202.

(2) *Trees, immoveable property for purposes of Oudh Rent Act—Oudh Rent Act interpretation of the provisions of—General Clauses Act (X of 1897), application of, to the Oudh Rent Act.* **Sheo Bakhsh Singh v. Musammat Umeda**, 16 O.C. 346=22 Ind. Cas. 605. See Final Part, 1913, Col. 202.

(3) *Ss. 2, cl. (5), 124-C, 124-D—“Portion of the produce of land,” meaning of—Landlord's remedy against tenant failing to cultivate holding held on rent payable in kind—Rent Act, Ss. 124-C and 124-D, applicability of.*

Held, that the words “portion of the produce of land” in the definition of *rent* as given in S. 2, cl. 5, Oudh Rent Act, mean a portion of what the land has actually produced and not a portion of what it might have produced. They cannot be held to be a portion of the produce which ought to have been grown upon the field.

Where a tenant deliberately omits to cultivate a holding the rent of which is payable in kind, no arrears of rent can be held to exist and the landlord's remedy is to sue in the proper Court for damages for breach of the contract which such a tenant is implied to have made to cultivate the holding as well as his capacities and resources permit.

Held, further, that Ss. 124-C and 124-D apply only when the suit has been instituted in a wrong Court and not when the plaintiff has sued in the right Court upon a cause of action upon which he cannot succeed. **Sri Krishna Lal v. Subhanil Sheikh Ghulam**, 17 O.C. 55=23 Ind. Cas. 460.

STUART, J. C.

8.—Oudh Acts—(Continued).**Act XXII of 1886 (Oudh Rent)—(Continued).**

(4) S. 108. See No. 7, *infra*.

(5) S. 119-A—Appeals from decisions of Revenue Courts to District Judge—Applicability of Limitation Act. See LIMITATION ACT (1908), No. 1, 17 O.C. 254.

(6) S. 124. See No. 3, *supra*.

(7) Ss. 127 and 108—Purchaser, right of, to claim rent for the use and occupation of land after the confirmation of sale to him—Right to have rent determined—Claim to recover rent.

The defendant was a co-sharer in a village. His share was sold by auction and was purchased by the plaintiff. At the time of the auction sale he was cultivating some land and he continued to cultivate the same thereafter without payment of any rent. *Held*, that the right of the landlord to claim rent for the use and occupation of the land came into existence for the first time after the sale was confirmed and as no consent was given by him at that time or afterwards he is entitled to have the rent determined under S. 127 and claim its recovery under S. 108, Rent Act, in one and the same suit. *Lattu Singh v. Hazari Singh*, 17 O.C. 343.

KANHAIYA LAL and KENDALL, J.C.S.

(8) S. 140—Arrears of rent, suit to recover—Dahyak allowance, how to be paid—Counter-claim—Equitable set-off—Part-payment.

Section 140 of the Oudh Rent Act prevents the defendant in a suit for arrears of rent from raising a plea of counter-claim or equitable set-off, except in the particular set of circumstances for which the section provides, but not from raising a plea of part-payment. Hence in a suit for arrears of rent, the defendants are entitled to set up their claim to *Dahyak* allowance not by way of set-off but by way of part-payment for anything which the parties agreed might be deducted from the rent would be *pro tanto* a payment of the rent. *Bhagwati Prasad Singh v. Ram Jiwan*, 21 Ind. Cas. 201=17 O.C. 6.

LINDSAY and KANHAIYA LAL, A.J. CS.

References:—A.W.N. (1889) 143; 15 A. 404—A.W.N. (1893) 168; 4 B. 407, R.

(9) S. 141—Interest on arrears of rent reserved by lease, whether claimable—Contract Act, S. 73.

* Where a lease provides for the payment of rent in arrears with interest, the failure to pay the rent reserved by the lease entitles the lessor to claim the rent in arrears with interest thereon. There is nothing in S. 141 of the Oudh Rent Act which excludes any liability for payment of interest apart from that Act. The liability in such a case is, apart from the Act, derived from S. 73 of the Contract Act, by reason of the lessee's failure to pay the rent

8.—Oudh Acts—(Concluded).**Act XXII of 1886 (Oudh Rent)—(Concluded).**

referred to in the lease. *Kifayat Ullah v. Protap Bahadur Singh*, 21 Ind. Cas. 82.

KANHAIYA LAL, A.J.C.

References:—26 A. 299=31 I.A. 116=8 C.W. N. 521=14 M.L.J. 190=6 Bom. L.R. 505, R.

(9-a) Ss. 152, 154. See PRE-EMPTION, No. 28-b, 17 O.C. 979.

(10) Chap. VII-A—Resumption of land—Civil Court's power to decide the question of proprietorship after the decision of the Revenue Court.

Where a suit was instituted in the Revenue Court on the allegation that the defendants were holding certain land as a *muafi* grant which was liable to resumption under Ch. VII-A of the Oudh Rent Act and the defendant set up the defence that they were proprietors of the land and not mere *muafidars* and the Revenue Courts decided against the defendants and declared them to be under-proprietors under S. 107-H, and the defendants thereupon instituted a suit in the Civil Court for a declaration that they were proprietors of the land in question, *held*, that the decision of the Revenue Court did not debar the Civil Court from trying the question as to whether or not the aforesaid defendants were proprietors of the land in suit. *Natal Singh v. Ajudhya Singh*, 17 O.C. 86=24 Ind. Cas. 223.

LINDSAY, J.C.

9.—Punjab Acts.**Act XVIII of 1884 (Punjab Courts).**

(1) Ss. 24, 75—Power of District Judge to transfer or make over case to Additional District Judge—Powers of Additional Judge. See HINDU LAW (ALIENATION), No. 9, 215 P.L. R. 1914.

(2) S. 40—Act before amendment of 1912—Unclassed suit—Same question involved in two decrees—Each decree less than Rs. 2,500—Both decrees combined exceeding Rs. 2,500—Further appeal whether lies.

Where, in two decrees in unclassified suits for Rs. 2,243-10-0 and Rs. 600 respectively, the same question of inheritance was involved and it was, therefore, contended that each decree directly involved a question respecting property valued at Rs. 2,243-10-0 plus Rs. 600, i.e., over Rs. 2,500.

Held, overruling the contention, that, whatever each suit may directly involve, each decree directly involves only a question respecting the property dealt with in it and, therefore, no further appeal was competent under S. 40 of the Punjab Courts Act, as it stood before amendment by the Act of 1912. *Hukam Chand v. Musammat Jindo Bai*, 129 P.L.R. 1914=90 P.W.R. 1914=23 Ind. Cas. 109.

JOHNSTONE and SHAH DIN, JJ.

9.—Punjab Acts—(Continued).**Act XVIII of 1884 (Punjab Courts)—(Contd.).**

- (8) S. 40—(As amended by Acts I and IV of 1912)—No appeal or revision on question of custom without a certificate granting permission to appeal.

Held, that, under S. 40 of Act XVIII of 1884, as amended by Acts I and IV of 1912, no appeal regarding the validity or existence of any custom or usage is allowed from an appellate decree without a certificate mentioned therein, even if questions of law are involved or material errors of procedure have occurred so far as the finding on the question of that custom or usage is concerned. *Arura v. Imam Bakhsh*, 4 P.W.R. 1914=28 P.L.R. 1914=29 Ind. Cas. 952.

CHEVIS, J.

- (4) S. 40—As amended by Act IV of 1912—Finding of lower appellate Court that no necessity proved—Previous mortgage more than 12 years old—Mutation not effected more than 12 years before suit—Interference in second appeal. See APPEAL (SECOND APPEAL), No. 3, 31 P.W.R. 1914.

- (5) S. 40 as amended by Punjab Acts I and IV of 1912—Necessity for alienation—Question of fact—Second appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 12, 60 P.W.R. 1914.

- (6) S. 40—Suit for succession to the holding of an occupancy tenant—Question whether common ancestor occupied it or not—Question of fact—No second appeal. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 6, 92 P.W.R. 1914.

- (7) S. 40—Concurrent finding as to receipt of consideration cannot be questioned in second appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 15, 86 P.W.R. 1914.

- (8) S. 40—Court ignoring important evidence—Ground for second appeal—Pre-emption—Absence of good faith—Market value where to be allowed. See APPEAL (SECOND APPEAL), No. 5, 76 P.W.R. 1914.

- (9) S. 40—Finding on fact without evidence—Interference in second appeal. See INJUNCTION, No. 4, 80 P.W.R. 1914.

- (10) S. 40 (1) (a) (ii)—Further appeal—Small Cause suit of value less than Rs. 2,500—Divisional Court confirming decree of first Court—No further appeal—S. 70 (1) (b) repealed before date of hearing—Court incompetent to exercise powers under it.

Plaintiff sued to recover Rs. 1,450 principal and interest on a bond, and obtained a decree for the principal amount, Rs. 1,258, payable by half-yearly instalments of Rs. 50 each. On his memorandum of appeal to the Divisional Court, plaintiff affixed a Court-fee stamp of Rs. 25, calculating the amount as follows: (1) Rs. 15 on account of *ad valorem* Court-fee payable on Rs. 192, interest which was disallowed by the first Court, and (2) Rs. 10 in respect of the prayer for the cancelment of

9.—Punjab Acts—(Continued).**Act XVIII of 1884 (Punjab Courts)—(Contd.).**

that part of the decree which related to instalments. The Divisional Judge, however, ordered plaintiff to pay *ad valorem* Court-fee on Rs. 975 instead of the fixed fee of Rs. 10. The plaintiff failing to pay the required Court-fee his appeal was rejected under O. VII, r. 11 (b), read with S. 107 (2) of the Civ. Pro. Code.

On further appeal to the Chief Court.

Held, that, under S. 40, sub-S. 1 (a) (ii) of the Punjab Courts Act, as it stood before it was amended by Act I of 1912, no further appeal lay in the case; and

that S. 70 (1) (b) of the Punjab Courts Act as stood at the date of the institution of the appeal, having been repealed, the Court's power under that section had been taken away, and hence it could not treat the petition as one of revision under that section. *Surju Mal v. Assam*, 160 P.L.R. 1914=23 Ind. Cas. 451=130 P.W.R. 1914.

SHAH DIN and CHEVIS, JJ. 3

- (11) Ss. 40 (1) (a), 40 (3)—Validity or existence of custom in question—Certificate—Money advanced to agriculturist for trade—Necessary purpose.

Under S. 40 (1) (a) of the Punjab Courts Act, a second appeal lies to the Chief Court on the ground that the decision is contrary to law or custom or usage, and it is only in those cases where the contention is that the custom alleged is invalid or that a particular custom does or does not exist that a certificate is necessary.

Money advanced to an agriculturist to enable him to carry on a shop keeping business cannot be called a just antecedent debt to justify a subsequent sale by him of his ancestral land to pay off that debt. *Santa Singh v. Waryam Singh*, 207 P.L.R. 1914=147 P.W.R. 1914=24 Ind. Cas. 361.

RATTIGAN and SHADI LAL, JJ.

- (12) S. 40 (3)—Question of custom—Second appeal. See CIV. PRO. CODE (1908), No. 451, 162 P.L.R. 1914.

- (13) S. 70—(as amended by Act IV of 1912)—Private arbitration—Application to file it in Court—Decree based thereon—Revision. See AWARD, No. 3, 13 P.W.R. 1914.

- (14) S. 70—As amended by Punjab Acts I and IV of 1912—Question whether Succession certificate is necessary—Revision. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 4, 73 P.W.R. 1914.

- (15) S. 70 (1) (a)—Order rejecting plaint—Appeal—Revision. See CIV. PRO. CODE (1908), No. 271, 80 P.R. 1914.

- (16) S. 70 (1) (a)—Onus wrongly thrown—Revision. See PROMISSORY NOTE, No. 1, 8 P.W.R. 1914.

- (17) S. 70 (1) (a)—Acquiescence of petitioner—Delay—Revisional jurisdiction not to be exercised. See REVISION, No. 1, 25 P.R. 1914.

9.—Punjab Acts—(Continued).**Act XVIII of 1884 (Punjab Courts)—(Concl'd.).**

(18) S. 70 (1) (b)—Civil cases—Finding of fact—Custom—Revision. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 7, 58 P.L.R. 1914.

(19) S. 70 (1) (b), Act I of 1912—Revision—Civil Cases, Chief Court, Powers of, under amending Act.

At the hearing of a further appeal in a land suit, where the value of the suit was under Rs. 1,000 and admittedly no appeal lay, it was prayed that the appeal may be entertained as under cl. (1) (b) of S. 70 of the Punjab Courts Act, as it stood before it was amended by Act I of 1912.

Held, that the powers under S. 70 (1) (b) of the Punjab Courts Act, as it stood at the date of institution of appeal were taken away from the Chief Court by Punjab Act I of 1912. *Nar Dia v. Mussammat Jhando*, 44 P.L.R. 1914=89 P.W.R. 1914=23 Ind. Cas. 85.

JOHNSTONE and CHEVIS, JJ.

(20) S. 75. See No. 1, *supra*.

Act XVI of 1887 (Punjab Tenancy).

(1) Ss. 4 (5), (6), 77 (3) (e), 84—Suit by mortgagee-landlords to eject mortgagor-tenant—Jurisdiction of Civil or Revenue Court. *Kishor Chand v. Badhawa Singh*, 9 P.R. 1913 (Rev.) =82 P.L.R. 1914=22 Ind. Cas. 656. See Final Part, 1913, Col. 205.

(2) S. 5 (i) (a), (2)—Occupancy rights—Tenant claiming the benefit of presumption under S. 5 (2)—What he must prove. *Polar v. Khayali*, 7 P.R. 1913 (Rev.)=76 P.L.R. 1914=22 Ind. Cas. 552. See Final Part, 1913, Col. 205.

(3) S. 8—*Mausa Ganga, Tahsil Sirsa*—Tenants breaking up waste—Acquisition of occupancy rights—Test.

Mr. Thorburn's decision in Case No. 406 of 1897-98 did not establish a new principle of law conferring occupancy rights under S. 8 on all tenants in the old Sirsa District who had broken up waste prior to 1882. It merely provided a new criterion by which each claim put forward by such persons to the establishment of such rights might equitably be decided. The application of the criterion depends upon the particular facts of each case, and the question at issue in every such case is one of fact whether the circumstances, and in particular the rate of rent paid, point to the conclusion that, at the time when the waste was broken up, tenants were so scarce as to be in a position to dictate their own terms. In cases where the breaking up of the waste took place prior to 1882, the probability that tenants were so scarce as to be in a position to dictate their own terms is greater than in cases where it took place later. But the probability is not to be taken as a certainty, in any case, and all the circumstances must be examined. *Nawab Ali g. Lal Singh*, 6 P.R. 1914 (Rev.).

MAYNARD, F.C.

9.—Punjab Acts—(Continued).**Act XVI of 1887 (Punjab Tenancy)—(Cont'd.).**

(4) Ss. 38, 59 (1) (b) (c)—Rights of widow in an occupancy tenancy—Abandonment by widow—Effect—Rights of male collaterals.

The rights of a widow in an occupancy tenancy are very strictly limited by law. She cannot transfer the right by sale, gift or mortgage or even by sub-lease for a term exceeding one year.

Abandonment by a widow, like ejectment, terminates the rights of the widow, and the right of occupancy at once devolves upon the next claimant. At the very moment that the widow completed the period required to bring S. 38 of the Punjab Tenancy Act into operation she ceased to be the 'tenant having the right of occupancy' by the operation of S. 59 (1) (b) of that Act.

In order to establish the conditions contemplated by S. 38, the tenant, whose abandonment of his tenancy is alleged, must have been at some time in possession of the tenancy in question. *Rugha v. Mughli*, 2 P.R. 1914 (Rev.).

MAYNARD, F.C.

(5) Ss. 45 (1) and 84 (5)—Landlord and tenant—Notice of ejectment—Inclusion of field from which tenant was held not liable to ejectment—Suit by tenants to contest notice—Decree ex parte—Setting aside ex parte decree—Dismissal for default on restoration—Revision—Limits of revision by Financial Commissioner.

The landlords, N and others, caused a notice of ejectment under S. 45 (1) of the Punjab Tenancy Act to be served upon the tenants, H and others, in respect of certain land, and the notice included also a field bearing No. 743 which had been held in previous judicial proceedings to be a part of the land from which the tenants were not liable to be ejected. The tenants sued to contest their liability to ejectment and obtained an *ex parte* decree in their favour which was however set aside on the application of the landlords. The tenants absented themselves when the suit came on for hearing and it was dismissed for default. In passing orders, the Court did not direct the ejectment of the tenants in accordance with S. 45 (6) of the Punjab Tenancy Act, but the landlords obtained possession in execution of the decree.

Held that the fact that ejectment proceedings were twice in succession decided otherwise than upon the merits did not justify interference upon the revision side, in the absence of any indication of material irregularity.

Held, however, that the careless inclusion of field No. 743 in the notice of ejectment and the subsequent delivery of possession of field No. 743 was a material irregularity, and that possession of that field should be directed to be restored to the tenants.

9.—Punjab Acts—(Continued).

Act XVI of 1887 (Punjab Tenancy)—(Contd.).

The Financial Commissioner will exercise his powers under S. 84 (5) of the Punjab Tenancy Act (within the limits set by the Civ. Pro. Code to the revisional jurisdiction of the Chief Court), only when interference is necessary in order that substantial justice may be done. *Hira v. Nihal Singh*, 4 P.R. 1914 (Rev.).

MAYNARD, F.C.

- (6) S. 59—Second appeal—Question whether common ancestor occupied the land—Punjab Courts Act, XVIII of 1884, S. 40 (1) (a).

Held, that, in a suit brought by collaterals of an occupancy tenant for succeeding to his holding under S. 59, clause (c), the question whether their common ancestor occupied it or not is a pure question of fact; and consequently it is not a ground for second appeal under S. 40 (1) (a) of the Punjab Courts Act as amended. *Dhian Singh v. Santa Singh*, 92 P.W.R. 1914 = 190 P.L.R. 1914 = 24 Ind. Cas. 687.

JOHNSTONE, J.

References:—18 P.R. 1876; 101 P.R. 1908 = 166 P.W.R. 1908, R.

(7) S. 59—Male lineal descendant—Illegitimate son of Rajput—Punjab Courts Act (XVIII of 1884), S. 70 (1) (b)—Practice—Question on which revision petition not admitted as further appeal. *Manohar v. Dula*, 301 P.L.R. 1913 = 20 Ind. Cas. 755 = 203 P.W.R. 1913 = 15 P.R. 1914. See Final Part, 1913, Col. 208.

- (8) S. 59. See No. 4, *supra*.

(9) Ss. 59 (1) (b), 112—Succession—Occupancy rights—Terms of *wajib-ul-arz* of a revised Settlement—Attested after 1871, contrary to S. 59 (b) of the Act. *Narain Devi v. Hira*, 212 P.W.R. 1913 = 339 P.L.R. 1913 = 12 P.L.R. 1914 = 22 P.R. 1914 = 21 Ind. Cas. 843. See Final Part, 1913, Col. 208.

(10) Ss. 59, 50—Scope—Contract in contravention of S. 59—Whether can be recognized by mutation officer. *Mussammat Khanum Nur v. Hayat Khan*, 6 P.R. 1913 (Rev.) = 120 P.L.R. 1914 = 22 Ind. Cas. 660. See Final Part, 1913, Col. 209.

- (11) S. 60. See No. 10, *supra*.

- (12) S. 77. See No. 1, *supra*.

(13) Ss. 77, 100—Jurisdiction of Civil or Revenue Court—Claim by one proprietor against another for establishing occupancy rights—When decree of Civil Court cannot be registered in Revenue Court—Return of plaint.

Held, that, a suit by one of the proprietary body against another for declaring that the former is the occupancy tenant of land belonging to the latter falls under S. 77 (3) (a) and is consequently triable only by a Revenue Court.

It is immaterial whether the dispute has arisen out of the partition proceeding of the land:

9.—Punjab Acts—(Continued).

Act XVI of 1887 (Punjab Tenancy)—(Contd.).

Held, also, that, when a suit, of this nature has been decided by a Munsif having no Revenue powers, his decree cannot be registered in a Revenue Court by the Chief Court. The ordinary course in such a case is to return the plaint for presenting it to a competent Revenue Court. *Kirpa Ram v. Kirpa Ram*, 156 P.W.R. 1914 = 282 P.L.R. 1914.

CHEVIS, J.

References:—25 P.R. 1909 = 39 P.W.R. 1909, R.

- (14) Ss. 77 (3), cl. 1, and 100 (2) —Landlord and tenant—Suit between—Cognizability by Revenue Courts—Suit below Rs. 500—Small Cause—Registration of decree by Revenue Court as that of Civil Court—Prejudice to parties—Chief Court—Interference of.

Where the parties to a suit stand in the relation of landlord and tenant, the suit is covered by cl. (1) of S. 77 (3) of the Tenancy Act and is one that can be heard by the Revenue Courts. Where the value of a suit is only Rs. 160, it would, if heard by a Civil Court, be a Small Cause under Rs. 500 in value, and under S. 41 (2), Punjab Courts Act, as amended in 1912, no second appeal will lie. Where the result of registering a Collector's decree as that of a Civil Court would be to deprive the defendants of all further remedy, the Chief Court will refuse to intervene. Because S. 100, cl. 2 of the Punjab Tenancy Act gives the Chief Court power only where it appears that the parties have not been prejudiced by a mistake as to jurisdiction. If they have been prejudiced, registration is inadmissible. *Nawab Khan v. Karan Chand*, 56 P.R. 1914 = 235 P.L.R. 1914 = 154 P.W.R. 1914.

KENSINGTON, C. J.

- (15) S. 77 (3) (i)—Suit by occupancy tenants against landlords for possession of certain land as a threshing floor—Jurisdiction of Civil or Revenue Courts.

Suit for possession of certain land for the purpose of using it as a threshing floor. The defendants were landlords and plaintiffs were the occupancy tenants of other land in the village, and it was alleged by the plaintiffs that it was in consequence of their holding those occupancy rights that they were entitled to the use of the land in suit as a threshing floor. The suit land was formerly *shamilat-i-deh* and passed to the defendants on partition. *Held* that this was a suit 'between landlord and tenant' arising out of the conditions of plaintiff's occupancy tenancy, and S. 77 (3), cl. (i) of the Tenancy Act applied and that the Revenue Courts had jurisdiction. *Bir Singh v. Khan Singh*, 44 P.R. 1914 = 254 P.L.R. 1914.

JOHNSTONE and CHEVIS, JJ.

Reference:—16 A. 181, R.

- (16) S. 84. See Nos. 1 and 5, *supra*.

9.—Punjab Acts—(Continued).**Act XVI of 1887 (Punjab Tenancy)—(Concl'd.).**

- (17) S. 84 (5)—*Financial Commissioner—Powers of revision—Extent—When to be exercised.*

Where there is on the part of two Courts a definite finding supported by the Revenue records of facts which give jurisdiction to the Revenue Courts and render the plaintiffs liable to ejectment, *held*, that the Financial Commissioner should not, as a Court of revision, interfere with such a finding of fact.

It has always been recognized that the Financial Commissioner, acting under S. 84 (5) of the Punjab Tenancy Act, has, within the limits prescribed for the revisional jurisdiction of the Chief Court, an absolute discretion to determine whether his intervention is expedient. The broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice (*a*).

The circumstances which would justify the Court of the Financial Commissioner, on its revision side, in holding that a subordinate Court had acted either without jurisdiction or illegally or with material irregularity, when on the facts found by that Court there is no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind, though absolute perversity in the finding or a serious misapplication of the law of evidence in arriving at it, might justify such interference. **Mahan Singh v. Narain Singh**, 1 P.R. 1914 (Rev.)

FAGAN, F.C.

Reference :—(*a*) 2 P.R. Rev. 1910, R.

- (18) S. 100. See Nos. 13 and 14, *supra*.

(19) S. 111—*Agreement. Labhu v. Ganda Singh*, 185 P.W.R. 1913=20 Ind. Cas. 528=2 P.L.R. 1914. See Final Part, 1913, Col. 210.

- (20) S. 112. See No 9, *supra*.

Act XVII of 1887 (Punjab Land Revenue).

- (1) Ss. 115, 117 (2)—*Order of Revenue Officer dealing with application for partition—Applicability of S. 11, Civ. Pro. Code (1908) to such orders—Discretionary powers of Revenue officers—Finality of such orders.*

S. 11, Civ. Pro. Code, has no application to the partition orders of Revenue Officers. A Revenue Officer dealing with an application for partition acts as an administrative authority not as a Court, the proceeding is an administrative adjustment, not a suit, and the decision is embodied in an order, not in a decree.

But the decision that S. 11 of the Civ. Pro. Code has no application to the partition orders of Revenue Officers does not connote a decision that such orders will henceforth have no legal finality. Under S. 115 of the Land Revenue Act, a Revenue Officer has discretionary authority absolutely to disallow an application for partition; and he ought to use this authority in every instance in which the same question

9.—Punjab Acts—(Continued).**Act XVII of 1887 (Punjab Land Revenue)—(Concluded).¹**

has been previously decided, unless it is shown that the circumstances which made the previous orders appropriate have changed. **Nathu v. Bishna**, 5 P.R. 1914 (Rev.).

MAYNARD, F.C.

- (2) S. 117. See No. 1, *supra*.

(3) S. 158 (2), *cls.* (17) and (18)—*Agricultural land—Agreement to refer to arbitration—Matter not cognizable by Civil Court. See CIV. PRO. CODE (1908), No. 473, 46 P.L.R. 1914.*

(4) S. 158 (viii)—*Settlement of muafi by Revenue Officers—Jurisdiction of Civil Courts to interfere. See JURISDICTION OF CIVIL OR REVENUE COURTS, No. 2, 96 P.W.R. 1914.*

Act XX of 1891 (Punjab Municipal).

- (1) S. 38 (=S. 49 of Act III of 1911)—*Declaratory suit against a Municipal Committee—No notice necessary.*

Held, that previous notice of one month required under S. 38 of Act XX of 1891 is not necessary to bring a suit against a Municipal Committee for a declaration that the plaintiff is the owner of a certain plot of land, and that the Municipal Committee who refused the plaintiff permission to build on it alleging that it was their property had no right to do so. **Ishar v. The Municipal Committee, Lahore**, 1 P.W.R. 1914=24 P.L.R. 1914=32 P.R. 1914=23 Ind. Cas. 817.

REID, C.J.

References :—22 B. 230; 25 B. 142, F.

Act I of 1900 (Punjab Alienation of Land).

- (1) *Limitation—Alienation by childless proprietor—Suit by reversioner—Acquiescence—Attesting deed of exchange—Knowledge not necessary—Estoppel—Evidence Act, S. 115.*

Held, that, in case of alienation governed by the Punjab Alienation of Land Act, where time begins to run from the date of alienee's getting possession of the property alienated, it is immaterial whether the reversioner has knowledge of it or not.

Held also, that a reversioner by attesting as a witness, the deed of exchange of the property in dispute, is estopped from contesting the validity of its alienation. **Ganda Singh v. Gulab Singh**, 65 P.W.R. 1914=159 P.L.R. 1914.

SCOTT-SMITH, J.

(2) 'Right to receive rent,' meaning of. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 1, 132 P.W.R. 1914.

(3) Suit by plaintiff who was minor on date of mutation—Plaintiff entitled to sue within three years of majority. See LIMITATION ACT (1908), No. 22, 84 P.L.R. 1914.

9.—Punjab Acts—(Continued).**Act I of 1900 (Punjab Alienation of Land)**
—(Concluded).

(4) Vendee becoming owner by exchange before property was sold—Sanction given by Collector under the Act after institution of suit for pre-emption—Effect. See PRE-EMPTION, No. 7, 66 P.W.R. 1914.

(5) Ancestral land—Gift in favour of daughter's son—Suit by reversioner to recover possession—Applicability of Punjab Act I of 1900. See LIMITATION ACT (1908), No. 180, 29 P.R. 1914.

(6) S. 21 (A)—Application under—Two months period prescribed for presentation—Whether Chief Court can extend the period—Order under S. 9, Specific Relief Act—Not open to revision under S. 21 (a).

Where an application professing to be one under S. 21 (a), Land Alienation Act, 1900, is made to the Chief Court, it is not open to the Court to extend the period of two months within which such application should be made.

It is extremely doubtful whether a decree under S. 9, Specific Relief Act, which settles no question of title, can be revised under S. 21 (A) (2), Punjab Act XIII of 1900. *Phuman Shah v. Chhanga*, 7 P.R. 1914=135 P.L.R. 1914=153 P.L.R. 1914=23 Ind. Cas. 299.

KENSINGTON, C.J.

Act II of 1905 (Punjab Pre-emption).

(1) *Punjab Alienation of Land Act (XIII of 1900)—Right to realize arrears of rent for agricultural land, not land—Objection as to omission of portion of property sold taken at late stage not entertainable—Amendment of plaint—Estoppel.*

Held, that the right to realize arrears of rent of agricultural land, is not agricultural land within the meaning of the Punjab Pre-emption Act (II of 1905), and the omission to include that right in a suit for pre-emption in respect of the land with which the said right is sold is not fatal to the suit.

'A right to receive rent,' which is included in the definition of 'land' as given in the Alienation of Land Act, means a right to receive rent which would become payable in future. It does not mean a right to realize arrears of rent which have already accrued due and are recoverable as a liquidated sum.

Held, also, that an objection taken by the vendee as to the omission in a pre-emption suit of a portion of the property sold, after the evidence of both parties has been recorded and on the date fixed for arguments in the case, is raised at too late a stage and should not be entertained by the Court. The Court, however, would be perfectly right in allowing amendment of the plaint, if it ever entertains the objection.

Held, further, that the Court will not draw vague and general inferences as to estoppel by conduct against a pre-emptor from the mere

9.—Punjab Acts—(Continued).**Act II of 1905 (Punjab Pre-emption)—(Ctd.).**

fact that a large number of the residents of the village in which the land in dispute is situate attempted to purchase it but failed before the sale in dispute took place. *Shankar Lal v. Dallu*, 132 P.W.R. 1914=280 P.L.R. 1914.

KENSINGTON, C.J. and SHAH DIN, J.

(2) S. 11, proviso—Vendee—Acquisition of new status as member of agricultural tribe after sale—Effect on pre-emptor's right—Suit for pre-emption—Land in dispute—Value for jurisdiction purpose below Rs. 250—Pre-emptive price above that sum—Further appeal—Whether lies.

On the 23rd October, 1906, an Arora sold agricultural land to a Kureshi of the same village who was an agriculturist and a co-sharer in the *Khota* which comprised the land sold. On the 12th April 1907 by a Government notification, the Kureshis were declared to be members of an agricultural tribe. In October, 1907, the plaintiff, an Arora, who was a member of the vendor's tribe and also a co-sharer in the *Khota* comprising the land sold, brought the present suit for pre-emption, alleging that he fulfilled the conditions of the proviso to S. 11 of the Pre-emption Act. The purchaser contended that, inasmuch as he became a member of an agricultural tribe before the date of suit, he acquired a right of pre-emption at least equal to that of the plaintiff whose suit must therefore fail.

Held, by the Chief Court on further appeal, that the plaintiff must succeed by reason of the superiority of his position at the date of sale and his retention of the status on which his suit was based (a).

Held, also, that, where, though the value of the land in dispute, at thirty years' Government revenue, was less than Rs. 250, the pre-emptive price was found to be Rs. 800, a further appeal lay to the Chief Court (b). *Amir Shah and Kamir Shah v. Jetha*, 26 P.R. 1914=152 P.L.R. 1914=23 Ind. Cas. 908.

REID, C.J., and BEADON, J.

References :—(a) 53 P.R. 1911, D.; 90 P.R. 1909 (F.B.), R. (b) 24 P.R. 1903 (F.B.), *Rel.*

(3) S. 11, proviso—*Tarkhans and Lohars* whether members of the same tribe—Meaning of the word 'tribe.'

The word 'tribe' used in S. 11, proviso, of the Pre-emption Act should be construed broadly and each case should be decided on its merits (a).

Held that the *lohars* and the *tarkhans* of the village Harnaali form one tribe for the purposes of this Act (b).

The question is a pure question of fact. *Fazal Husain v. Malik Jinda*, 49 P.R. 1914=252 P.L.R. 1914=160 P.W.R. 1914.

JOHNSTONE and SHAH DIN, JJ.

References :—(a) 112 P.R. 1908, F. (b) 31 P.R. 1913, R.

9.—Punjab Acts—(Continued).

Act I of 1905 (Punjab Pre-emption)—(Old.).

- (4) S. 12 (b), (3), (9), (4)—*Widow, right of—Proprietary holding—Occupancy holding—Heir—Co-sharer.*

Held, that, neither a mother, nor a widow, who obtains possession of property left by her son or husband for enjoyment during her life or any shorter period, can be regarded as an 'heir' to that property within the meaning of Customary Law, and she could not claim 'pre-emption under sub-clause 'thirdly.' As a co-sharer she could claim only under sub-clause 'fourthly' of cls. (b) (a).

Held, also, that the mother of an occupancy tenant has no right whatever to succeed on the latter's death to occupancy rights held by him, and her claim to pre-empt could only fall under clause (c) sub-clause 'secondly' and was inferior to the right of the respondents, *Musammam Fatch Nisheh v. Sayad Ahmad Shah*, 55 P.L.R. 1914=46 P.R. 1914=103 P.W.R. 1914=23 Ind. Cas. 532.

RATTIGAN and BEADON, JJ.

Reference :—(a) 34 P.R. 1893, R.

- (5) S. 12, (c), *secondly*—“sub-division, meaning of—Thulla Hari Singh of Mauza Burj Hari Singh, Jagraon Tahsil, Ludhiana District whether sub-division—Vendee joining stranger, whether can resist pre-emption.

Thulla Hari Singh of Mousa Burj Hari Singh, Tahsil Jagraon, District Ludhiana, is a sub-division within S. (12) (c), secondly of the Punjab Pre-emption Act.

The intention of the Legislature in enacting cls. (c) and (d) of S. 12 of the Punjab Pre-emption Act was not only to recognize the main or primary sub-divisions of a village but also any further divisions of such sub-divisions as may be well marked and authenticated by the Settlement Record and the history of the village (a).

A vendee who associates with himself in the purchase a stranger co-vendee loses his right to resist a pre-emptor's claim. *Basawa Singh v. Natha Singh*, 128 P.L.R. 1914=83 P. W. R. 1914=23 Ind. Cas. 151=60 P. R. 1914.

SHAH DIN and CHEVIS, JJ.

References :—(a) 169 P.R. 1899; 69 P.R. 1899; 76 P.R. 1894, F.; 45 P. R. 1897; 124 P.L.R. 1905, D.

- (6) S. 13 (1) (sevently)—Right of mosque to claim pre-emption through its mutwalli. See PRE-EMPTION, No. 6, 52 P.W.R. 1914.

- (7) S. 18 (2)—*Custom—Pre-emption—Houses—Shops—Vicinity—Sale of a house and a shop—Pre-emptor's house adjoining shop only—Punjab Court's Act (XVIII of 1884), S. 70 (1) (b)—Revision—Civil cases—Findings of fact.*

The plaintiff sued for possession of a house and a *baithak* with a shop underneath basing his claim on right of pre-emption on the ground

9.—Punjab Acts—(Concluded).

Act II of 1905 (Punjab Pre-emption)—(Old.).

of vicinage. The custom of pre-emption was not found established and the claim was dismissed. Further appeal was admitted under S. 70 (1) (b) of the Punjab Courts Act on the ground of custom. A preliminary objection was taken that the appeal did not lie.

Held, that the objection must prevail, for it was immaterial whether the custom of pre-emption existed or not. The plaintiff's house was contiguous only to the shop and the *baithak* which was used for residential purposes, and this did not confer any right on the plaintiff and the right if it existed could not extend to the other house (a).

That, though the appeal had been admitted on the question of custom, it was not maintainable, for it was unnecessary to go into the question of custom to decide the case. *Sirdar Ragbir Singh v. Amir Bakshah*, 58 P.L.R. 1914=22 Ind. Cas. 960=93 P.W.R. 1914.

JOHNSTONE and SHAH DIN, JJ.

Reference :—(a) 83 P.R. 1901, R.

- (8) S. 14, cls. (c) and (e)—*Rival pre-emptors—Pre-emptor proprietor in two pattis, whether has better right—Vendor showing preference to one of the rival pre-emptors in pleadings, effect of—Right of pre-emption—Right in land from date of payment under pre-emption decree.*

The fact that U was a proprietor in two of the three *pattis* in which the land sold was situate, cannot give him a preferential right of pre-emption over a rival pre-emptor so far as the land in the *pattis* in which the said rival pre-emptor is a proprietor is concerned.

S. 14 (c) of the Pre-emption Act, applied to the case and the statement of the vendors in their pleadings that, if they had any choice, they would prefer the land to go to U would not bring the case within the purview of cl. (e), of S. 14 of the Pre-emption Act.

The right of pre-emption is not a right in the land, but a right to acquire the land. A pre-emptor acquires a right in the land only when he has paid the money in accordance with the decree of the Court, recognizing his right. *Uttam Singh v. Sunder Singh*, 218 P.L.R. 1914=136 P.W.R. 1914=24 Ind. Cas. 918.

RATTIGAN and SHADI LAL, JJ.

- (9) Ss. 16 and 17—*Pre-emption—Notice to pre-emptor—Waiver of right.* *Abdullah Shah v. Hussain Jahana Sha*, 250 P.L.R. 1918=179 P.W.R. 1918=20 Ind. Cas. 564=14 P.R. 1914. See Final Part, 1918, Col. 218.

- (10) S. 17. See No. 9, *supra*.

- (11) S. 19—*Payment of pre-emption money into Court—Its receipt by a wrong person—Responsibility of pre-emptor.* See PRE-EMPTION, No. 8, 62 P.W.R. 1914.

Actionable Claim.

Breach of contract—Claim for damages—Whether an actionable claim—Assignment—Right of assignee to sue. See TRANSFER OF PROPERTY ACT, No. 9, 106 P.R. 1914.

Additional Judge.

(1) Whether subordinate to District Court—Appeal from decision of Additional Judge where lies. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 45, 12 A.L.J. 1105.

(2) Is subordinate to District Judge—Power of District Judge to transfer or make over case to

• Additional District Judge—Jurisdiction of latter when arises. See HINDU LAW (ALIENATION), No. 9, 215 P. L. R. 1914.

Adjournment.

(1) Plaintiff absent—Pleader applying for adjournment—Court refusing adjournment and dismissing suit—Procedure—Practice. See CIV. PRO. CODE (1908), No. 284, (1914) M.W.N. 344.

(2) Order of, on payment of costs—Interlocutory order—Revision. See CIV. PRO. CODE (1908), No. 178, 12 A. L. J. 460.

(3) Time granted to produce evidence—Adjournment of suit—Failure to appear on adjourned date—Proper order. See CIV. PRO. CODE (1908), No. 277, 23 Ind. Cas. 519.

(4) Suit part-heard by Sub-Judge—Sub-Judge is the proper officer to adjourn—District Judge has no voice in the matter. See CIV. PRO. CODE (1908), No. 297, 16 M. L. T. 504.

(5) When may be granted or refused—Discretion of Court—Interference in second appeal. See CIV. PRO. CODE (1908), No. 296, 24 Ind. Cas. 206.

Administration.

(1) *Surety for an administrator of estate, if may be discharged or substituted—Surety, creating charge on his immoveable property, release of charge—Surety bond, discharge of and substitution—Administration account, if may be examined by Court.*

Letters of administration were granted to the estate of the deceased K, a Hindu governed by the Dayabhaga Law, to R, one of his first cousins, who for purposes of such administration was also appointed guardian of deceased's infant son, and R's two brothers stood surety for the administrator. The estate being a very large one, the Court required the sureties to charge their immoveable properties in the surety bond besides making them personally liable. The infant having died without issue and intestate, his paternal grandmother succeeded to the estate as his heir. R thereupon applied to Court stating that he had rendered an account of the estate as administered by him to the lady, and that she had the same examined by her constituted attorneys and that they were satisfied with the account and that the residue of the estate had been made over to her, and prayed that the sureties be discharged and the charge on their immoveable property be also discharged.

Administration—(Concluded).

The Court ordered that, on the lady's constituted attorneys filing a verified certificate together with the account or abstract thereof stating that they had examined and found it correct, and on the administrator filing the receipts for the debts paid to the satisfaction of the Registrar, the surety bond creating a charge on the immoveable properties of the sureties would be discharged, conditional upon the sureties executing a fresh security bond making themselves personally liable for the administration of the estate by the petitioner (a).

The account of the administrator need not be investigated by the Court, there being no procedure or practice for doing so. *In the goods of Kanai Lal Khan*, 18 C.W.N. 320=24 Ind. Cas. 447.

CHAUDHURI, J.

Reference:—(a) 29 C. 68, R.

(2) When administration complete—Sale by Administrator General after party attains majority. See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), No. 1, 16 M.L.T. 231.

Administration Suit.

(1) *Administration suit by annuitant legatee—Legacy paid into Court by executor—Power of Court to dismiss suit.*

A suit by an annuitant legatee against the executor for a general administration of the testator's estate may, at the discretion of the Court, be dismissed, if the executor pays into Court the amount of the legacy and a sum sufficient to secure the payment of the annuity. *Athalur Malakondian v. Thatha Lakshminarasimhulu*, 26 M.L.J. 312=23 Ind. Cas. 134.

WHITE, C.J., and OLDFIELD, J.

References:—7 Ch. D. 58; 47 L.J. Ch. 117; 37 L.T. 631; 26 W.R. 77, F.; (1900) 1 Ch. 225 (228); 69 L.J. Ch. 223; 81 L.T. 514; 48 W.R. 150, D.

(2) Suit asking Court to administer the estate of a deceased person and give plaintiff his share therein—Nature of suit—Whether suit 'for accounts'—Valuation for purposes of jurisdiction—S. 8, Suits Valuation Act—O. 20, r. 13, Civ. Pro. Code. See COURT FEES ACT, No. 7, 100 P.R. 1914.

Administrator.

(1) *Administrator pendente lite, commission by way of remuneration that may be properly charged—Assets in his hands, meaning of—Negotiable securities endorsed over to banks for loans obtained by deceased, assets to what extent—Such securities, if pledges in the hands of bank and bank if holders for value thereof to the extent of loan—Lien of bank for loan on negotiable securities—Contract Act, Ss. 172, 176—Account of administrator pendente lite passed, if amount to settled account and if any bar to recovery of monies retained by him to which he is not entitled—Fiduciary.*

Administrator—(Continued).

position of such administrator—Estoppel—Laches—Acquiescence—Partition suit between Hindu sons—Mother's share, if ascertained before decree—Limitation, error of procedure, rectification within time, delay in completion of order and recording the representation of plaintiff—Limitation of suits against persons in fiduciary position.

Where Government securities are endorsed in bank or endorsed in favour of a bank and given to the bank as security for loans obtained, the bank would be not merely a pledgee but a holder for value of the negotiable instruments to the extent of the sum for which it had a lien. The delivery of securities so endorsed passed to the bank a legal and not a mere equitable title (a).

Where such Government securities were, after the debtor's death, sold by the bank through a firm of brokers nominated by the administrator *pendente lite* to the debtor's estate;

Held—That the bank did not sell as the agent of the administrator *pendente lite* and that so much of the sale-proceeds as the bank applied to the discharge of debts due to it were not assets that came into the hands of the administrator *pendente lite* and the latter was not justified in charging commission on the whole of the sale-proceeds of the Government securities but only on the balance that came into his hands after satisfaction of the lien of the bank.

Where the accounts of the administrator *pendente lite* were passed by Court, including the charge of commission on the whole of the sale-proceeds mentioned above, and the heirs had full knowledge of it through their agents and solicitor and the solicitor also expressed an opinion that commission so charged was properly charged, no estoppel arose to debar the heirs from suing the administrator for refund of the commission to which he was not legally entitled.

That this was not a case of opening a settled account but one of enforcing a claim against a fiduciary agent on the ground that he had retained more of the estate than he was entitled to under the order of Court authorising his remuneration, and the alleged acquiescence on the part of the plaintiff would be no defence to the suit.

The suit being also within the statutory period of limitation, the defence of laches could not prevail.

Where there was no evidence that the plaintiff knew that the facts as represented in the accounts were incorrect or that they did not rely on that representation, the inference was that they did so rely on the representation (b).

When one of four brothers governed by the Bengal School of Hindu Law sued for partition and their mother was made party and an administrator *pendente lite* was appointed to represent the interests of a deceased brother before partition was actually effected, such administrator was entitled to charge commission

Administrator—(Conti

on $\frac{1}{4}$ th share of the whole estate and not on the $\frac{1}{5}$ th share as mother's share was a mere charge for maintenance and could not be declared before partition actually took place.

Where the administrator *pendente lite* charged commission on the whole estate when it came into his hands, he could not charge any commission on the sale-proceeds of any portion of it.

Where, on leave being asked for in the plaint under cl. 12 of the Charter, the Registrar on the Original Side of the High Court, under a misapprehension of the change in procedure, with regard to the filing of plaints, gave such leave but on discovery of the fact that the Registrar had no authority to grant such leave, the plaint was withdrawn on the 15th August 1907 and was immediately after presented before a Judge sitting on the Original Side who gave the leave and endorsed on the plaint "presented 15th August 1907," but there was delay in the office in completing the order and stamps were supplied upon requisition from the office on the 14th December 1907, and it was recorded in the office and also re-endorsed on the plaint that the plaint was re-registered and filed on the 18th December 1907; on objection being taken by the defendant that the suit was barred by limitation:

Held by Chaudhuri, J.—That the 15th of August 1907 as recorded by the Judge on the plaint was the date of its presentation and the suit was not barred by limitation. **Osmond Beeby v. Kshitish Chandra Acharya Chaudhuri**, 18 C.W.N. 631 = 41 C. 771.

JENKINS, C.J. and WOODROFFE, J.

References :—(a) (1812) 15 East. 428, R. (b) (1881) L.R. 20 Ch. D. 1, R.

(2) *Administration—Trust—Representation of estate by one of three administrators—Compromise by him—Effect on sale—Rights of bona fide auction purchaser—Limitation to set aside sale.*

Where a testator died in 1866 leaving 7 sons and 4 daughters and executed a will containing a clause directing that the suit house along with four other houses be kept in trust and that the rents realised therefrom be divided equally among the whole of the children and their heirs respectively for their support and maintenance, and no trustees were appointed for the purpose and the executors did not do anything to carry out the terms, and in 1877 the 6th and 7th sons and one married daughter obtained letters of administration with the will annexed; *held* that a valid trust has been created and the trust is not void as infringing the rule against perpetuities because the estate given to the sons and daughters was an absolute estate. *Held* also that the administrators were bound to give the annual income of the house to the sons and daughters of the testator until they put them in possession, and till they did so the trust could not come to an end and the legatees would be entitled to institute a suit for administration with a view to get possession of their shares in the house.

Administrator—(Concluded).

Where a decree was obtained against one of

A mortgagee decree-holder who purchases in Court auction sale is in the same position as any outside purchaser unconnected with the property would have been. A sale held in execution of a decree in a suit where the proper representative was not impleaded in the record ought to be set aside within one year of the sale. The plea of limitation which lies in the face of the plaint and on the facts found is bound to be entertained even in the second appeal. *Rosamund Rhodes v. Padmanabha Chettiar*, (1914) M.W.N. 921=17 M.L.T. 18.

SADASIVA AIYAR and NAPIER, JJ.

(3) Administrator²—Unauthorised sale—*Bona fide* purchaser from vendee—Creditor's right to avoid sale. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 18, 7 L.B.R. 98.

Administrator-General.

Property vesting in the — Administrator General handing keys—Effect. See HINDU LAW (WIDOW), No. 15, 16 M. L. T. 26.

Administrator General's Act.

See ACT II OF 1874.

Admission.

(1) Admission by one of two brothers, whether binding on the other.

One of the two brothers admitted the claim of the plaintiff who sued them for a sum of money:

Held, that the other brother was not bound by such admission. *Musammatt Maina v. Madho Prasad*, 24 Ind. Cas. 105.

TUDBALL, J.

Admission—(Concluded).

(2) Withdrawal of gratuitous admission—Effect. See ACT III OF 1901 (U.P. LAND REVENUE), No. 12, 28 Ind. Cas. 965.

(3) Admissions of one defendant whether binding on co-defendants. See APPEAL (GENERAL), No. 6, 22 Ind. Cas. 916.

(4) Admission by party or pleader in another suit—Weight to be attached. See APPEAL (SECOND APPEAL), No. 7, 19 C.L.J. 541.

(5) When relevant. See EVIDENCE ACT, No. 10, 19 C.L.J. 1.

(6) Creditor admitting payment before transferring his debt to a third person—Effect upon transferee. See EVIDENCE ACT, No. 11, 108 P.W.R. 1914.

(7) Admission of right involves admission of legal consequences of that right. See LIMITATION ACT (1877), No. 3, 22 Ind. Cas. 650.

(8) Pro-note alleged to have been executed by two persons, but found not to have been executed by one of them or with his consent—Admission of the other that both executed—Liability of person admitting. See PROMISSORY NOTE, No. 9, 16 M.L.T. 185.

Adoption.

(1) Consent by next reversioners binds more remote reversioners.

In a case of adoption, the consent given by the next reversioner of the adoptive father takes it out of the power of the more remote reversioners to object. *Sohaj Ram v. Ram Lal*, 78 P. L. R. 1914=22 Ind. Cas. 542=69 P. W. R. 1914.

JOHNSTONE and CREVIS, JJ.

References:—78 P. R. 1908=138 P.W.R. 1903; 16 Ind. Cas. 469=68 P. R. 1912=194 P. W. R. 1912=210 P. L. R. 1912, R.

(2) Limitation—Adoption—Suit to recover possession of immoveable property as adopted son—Arts. 118, 119 and 144 of Act XV of 1877 (now Act IX of 1908).

Held, by the Full Bench that when a person (Hindu or Muhammadan) sues for possession of immoveable property alleging that he is the adopted son of the last proprietor and his adoption is denied, his suit is governed not by Art. 119 but by Art. 144, Limitation Act, 1877 (now Act IX of 1908). *Arjan Singh v. Lachman Singh*, 104 P.W.R. 1914=203 P. L. R. 1914=81 P. R. 1914 (F. B.).

JOHNSTONE, RATTIGAN and SHAH DIN, JJ.

References:—71 P. R. 1901; 20 P. R. 1902; 68 P. R. 1903; 3 P. R. 1904; 1 P. R. 1907=31 P. W. R. 1907, *overruled*; 126 P. R. 1912=6 P. W. R. 1912=39 C. 418; 30 M. 308; 23 A. 727, F.; 56 P. R. 1903(F. B.); 96 P. R. 1908=79 P. W. R. 1908; 44 P. R. 1911; 85 P. W. R. 1911; 24 A. 195; 26 A. 40; 25 C. 354; 27 C. 242, R.; 13 C. 308 (P. C.); 20 C. 487 (P. C.); 22 C. 609 (P. C.); 20 M. 40; 24 B. 260, (F. B.); 87 B. 513; 26 M. 291 (F. B.) *Diss.*; 38 P. R. 1907=161 P. W. R. 1907; 86 P. R. 1905=112 P. W. R. 1905, R.

Adverse Possession.

- (1) *Ex-proprietary tenancy—Whether can be acquired by adverse possession—Agra Tenancy Act (II of 1901).*

It is possible to acquire by adverse possession a right, short of full proprietorship. Where, therefore, on the death of a Hindu widow, her husband's brother S, as his next reversioner, took possession of a certain *mahal* owned by the deceased, litigation followed between him and his brother's sons, and by a decree on an award by the arbitrators the entire *mahal* was allotted to I, the son of a third brother, formal possession was given to I, in 1891, but S, and after him his heir, the defendant, remained in possession of certain plots of *sir* land appertaining to the *mahal* for over twelve years; *held*, that the defendant acquired by adverse possession the status of an *ex-proprietary* tenant. *Ulfat Rai v. Basdeo*, 12 A.L.J. 93=22 Ind. Cas. 269.

PIGGOTT, J.

Reference:—Unreported, L.P.A. No. 38 of 1911, R.

- (2) *Adverse possession—Enclosing neighbour's land—Auction purchaser—Symbolical delivery.*

Where one of two owners of neighbouring lands encloses with his own a portion of the other's lands, the act is a most unequivocal assertion of the intention to appropriate it. In the absence of any circumstances to show that the occupation was permissive, such possession must be held to be adverse.

Where the land purchased at a sale in execution is in the adverse possession of a third person, symbolical delivery to the auction-purchaser is not effective in saving limitation. *Rompicherla v. Shaik Ismael Saheb*, 21 Ind. Cas. 765.

AYLING and TYABJI, JJ.

- (3) *Adverse possession—Entry into possession as limited heir—Daughter-in-law succeeding to mother-in-law's stridhan property—Prescription—Acquisition of title—Only limited interest—Absolute title—Evidence to show acquisition of—Nature of.*

C, a Hindu widow governed by the Benares school of Hindu law, owned the suit property as her *stridhan*. In 1889, C died leaving behind a daughter, the present defendant and her daughter-in-law, P. On C's death, P. entered into possession claiming title as C's daughter-in-law and remained in possession till her death in 1908. Plaintiffs, the reversioners of the husband of C, now sued to recover possession as being the nearest *sapendas* of P's husband.

Held, that P's possession was adverse to the defendant, that she acquired by prescription only a daughter-in-law's limited interest which came to an end on her death, and that the defendant came in again as her mother C's heir.

When a person enters on land under a title as heir which is necessarily a limited title, as in the present case, very cogent evidence is

Adverse Possession—(Continued).

necessary to show that she afterwards asserted a title as absolute owner (a). *Sheolal v. Mt. Sheorajia*, 10 N.L.R. 35=23 Ind. Cas. 719.

MITTRA, A.J.C.

References:—(a) 25 A. 468; 25 A. 476; 22 C. 445, R.

- (4) *Landlord and tenant—Payment of rent to third person—Denial of landlord's title to his knowledge—Adverse possession.*

The mere fact that a tenant paid rent to some other person would not necessarily show that the possession was adverse to the landlord, unless it was shown that such possession was in denial of the title of the real owner to his knowledge. *Shyama Charan Pahary v. Ram Prosad Das*, 22 Ind. Cas. 796.

CHATTERJEA and TEUNON, JJ.

- (5) *Gramanatham—Storing straw ricks—Possession and enjoyment whether adverse—Madras Act III of 1905.*

Spencer, J.—Storing straw ricks upon a part of the *gramanatham* will not give any title to any person as against Government by adverse possession, for such possession must be adequate in continuity, publicity and extent (a).

Occupation of a fugitive and temporary nature or temporary use as vacant house site or back-yard is not sufficient to create a title (b).

When the property concerned is land which, even before the introduction of Act III of 1905, was universally recognised as being the property of the State, a person who executes documents purporting to transfer ownership in it does so at his own risk, as he should know that the efficacy of the transfer is liable to be repudiated.

The *animus possidendi* of parties to such transactions must necessarily be of an inconsequential character.

Sadasiva Aiyar, J.—The Government's right to a *natham* poramboke site for residential purposes provided it is not already owned and possessed, is indisputable.

But a plaintiff who comes into Court in ejectment, though claiming under a grant from Government, ought to prove that the site was not owned and possessed by the defendant at the time of the grant to the plaintiff by the Revenue authorities.

In determining what right adverse possession would confer on the holder, the *animus possidendi* is the decisive factor. The character in which possession is held must determine the right which the possession would confer. Storing hayricks on a piece of waste land when the title to that land vests in another will not ordinarily raise a presumption that the act of possession is accompanied with the intention to assert an ownership title over it in denial of the title of the real owner (c).

But where the defendant has let an oral and documentary evidence to the effect that the defendant's ancestor sold the site to a stranger

Adverse Possession—(Continued).

several years ago and that his family repurchased from that stranger in 1879, it is difficult to hold that a person who has sold and repurchased a site did not intend to assert an ownership title in himself.

If the *animus* to assert a right in himself and to deny a title in anybody else could be inferred from these acts of sale and re-purchase, the acts of enjoyment like putting up hayricks will constitute adverse possession against the true owner though, without the proof of such an *animus*, those acts may be merely treated as permissive and not as adverse possession. **Putloer Boyanna v. Golusu Asethu**, 16 M.L.T. 48 = 24 Ind. Cas. 735.

MILLER and SADASIVA AIYAR, JJ.

References:—(a) 31 C. 397, R. (b) 16 B. 338; 21 M. 53; 33 M. 362, R. (c) (1912) M.W.N. 445 (448), R.

- (6) *Grant of land under Darkhast rules—Rules not complied with—Jurisdiction—Adverse possession—Presumption—Confined to spot actually in possession.*

The fact that a Divisional Officer contravened certain rules framed for his guidance does not affect his jurisdiction to cancel a grant made by a Tahsildar.

The ordinary presumption that a person having title has possession over the whole if he exercises acts of ownership only over a portion leaving the rest as waste, does not arise in the case of a trespasser whose adverse possession will be restricted to the particular portions in his possession. **Karla Kownden alias Aruna-challa Kownden v. Raghava Reddi**, 23 Ind. Cas. 520.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

- (7) *Adverse possession—Burden of proof—Presumption—Limitation.*

In a suit for the recovery of a house, the plaintiffs alleged that the defendant had unlawfully and without any right taken possession of it ten years before suit and after the death of the plaintiffs' ancestor. The defendant pleaded more than twelve years' adverse possession. The Court found that the death of plaintiff's ancestor took place more than twelve years prior to the institution of the suit.

Held, under the circumstances, (1) that no presumption as to continuation of the plaintiff's possession could be made in his favour;

(2) that it was for the plaintiff to prove by *prima facie* evidence that he had been in possession of the house within twelve years. **Musamat Hulaso v. Salamat Khan**, 23 Ind. Cas. 521.

RAFIQUE, J.

- (8) *Hindu joint family—Possession of one co-parcener, nature of—Alienation by such co-parcener—Effect—Alienee's possession, whether adverse.*

Adverse Possession—(Continued).

Plaintiffs and defendants 1 and 2 were co-parceners jointly interested in the plaint property. Defendants 1 and 2 were in possession of the property and they sold it to the 5th defendant in 1890. The alienee claimed to have derived title to the whole property from defendants 1 and 2, contending that the whole of it, and not merely the rights of the defendants 1 and 2 therein, was purported to be sold to him, and he also claimed to have asserted a title in himself adverse to the plaintiffs since 1890 and that his title had become perfected by 12 years' adverse possession. There was no evidence that plaintiffs had knowledge of the fact that the defendants 1 and 2 or the 5th defendant ever asserted a title adverse to the plaintiffs.

Held that the plaintiffs' rights to the property in question was not barred by adverse possession.

A co-parcener holds property under conditions one of which for the present purposes may be described as the disability to claim that his possession is adverse to that of the other co-parceners, unless they have notice of his purporting so to hold the property. It is difficult to understand how a person holding property with limitations can pass to a transferee a title free from those limitations. **Muthukrishna Iyengar v. Sankar Narayana Iyer**, 16 M.L.T. 196 = (1914) M.W.N. 708 = 27 M.L.J. 600.

AYLING and TYABJI, JJ.

References:—15 M.L.T. 112 = 26 M.L.J. 140; (1912) A.C. 230 (235); (1855) 2 K.&J. 79 (83), R.

- (9) *Adverse possession—Suit against Government—Projection in front of house—Public pathway—Portion thereof—Proof of possession for over 12 years—No acts of possession by Government or plaintiff proved prior to 12 years—Government not bound to prove possession within 60 years—Presumption of possession on Government's behalf—Art. 149, Limitation Act, 1908—Limitation.*

Where the plaintiff built a projection in front of a house in 1868 and thus remained in possession of a portion of a public pathway since that date, and there was no evidence as to any acts of possession by the plaintiff or the Government prior to 1868.

Held that, in the case of a public pathway, the presumption is that the public have been using every portion of it unless some one had encroached upon it and obstructed their user, and that it must follow that prior to 1868 the public, as beneficiaries of the Government who have set apart the property for their use, have been in enjoyment, and that the suit against Government was therefore rightly dismissed.

Per Seshagiri Iyer, J.—Where a private person proves that he has been in possession for over 12 years, the onus is on the Government to show that they had some possession within 60 years (a).

Per Kumarasami Sastri, J.—It cannot be laid down as an inflexible rule that, in a suit against

Adverse Possession—(Continued).

the Government for recovery of possession of immovable property and damages for trespass, the plaintiff is entitled to succeed merely by showing possession for over twelve years before suit, unless the Government can show possession or title within 60 years. All that the cases decide is that, when possession whose origin cannot be definitely fixed has been proved against the Government for a long series of years (not less than twelve), it is reasonable to presume that such possession commenced at a period over sixty years ago, so as to throw on the Government the onus of showing either a subsisting title or possession within 60 years (b). **Sambasiva Mudaliar v. The Secretary of State for India in Council**, 27 M.L.J. 299= (1914) M.W.N. 711.

SESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

References:—(a) & (b) 30 M. 245; 33 M. 173; 33 M. 362; 23 M.L.J. 162, R.

(10) *Adverse possession over a right of equity of redemption—Limitation Act, Art. 144.*

Held, that adverse possession can legally exist over a right of equity of redemption (a).

Held further, that, in a case of adverse possession of the equity of redemption, the article of Limitation Act applicable is Art. 144. **Hubdar Khan v. Gajadhar Chaube**, 17 O.C. 294.

STUART, F.C.

References:—(a) 14 B. 176; 5 C.W.N. 601; 32 C. 296; 11 O.C. 1, R.

(11) *Adverse possession, title by—Animus possidendi—Animus based on real or pretended title—Title acquired not higher—Defendants, lessees within twelve years—No acquisition of title by prescription.*

Acquisition of title by prescription depends upon the nature of the *animus possidendi*, whether that *animus* is based on a real or false or pretended title does not matter, and the title cannot be higher than what could be acquired if the pretence or falsehood proved true.

Where the defendants were lessees within twelve years there could be no acquisition of title by prescription. **Meethale Yittil Raman v. Puthulath Ambu**, 24 Ind. Cas. 95.

SADASIVA AIYER and SPENCER, JJ.

(12) *Adverse possession—Revenue records—Entry in—Recorded owner not in possession—Title—Burden of proof—Boundary dispute—Decision when not binding on parties.*

The plaintiffs, who were proprietors in the village of Musapur in Jullundur District, sued for possession of two plots of land of which they claimed to be owners. The defendants, who were proprietors in the village of Domeli in the Kapurthala State, pleaded that the land in suit had for the last 50 years formed part of their village and had been in their possession as owners. They also pleaded that, if the

Adverse Possession—(Continued).

plaintiffs were proved to have been the owners of the land, they had lost their ownership by reason of adverse possession on the part of the defendants. Between the two villages flowed a stream and the lands on both sides of it were subject to the action of the water.

It appeared that the defendants had been in possession of the land ever since it was brought under cultivation, i.e., for a period of between 20 to 30 years and in the settlement record of the years 1871—1873 and 1891-92 of the Kapurthala State the defendants were recorded as owners of the land. In the Settlement of 1850-51 of the Jullundur District both the plots were apparently entered as part of the Musapur Estate, but in the revised Settlement of 1884-85 one of the plots was not so shown and of the other plot one half was shown as *banjar* and belonging to the proprietors of Musapur, but the possession of the cultivated portion always remained with the defendants. The plaintiffs relied also on the boundary line of the two villages demarcated by the Revenue officers of the two estates. The Subordinate Judge dismissed the suit, but the Divisional Judge decreed the claim holding that the plots in dispute had gone over to the Domeli side as the result of avulsion and the plaintiffs were entitled to their possession as owners.

Held, that the burden of proving superior title lay on the plaintiffs, and they had failed to prove it. It was abundantly proved that the possession had all along remained with the defendants.

That as to demarcation of boundary line it was not quite clear on what data the decision of the Revenue Officers was based and what authority they had for coming to a decision so as to settle the question of title to the land which had been debatable ground for a long series of years. **Amar Singh v. Bhola**, 240 P. L. R. 1914.

SHAH DIN, J.

(13) *Adverse possession—Proof of—Practice—Pleadings—Suit for redemption—Plaintiff's failure to prove mortgage—Plaintiff's possession through mortgagees proved—Decree in plaintiff's favour—Issue remitted by High Court—New case.*

This was a suit for redemption against certain persons alleged to be mortgagees and the appellant who had purchased the property in execution of a decree against other persons who were not its owners. The relief the plaintiffs asked for was redemption against the mortgagees and ejectment of the trespasser. The mortgagees admitted the title of the plaintiffs but the defendant-appellant denied the mortgage and the right of the plaintiffs. The lower appellate Court finding that the mortgage was not proved dismissed the suit. On an issue being referred by a single Judge of the High Court, it further found that the persons whom the plaintiffs called their mortgagees were in possession. The single Judge on this finding decreed the suit.

Adverse Possession—(Continued).

Held, by Richards, C.J.—That the lower appellate Court having found that no mortgage was proved, the single Judge was not justified in sending down an issue to enquire whether the plaintiffs or any one on their behalf was in possession within 12 years next before the institution of the suit. The plaintiffs having failed to prove the case set up by them the suit was rightly dismissed.

Held by Banerji, J.—That the failure of the plaintiffs to prove as against the appellant the mortgage alleged by them would not make the possession of the mortgagees or their successors adverse to them. Possession in order to be adverse must be coupled with an express or implied claim of right and in this case the mortgagees, who were found, on an issue remitted to the Court below, to be in possession, never having denied the right of the plaintiffs, the latter were entitled to possession (a). **Asad Ali v. Anand Sarup**, 12 A.L.J. 1233.

RICHARDS, C. J. and BANERJI, J.

References :—(a) 4 C. 327 ; 23 B. 137, R.

(14) *Adverse possession—Right acquired by—Ex-proprietary tenancy.*

The right of a person who remains in possession of land adversely to the owner is a proprietary right and not the right of an ex-proprietary tenant. **Baldeo v. Ulfat Rai**, 12 A.L.J. 1153.

RICHARDS, C. J. and BANERJI, J.

(15) *Adverse possession—Heirs of deceased person—Tenants-in-common—Exclusion from enjoyment necessary to claim title by adverse possession.*

Where possession can be referred to a legal right, there is no acquisition of title by prescription.

Where the heirs of a deceased person succeed as tenants-in-common, mere possession of the property by one of the heirs of the deceased cannot be adverse against the other, unless there has been exclusion of the latter from enjoyment to his knowledge. **Giri Appaya v. Giri Kristamma**, 24 Ind. Cas. 436.

MILLER and BAKEWELL, JJ.

(16) *Possession of a co-heir whether adverse to other co-heirs—Possession traceable to a lawful title is not adverse—Hindu widow alienating property by gift to one of the presumptive reversioners—Validity—Alienation by donee—Suit by alienee from the other reversioners—Adverse possession when commences.*

When one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs (a).

If the possession of a person can be traced to a lawful title, possession will be referred to such title and would not be treated as the possession of a trespasser.

Plaintiffs were the purchasers of $\frac{3}{4}$ share of certain lands which belonged to A. A's widow

Adverse Possession—(Continued).

B died in 1895 leaving one grandson M by one daughter and 3 grandsons by the other daughter. *Prima facie* each grandson got $\frac{1}{4}$ share as reversioner of A. The 3 grandsons other than M sold their $\frac{3}{4}$ share in 1899 to plaintiffs. M, the other grandson, however claimed the whole property under a deed of gift from his grandmother B executed in 1895 shortly before B's death, and he sold it in 1899 to defendant. Plaintiffs sued in 1909 for possession of the $\frac{3}{4}$ share purchased by them. The lower Courts dismissed the suit as barred by limitation on the ground that M enjoyed the property from 1895 till 1899 when he sold it to defendant and defendant enjoyed it from 1899 (from ten years before suit) and the two periods together made up more than 12 years.

Held, on appeal, that, as M's possession on B's death could be traced to his lawful title as one of the reversioners after B's death, M's possession on B's death should be treated as the possession of one of the lawful heirs, and not as that of a person who held under the title created by B's gift deed which was invalid beyond her life. M's possession, therefore, between 1895 and 1899 was not adverse to plaintiff's vendors, and the period of his possession between B's death and the sale deed to defendant in 1899 cannot be tacked on to the possession of the defendant after 1899; and that the suit was not barred. **Ponnusawmy Iyer v. Permaye**, 16 M.L.T. 530.

SADASIVA AIYAR and NAPIER, JJ.

Reference :—(a) 20 M.L.J. 283, F.

(17) *Revenue sale of entire estate—Persons holding portions of estate for over 12 years adversely to the then owners if may maintain possession against purchaser. Limitation when commences. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.*

(18) *Adverse possession prior to creation of putni—Effect—Adverse possession if arrested by creation of subordinate tenure when proprietor is out of possession. See ACT VIII OF 1885 (BENGAL TENANCY), No. 86, 19 C.W.N. 18.*

(19) *Adverse possession by co-sharer, what amounts to—Duty of other co-sharers. See CO-SHARERS, No. 4, 105 P.L.R. 1914.*

(20) *By co-sharer—What amounts to. See CO-SHARERS, No. 1, 21 Ind. Cas. 88.*

(21) *Invalid transfer by widow—Permissive or adverse possession—Transferee's title by adverse possession. See HINDU LAW (WIDOW), No. 21, 23 Ind. Cas. 931.*

(22) *Adverse possession of right to income. See INAM, No. 4, (1914) M.W.N. 745.*

(23) *Ijara—Rent not realised for many years—Possession without payment of rent after expiry of lease—Adverse possession. See LANDLORD AND TENANT, No. 24, 20 C.L.J. 800.*

(24) *Trespassers whether can tack on periods of enjoyments. See LIMITATION ACT (1908), No. 129, 119 P.L.R. 1914.*

Adverse Possession—(Concluded).

(25) Adoption—Possession of widow—Relief that the possession was mere life-estate and not absolute—Widow's possession not adverse to adopted son. See LIMITATION ACT (1908), No. 100, 16 Bom.L.R. 111.

(26) Suit for sale against mortgagor and person in adverse possession—Maintainability—Limitation. See LIMITATION ACT (1908), No. 128, 12 A.L.J. 982.

(27) Mahant's possession of Dharmasala when becomes adverse to its founder. See MAHANT, No. 1, 151 P.W.R. 1914.

(28) Simple mortgage—Mortgages entitled to possession on default—Failure to take possession—Whether possession of mortgagor is adverse. See MORTGAGE (GENERAL), No. 6, 21 Ind. Cas. 773.

(29) Mortgagee in possession—Trespasser—Dispossession of mortgagee—Whether adverse possession against mortgagor—Declaratory suit—Limitation. See MORTGAGE (GENERAL), No. 2, 15 M.L.T. 112.

(30) Mortgagee encroaching on other land of mortgagor—Effect of his being recorded in the settlement papers as mortgagee of encroached land—Adverse possession. See MORTGAGE (GENERAL), No. 19, 100 P.W.R. 1914.

(31) What amounts to—Interrupted possession—Stranger grazing cattle—Assertion of hostile title by one co-sharer against another—Effect. See PARTITION, No. 2, 20 C.L.J. 32.

(32) Whether incumbrance. See REGULATION I OF 1886 (ASSAM LAND AND REVENUE), No. 1, 23 Ind. Cas. 119.

(38) Establishment of title by adverse possession—Whether a transaction affecting immovable property. See TRANSFER OF PROPERTY ACT, No. 36, 16 M.L.T. 344.

Affidavit.

Meaning of. See CIV. PRO. CODE (1908), No. 302, 15 M.L.T. 377.

Age.

(1) Statement by deceased person as to date of birth of another person—Admissibility. See EVIDENCE ACT, No. 5, 20 C.L.J. 302.

(2) Burden of proving age to bring suit within time—Nature of proof required—Value of medical evidence to prove age. See LIMITATION, No. 3, 78 P.W.R. 1914.

Agency Rules (Vizagapatam).

Rules Nos. 17, 20—Scope—Agent declining to entertain special appeal under rule 17—High Court's power to interfere.

Rule No. 17 of the Vizagapatam Agency Rules expressly provides that the decision of a Divisional Assistant in an appeal shall be final. Rule No. 17 cannot therefore be read as giving a right of appeal against such a decision. The rule no doubt empowers the Agent for special reason to admit a special appeal. The meaning of this must be taken to be that, if the Agent

Agency Rules (Vizagapatam)—(Concluded).

thinks fit, the party should have a right of appeal. In other words a second appeal will lie with the Agent's leave.

Where the Agent refused leave to appeal, the Agent's order cannot be held to be a decree, and r. 20 does not apply, and the High Court has no power to direct the Agent to revise his order. *Lakshminarayana Panigrahi v. Pasupureddi Gopi*, 27 M.L.J. 177.

SUNDARA IYER and BENSON, JJ.

Agent.

(1) Recognised agent if has right of audience. See CIV. PRO. CODE (1908), No. 251, 19 C.W. N. 64.

(2) Commission agent—His right and liabilities—Comparison with those of ordinary seller. See CONTRACT ACT, No. 87, 7 L.B.R. 110.

(5) Mortgagee authorised to pay creditor of mortgagor in full—Whether he is an agent authorised to make a pure payment of interest—Optional exercise of authority—Effect. See LIMITATION ACT (1908), No. 56, 26 M.L.J. 509.

(4) Agent appointed to carry on business of a money-lending partnership—Right of agent to sue for dissolution of the partnership. See POWER OF ATTORNEY, No. 2, 7 Bur. L. T. 202.

(5) Misappropriation by deceased agent—Suit against his sons—Limitation. See LIMITATION ACT (1908), No. 87, 16 M. L. T. 614.

(6) See PRINCIPAL AND AGENT.

Agraharamdars.

Agraharamdars—Suit to eject tenants—Jurisdiction of Civil or Revenue Court—*Madras Estates Land Act* (I of 1908), Ss. 3 (2), 6 (1), 8—Presumption—Land revenue alone granted—Terms of grant—Evidence—Tenants, whether affected—Meaning of "acquired" in exception to S. 8.

A suit brought by an *agraharamdar* to eject tenants from the lands granted to him as a *surva inam* must be brought in a Revenue Court alone, as such an *inamdar* merely holds an "estate" within the meaning of S. 3 (2) of the *Estates Land Act*.

Sadasiva Iyer, J.—No distinction should be made between an *inamdar* and *seminadar* as to the presumption to be raised in respect of the *kudivaram* right in the land of which the *inamdar* or the *seminadar* is the proprietor.

The presumption ought to be that the *seminadar* or the *inamdar* is not owner of the *kudivaram* (a).

The same presumption should be raised in order to determine the jurisdiction of Civil Courts.

An *inamdar* cannot be said to "acquire" the *kudivaram* interest in the land within the meaning of the exception to S. 8 of the *Estates Land Act*, if the tenant either abandons or surrenders the land (b).

Agraharamdars—(Continued).

Spencer, J.—The mere use of the words "enjoy the produce of the land" in an *inam* grant does not connote anything more than an alienation of the revenue (c).

• Where there is nothing to show what was granted at the commencement of a tenancy, it must be presumed to be co-extensive with the duration of the tenure of the landlord (d).

The presumption is the same whether the grant was made by Government or by certain *Reddi* rulers.

• The correct rule to be applied by the Courts in India, in construing grants by former Governments, is the rule of English Law as to construction of grants to subjects by the Crown (e).

The presumption of occupancy rights in the tenants in *semindaris* was established by a long course of decisions before the introduction of the Madras Estates Land Act (f).

As regards *inams* and *agraharams*, if the *agraharamdar* or *inamdar* does not own the *kudivaram* right, they will fall under S. 3, cl. (2), of the Estates Land Act.

The Estates Land Act has, in this respect, essentially altered the position as to *inams* (g).

There is no presumption that an *inam* grant includes both *melvaram* and *kudivaram* rights; the *inamdar* is bound to prove his title to eject (h).

In the absence of conclusive evidence one way or the other, and when neither side is in a position to show where the jurisdiction lies, the natural presumption, which Courts have recognised about grants from the Crown being grants of revenue, comes into play and will have the effect of shifting the *onus* to the party to whom it is disadvantageous (i).

The principle applies even to minor *inams* in an *agraharam* (j).

Where minor *inamdars* sue to eject tenants, they must show that they let in the tenants at the beginning of their occupation (k).

The word "acquired" used in the exception to S. 8 of the Estates Land Act must be construed so as to include cases of surrender or relinquishment, but that must be read in conjunction with S. 6, sl. (1), and S. 3, cl. (7), so as to apply to cases where the land so "acquired" was in the possession of the *inamdar* for ten years, a period necessary to extinguish the right of a cultivator to claim that the land may be given to him for cultivation. *Aduamulli Suryanarayana v. Achutta Potanna*, 26 M.L.J. 99=22 Ind. Cas. 339=15 M. L. T. 268.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 11 Ind. Cas. 545; 10 M.L.T. 54; 21 M.L.J. 803; 19 Ind. Cas. 440; (1913) M.W.N. 282; 24 M.L.J. 288; 20 Ind. Cas. 753; 24 M.L.J. 655; 20 Ind. Cas. 769; (1913) M.W.N. 782; 24 M.L.J. 659. *F.*; 8 Ind. Cas. 865; 8 M.L.T. 376; (1910) M.W.N. 639; 30 M. 502; 2 M.L.T. 470. *Diss.* (b) 2 C.L.J. 570; 8 C.L.J.

Agraharamdars—(Concluded).

324; 13 C.W.N. 12; 15 Ind. Cas. 155. *R.* (e) 1 B. 523. *R.* (d) 19 Ind. Cas. 440; (1913) M.W.N. 282; 24 M.L.J. 288. *R.* (e) 6 B.H.C.R. A.O. J. 191. *R.* (f) 20 M. 299; 7 M.L.J. 251. *R.* (g) 8 Ind. Cas. 299; 8 M.L.T. 350; (1910) M.W.N. 566; 30 M. 502; 2 M.L.T. 470. *Diss.* (h) 8 Ind. Cas. 365; 8 M.L.T. 376; (1910) M.W.N. 639. *Diss.*; 4 M. 174; 15 M. 95; 16 M.L.J. 333; 1 M.L.T. 102. *F.* (i) 7 Ind. Cas. 358; 20 M.L.J. 526; 13 M. 60. *R.* (j) 6 Ind. Cas. 711; 34 M. 246; 7 M.L.T. 365; 20 M.L.J. 764; 11 Ind. Cas. 545; 21 M.L.J. 803; 10 M.L.T. 54. *R.* (k) 17 Ind. Cas. 246; 12 M.L.T. 313. *F.*

(2) *Agraharam* grant.—Grantee whether owner of *Kudivaram*—Presumption. See GRANT, No. 8, 16 M.L.T. 596.

Agra Tenancy Act.

See N.W.P. ACT II OF 1901.

Agreement.

(1) *Agreements to stifle prosecution in respect of an offence of a public nature, validity of—Compromise in respect of offences of a public nature but involving civil liability to an injured party, validity of.*

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal. Agreements of that class being founded upon the suppression of criminal offences have a tendency to subvert public justice and it is a well recognised rule that a person who has a public duty to perform should not be allowed to cause public injury in order to make a profit for himself. But there is no obligation on a person to forego his private rights and in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are of a public nature, to compromise or settle his private damage in any way he may think fit.

Where the consideration for a promise is to abstain from or withdraw a criminal prosecution for a non-compoundable offence, the promise cannot be enforced. But in cases like those of criminal breach of trust or embezzlement, where there is always a civil liability, a bond can be taken in acknowledgment of that civil liability, provided the stifling of the prosecution forms no part of the consideration. *Lachman Das v. Narain*, 17 O.C. 213.

PANDIT KANHAIYA LAL, A.J.C.

(2) *Agreement for partnership in respect of a lease for the farm and sale of drugs, validity of—Agreement by lessee to transfer a portion of the profits or losses resulting from a lease for the farm and sale of drugs—Preliminary decree, discretion of Court in passing—Civ. Pro. Code, O. XX, r. 15.*

Where the parties had agreed to start a business in partnership and to contribute capital therefor and to divide the profits and losses in fixed shares and a lease for the farm and sale of

Agreement—(Continued).

drugs was acquired in the name of the plaintiff after that agreement had been made, *held*, that the agreement was not illegal.

Held further, that the rules on the subject which have the force of law lay down no more than that the Government refuses to recognize any person for the purposes of management of the realisation of the Government demand other than the person or persons named as lessees. There is nothing in the rules to prevent a lessee agreeing to transfer a portion of the profits or losses resulting from the lease, to a third party (a).

Held, also, that under O. XX, r. 15, Civ. Pro. Code, it is within the discretion of a Court either to pass or not to pass a preliminary decree and a Court would make an improper use of this discretion if it passed a preliminary decree for the determination of points on which the parties had already agreed. *Merha Mussamat v. Kundan Lal*, 27 O. C. 193.

STUART and PANDIT KANHAIYA LAL,
A. J. CS.

References:—(a) 24 M. 401; 20 M.L.J. 337, R.

(3) Performance of one's part under arrangement made impossible—Effect—*Status quo ante*. See ACT I OF 1869 (OUPH ESTATES), No. 1, 22 Ind. Cas. 129.

(4) Agreement to pay money out of cheques coming into possession at a future date—Creates a valid equitable assignment. See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), No. 3, 22 Ind. Cas. 566.

(5) Agreement by a party to abide by decision of Court whether binding when suit not maintainable in law. See ACT VIII OF 1885 (BENGAL TENANCY), No. 71, 21 Ind. Cas. 958.

(6) Agreement admitting liability and prescribing payment by pro-notes—Pro-notes materially altered—Suit upon pro-notes dismissed—Suit upon agreement if lies. See CEYLON CIVIL PROCEDURE ACT, No. 1, 18 C.W.N. 617.

(7) Agreement to compound a non-compoundable offence—Effect—Entering into agreement after due deliberation whether makes it lawful. See CONTRACT ACT, No. 20, 54 P.L.R. 1914.

(8) Agreement discovered to be void—Payment of compensation. See CONTRACT ACT, No. 53, 16 Bom. L.R. 62.

(9) Conditional adoption—Widow stipulating for continuing her powers over property—Agreement unreasonable. See HINDU LAW (ADOPTION), No. 1, 16 Bom. L.R. 57.

(10) Agreement to sell joint family property by one brother with the other brother's consent—Whether binding. See HINDU LAW (JOINT FAMILY), No. 2, 12 A.L.J. 52.

(11) Agreement to sell whether gives any title to property. See HINDU LAW (WIDOW), No. 7, 22 Ind. Cas. 669.

Agreement—(Concluded).

(12) Female heirs—Agreement giving up right of survivorship—Validity. See HINDU LAW (WOMAN'S ESTATE), No. 1, 26 M.L.J. 479.

(13) Agreement to pay money after a certain event—Breach of—Suit for money—Limitation. See LIMITATION ACT (1908), No. 82, (1914) M.W.N. 264.

(14) Letter embodying agreement to transfer—Recital of possession of immovable property passed—Agreement to sell—No registration necessary. See REGISTRATION ACT (1908), No. 11, 21 Ind. Cas. 777.

(15) Agreement for re-conveyance of property is not compulsorily registrable—Suit for specific performance. See REGISTRATION ACT (1908), No. 9, 16 Bom. L.R. 582.

(16) Agreement of sale—Condition for return of earnest money on non-approval of title by purchaser's solicitor—Non-approval must be reasonable and not *mala fide*. See SALE, No. 13, 24 Ind. Cas. 452.

Agricultural Lease.

Law applicable to. See LANDLORD AND TENANT, No. 26, (1914) M.W.N. 723.

Alienation of Land Act (Punjab).

See PUNJAB ACT I OF 1900.

Aliyasantana Law.

(1) Aliyasantana law—Ejaman, removal of—Grounds—Limitation Act (1908), Sch. I, Arts. 44, 91 and 144—Alienation partly binding—Charge.

Where an *ejaman* of an *Aliyasantana* family sets up a title to family properties in himself and alienates them, and does not discharge the family debts when funds are available, and his conduct is inconsistent with the interests of the family, he is liable to be dismissed (a).

A suit by an *aliyasantana* family to recover possession of the family properties alienated by its *ejaman*, not being a suit "to set aside an instrument" within the meaning of Art. 91 of the Limitation Act, is governed by Art. 144 of the Act (b).

The portion of the consideration found to be binding on the family is a charge on the family property. *Kunhanna Shetty v. Timmaju*, 27 M.L.J. 60=24 Ind. Cas. 246.

WHITE, C J, and SESHAGIRI AYYAR, J.

References:—(a) 7 Ind. Cas. 158=34 M. 481=(1910) M.W.N. 293=8 M.L.T. 159. (b) 14 M. 26; 14 M. 101, F.; 15 Ind. Cas. 365=(1912) M.W.N. 383=11 M.L.T. 198=22 M.L.J. 404; 30 M. 18=1 M.L.T. 412; 17 Ind. Cas. 4=36 M. 575=12 M.L.T. 207=23 M.L.J. 306=(1913) M.W.N. 1112; 28 M. 349=15 M.L.T. 228, D.

(2) Adoption of sole male—Validity—Customs—Proof of—*Bhotala Pandia's Kattukat-tale*—Courts not bound to take judicial notice of—Inconsistency with other customs—No criterion to test validity of customs—S. 57, Evidence

Aliyasantana Law—(Concluded).

Act—Difference between legislative enactments and customs—Facts necessary to be proved in case of latter—Adoption—Difference between Hindu Law and Aliyasantana law. The Secretary of State for India in Council represented by the Collector of South Canara *v. Santaraja Shetty alias Bhojapparasa Binnani*, 25 M.L.J. 411 = 14 M.L.T. 348 = 21 Ind. Cas. 432 = (1914) M.W.N. 333. See Final Part, 1913, Col. 280.

Alluvion.

(1) Settlement of alluvial land by trespasser—Raiyat bona fide taking settlement—Rights of the raiyat. See ACCRETION, No. 1, 19 C.L.J. 595.

(2) Alluvion and diluvion—Riparian owners in Fyzabad—Custom of dhar-dhura—Ikrarnamas filed by riparian owners—Effect. See REGULATION XI OF 1825 (BENGAL), No. 1, 23 Ind. Cas. 224.

Alluvion and Diluvion Regulation.

See REG. XI OF 1825.

Alteration.

(1) *Document—Material alteration—Suit based on—Revision.*

Held, that where a document has been materially altered so as to cast a definite liability on the defendant, a suit based thereon is rightly dismissed and the Chief Court will not interfere on revision. *Per Ganga Nath v. Taja and Fattah Sher*, 28 P.W.R. 1914 = 70 P.L.R. 1914 = 23 Ind. Cas. 596.

BEADON, J.

References:—103 P.R. 1883; 91 P.R. 1900, R.

(2) Negotiable instrument—Material alteration—Invalidity of the instrument—Cases of instrument tainted by forgery at the time of creation—Applicability of the principle to such cases. See PROMISSORY NOTE, No. 3, 15 M.L.T. 205.

Alternative Claims.

Suit for possession as full owner—Alternative claim for pre-emption. See PRE-EMPTION, No. 20, 12 A.L.J. 798.

Alternative Relief.

Prayer for—Right to original relief whether waived. See MORTGAGE (GENERAL), No. 27, 216 P.L.R. 1914.

Amendment.

(1) *Amendment—Claim for fresh relief—Addition of—Date of institution of suit—Effect from such date—Addition of claim barred since date of suit—Not to be allowed by way of amendment—Amendment asked for in time—Refusal by lower Court—Appellate Court—Power to grant amendment.*

If a fresh relief or a new cause of action is allowed to be introduced into the plaint by way of amendment, the amendment relates back to the date of the institution of the suit (a).

Amendment—(Continued).

In the absence of any special circumstances, a plaintiff will not be allowed to amend by claiming a fresh relief which since the institution of suit has become barred (b).

If an amendment has been asked for within the period of limitation, the fact that the first Court wrongly disallowed it will not prevent an appellate Court from giving effect to it, even though the appellate order is passed after the period of limitation (c). *Nemasa v. Ramkrishna*, 10 N.L.R. 32 = 23 Ind. Cas. 165.

MITRA, OFFG. A.J.O.

References:—(a) 1 N.L.R. 117, F.; 2 N.L.R. 79, R. (b & c) 56 L.J.Q. B. 621 (622), R.

(2) *Amendment—Decree—No application by judgment-debtor—Strangers bona fide acquiring rights under decree—Amendment not allowed.*

In the absence of any application by the judgment-debtor to alter the decree, and where rights under the decree as existent have been bona fide acquired by third parties, it would be improper for the Court to exercise its powers by way of amendment of the decrees. *Lan Maung v. Momein Bee Bee*, 7 L.B.R. 81 = 22 Ind. Cas. 935.

HARTNOLL, O.C.J., and YOUNG, J.

Reference:—L.R. 1892 A.C. 547 (553), R.

(4) *Revision—Plaint—Amendment—Full Bench of Presidency Court of Small Causes—Jurisdiction to direct amendment of plaint—Amendment altering nature of suit.*

The Full Bench of the Presidency Court of Small Causes may, on an application for a new trial, allow a plaint to be amended, even though the suit was decided by a single Judge. An amendment of a plaint, even if it changes the nature of the cause of action and the suit, can, though unusual, be permitted when its effect is an avoidance of a multiplicity of suits, and a determination in the suit itself of the questions at issue between the parties.

The real restriction on the power of amendment of pleadings is that the parties should not be prejudicially affected. If the prejudice is such as can be compensated for by the payment of costs, then the Courts ought not to hesitate to permit the amendment if the ends of justice require it.

The High Court should only interfere with an order of a Small Cause Court where interference is necessary for the ends of justice. *Gangi Sait v. Ahmed Hussain Sait*, 22 Ind. Cas. 241.

TYABJI, J.

(4) *Amendment of plaint—Limitation—Expiry of—Change of relief—Power of Court to order amendment—Inference drawn—Laches—Want of consideration pleaded by defendant.*

Certain specified plots of land were mortgaged to the plaintiffs. There was a stipulation

Amendment—(Continued).

in the mortgage-deed that, if the mortgagees could not obtain possession of the plots, or if their possession was disturbed, they would be entitled to recover their money by sale of the mortgaged plots, or, by sale of the zemindari share to which these plots appertained or from the person and other property of the judgment-debtor. The suit was brought on the last day of limitation for sale of the specified plots. It appeared at a later stage that the plots in suit had changed hands in the meantime and for certain reasons could not be sold and the plaintiff applied for amendment of the plaint and asked for sale of the zemindari share. The Court below allowed the amendment.

Held that the cause of action for sale of the zemindari having become barred by limitation, the Court had no power to allow amendment of the plaint by introducing a new cause of action (a).

Held, further that, when a plaintiff does not bring a suit upon his mortgage for so long a time as seventeen years, the Court is entitled to draw an inference adverse to him either as to the passing of consideration or as to payment of interest (b). **Balkaran Upadhyaya v. Gaya Din Kalwar**, 12 A.L.J. 635=36 A. 370=24 Ind. Cas. 255.

RAFIQ and PIGGOT, JJ.

References :—(a) 8 A.L.J.R. 636, D. (b) 8 A.L.J.R. 368, R.

(5) *Decree, amendment of—Civ. Pro. Code, 1908, Ss. 151, 152—Decree, not inconsistent with the order in the judgment—Court, power of, to vary or alter the order and decree—Inherent power of Court, to give effect to its intention—Costs, decree for—Decree, amended in favour of persons other than applicants, by Court acting ex proprio motu—Power to amend, when appeal pending against the decree.*

A Court can, by virtue of its inherent power provided by S. 151, or by the power vested in it under S. 152 of the Code, alter or vary the order and the decree passed by it, although the decree is apparently not inconsistent with the order in the judgment, when it finds that the language of the ordering portion of the judgment is elliptical and ambiguous, and the order and the decree do not correctly state what was actually decided (a).

A suit was contested both in the Court of first instance and in the appellate Court by one among several defendants, and the appeal by the plaintiff was allowed and "the suit decreed with costs," and the decree prepared in the appellate Court gave costs against all the defendants. On an application for amendment of the decree for costs made by some of the non-contesting defendants.

Held, upon a consideration of the whole judgment passed in appeal, that the Court in deciding the case did not really intend to saddle all the defendants with costs, and as such the

Amendment—(Continued).

decree should be amended. And the Court, acting *ex proprio motu*, further directed that the order in favour of the applicants should also be extended to the cases of other defendants, although they did not join in the application for amendment of the decree.

A Court has the power under S. 152 of the Code to amend a decree, even when an appeal is pending in the higher Court against it (b). **Harmange Singh v. Ram Gopal Achari**, 20 C.L.J. 18.

CARNDUFF and RICHARDSON, JJ.

References :—(a) 37 C. 649 (657) and 30 Ch. D. 239, F. (b) L.R.P. 88, R.

(6) *Suit brought in wrong name—Amendment of plaint—Limitation.*

Where a plaintiff, intending to sue one person, by mistake enters the name of another, an amendment of the name, even if made after the period of limitation, does not bar the suit (a).

But where, under some mistake or error, the plaintiff intends to sue the wrong person, an amendment will not make the suit within time against the right person if it is already barred against him. **Narayana Sastrigal v. Mangalathammal**, 23 Ind. Cas. 764.

WALLIS and AYLING, JJ.

Reference :—(a) 1 T.L.R. 527, F.

(7) *Pleadings—Suit of one nature—Conversion into one of a different nature.* **Palakunath Kannamboth Imbichi Nair v. Manathanath Kotavachalil Ramar Nair**, (1913) M.W.N. 980=21 Ind. Cas. 935. See Final Part, 1913, Col. 233.

(8) Amendment ordered by High Court to be made by first Court—Amendment made by lower appellate Court if legal—Amendment order made under what power—O. VI, r. 18, Civ. Pro. Code (1908), applicability—Amendment made after fifteen days of order whether bad. See ACT I OF 1979 (CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE), No. 2, 22 Ind. Cas. 778.

(9) Plea taken at late stage—Amendment of plaint when may be allowed. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 1, 132 P. W.R. 1914.

(10) Pleadings faulty—Claim in plaint based on wrong grounds—No objection by defendant—Amendment. See CEYLON CIVIL PROCEDURE ACT, No. 1, 18 C.W.N.: 617.

(11) Negligence of Court's officers—Unintentional and accidental error in decree—Amendment of decree by correcting error—Inherent power of Court. See CIV. PRO. CODE (1908), No. 225, 21 Ind. Cas. 115.

(12) Of pauper petitions—Court's inherent power. See CIV. PRO. CODE (1908), No. 401, 26 M.L.J. 348.

(13) Of decree—Powers of Court—Whether pleadings also to be amended. See CIV. PRO. CODE (1908), No. 224, (1914) M.W.N. 107.

Amendment—(Continued).

(14) Error in the relief claimed due to an accidental slip—Record to be amended. See CIV. PRO. CODE (1908), No. 226, 12 A.L.J. 185.

(15) Amendment whether may be permitted to revive a barred claim—Court's power to amend—Circumstances under which amendment may be refused. See CIV. PRO. CODE (1908), No. 92, 17 M.L.J. 25.

(16) Amendment of plaint—Introduction of fresh cause of action which has become barred by limitation—Whether allowed. See CIV. PRO. CODE (1908), No. 260, 12 A.L.J. 833.

(17) Amendment—Pleadings—When allowed—Date of amendment—Date of presentation of plaint—Institution of suit deemed to be on latter date. See CIV. PRO. CODE (1908), No. 261, 62 P.R. 1914.

(18) Inherent power of Court—Amendment of decree to bring into conformity with judgment—Necessary for ends of justice—High Court's power of interference—Revision. See CIV. PRO. CODE (1908), No. 195, 23 Ind. Cas. 906.

(19) When may be allowed—Powers of Court. See CIV. PRO. CODE (1908), No. 223, 8 S.L.R. 28.

(20) Amendment when may be allowed—Objection against amendment in appeal against decree. See CIV. PRO. CODE (1908), No. 263, 8 S.L.R. 69.

(21) Of sale certificate—Powers of Court. See LIMITATION ACT (1908), No. 128, 19 C.L.J. 209.

(22) Amendment—Powers of—Civ. Pro. Code (1908), O. VI, r. 17. See LIMITATION ACT (1908), No. 25, 16 M.L.T. 241.

(23) Suit by a person in his private capacity—Subsequent prayer for a decree in the alternative as managing director of company—Amendment whether can be allowed. See LIMITATION ACT (1908), No. 62, 16 M.L.T. 251.

(24) Powers of Court to order. See MORTGAGE (GENERAL), No. 9, 15 M.L.T. 232.

(25) Of decree—Execution—Limitation. See MORTGAGE (REDEMPTION), No. 5, 22 Ind. Cas. 283.

(26) Amendment of plaint—Court's discretion. See PLEADINGS, No. 2, 19 C.L.J. 518.

(27) Agent appointed to carry on business of partnership—Right of agent to sue for dissolution of the partnership—Amendment of plaint—Formal defect. See POWER OF ATTORNEY, No. 2, 7 Bur. L. T. 202.

(28) Pre-emption—Suit based on Mahomedan Law—Custom found to be in existence—Effect—Whether amendment of plaint necessary. See PRE-EMPTION, No. 22, 12 A.L.J. 966.

(29) Agent authorised to enter appearance in suits—Power to sign amended plaint. See PRINCIPAL AND AGENT, No. 3, 7 Bur. L. T. 199.

Amendment—(Concluded).

(30) Amendment of claim when not to be allowed. See SALE, No. 3, 7 Bur. L.T. 69.

Ancient Documents.

(1) Proper custody of—Interference with discretion as to custody by appellate Court. See ACT VIII OF 1885 (BENGAL TENANCY), No. 24, 23 Ind. Cas. 773.

(2) Whether presumptive evidence of possession. See ACT VII OF 1885 (BENGAL TENANCY), No. 86, 19 C.W.N. 18.

(3) Deeds of endowment—Terms ambiguous—External evidence if admissible. See RELIGIOUS ENDOWMENTS, No. 1, 20 C.L.J. 312.

Annuity.

Annuity agreed to be paid to a person and heirs—Whether charge on the estate—Remedies open to annuitant. See HINDU LAW (GENERAL), No. 1, 27 M.L.J. 694.

Appeal.

1.—GENERAL.

2.—SECOND APPEAL.

3.—TO PRIVY COUNCIL.

—1.—General.

(1) Limitation—Appeal—Failure to file copy of the decree—Further time allowed for an appeal—Sufficient cause—S. 5 of Act IX of 1908—Civ. Pro. Code (1908), O. XLI, r. 1.

Held, that failure to present a copy of the decree appealed against within the time allowed for an appeal amounts to not filing the appeal at all, and time cannot be extended for the purpose of making up the deficiency, particularly when the appellant has already lost the opportunity once granted to him for doing so. *Achhar Singh v. Nikku*, 2 P.W.R. 1914=25 P.L.R. 1914=23 Ind. Cas. 319.

CHEVIS, J.

Reference :—8 P.W.R. 1911, F.

(2) Pauper—Application for leave to appeal as—Presentation of unstamped appeal memorandum along with it—Rejection of application—Subsequent stamping of memorandum of appeal—Expiry of period of limitation at date of stamping—Bar of limitation—Poverty not sufficient cause—Limitation Act, s. 5—Mistake of counsel—Failure of Court Officers to inform—Refund of Court-fee—Not allowed.

An unstamped memorandum of appeal was along with the appellant's application to be allowed to appeal as a pauper, filed before the period of limitation expired. But, the application for leave to appeal as a pauper having been rejected, the memorandum of appeal was stamped afterwards, by which time the period of limitation for filing the appeal expired.

Held, that it was only when it was duly stamped that the memorandum of appeal became one that could be acted on by the Court, and that it became time-barred when it was received by the Court duly stamped.

Appeal—(Continued).**—1.—General—(Continued).**

Held, also, that poverty was not a sufficient cause within the meaning of S. 5 of the Limitation Act for admitting an appeal after the ordinary period of limitation prescribed therefor has expired.

Where the counsel for the appellant applied for the refund of the Court-fee paid on the appeal on the ground that he was misled by the practice of the Court and that the clerk of the Court failed to inform him and to decline to receive the fee.

Held that it was not obligatory on the Court Clerk to have informed him and that the refund could not be ordered, because counsel could not have been legally heard at all on the question of limitation if he had not presented a duly stamped memorandum. *S. Annamalai v. O. M. M. R. M. Chetty Firm*, 7 L.B.R. 90=22 Ind. Cas. 884.

HARTNOLL, OFFG. C.J. and YOUNG, J.

References:—13 A. 305; 22 B. 849; 13 C. 78; 2 A. 241, R.

- (3) *Court-fee—Mortgage suit—Order absolute—Appeal against order absolute—Memorandum filed with 8 annas Court-fee instead of ad valorem—Extension of time by Court to pay deficit Court-fee—Payment of deficit Court-fee within time—Limitation—Appeal whether filed in time—Mistaken apprehension—Civ. Pro. Code, 1882, s. 592-A—Civ. Pro. Code, 1908, S. 149.*

The defendants in a suit upon a mortgage appealed against the order absolute. The appeal was lodged in time, but upon the memorandum of appeal a Court-fee of 8 annas only was attached. Exception was taken at the office whereupon the Judge held that *ad valorem* Court-fees must be paid. The appellants were granted time and the deficit Court-fee was paid. When the appeal was taken up for disposal, the District Judge held that the appeal was not filed in time as it must be deemed to have been presented on the day when the deficit Court-fee was paid. The appeal was, consequently, dismissed as barred:

Held, that the appellants by mistake treated the order as made in course of proceedings in execution of the preliminary decree and presented the appeal as a miscellaneous appeal against an order in execution proceedings; that, as there was no reason to hold that the appellants deliberately did not pay the Court-fee in the first instance, the appeal should have been treated as presented in time. *Hari Charan Dey v. Bakunth Nath Maukhopadhyaya*, 21 Ind. Cas. 866.

MOOKERJEE and HOLMWOOD, JJ.

References:—6 I.A. 126=2 A. 241; 19 C. 780; 20 C. 41; 27 C. 814=4 C.W.N. 818; 31 C. 75 and 2 Ind. Cas. 1, R.

- (4) *Question of law raised for first time in appeal, when may be allowed to be taken.*

Appeal—(Continued).**—1.—General—(Continued).**

When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon the facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But the course ought not in any case to be followed unless the Court is satisfied that the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. *Basi Mohan Malaker v. Gobinda Chandra Karmakar*, 22 Ind. Cas. 553.

MOOKERJEE and BEACHROFT, JJ.

Reference:—1892 A.C. 473 (480)=61 L.J.P.C. 50=67 L.T. 508=57 J.P. 21, F.

- (5) *Appeal—Practice—Evidence, conflicting—Opinion of first Court—Court of Appeal, duty of.*

In all cases in which the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it. *Bindubasini Debi v. Amar Chandra Bhowmik*, 22 Ind. Cas. 512.

CARNDUFF and RICHARDSON, JJ.

Reference:—21 C. 279, F.

- (6) *Public road—Obstruction, suit for removal of—Special damage, proof of—Pleadings—Admissions by one defendant whether binding on other defendants—Appeal, by defendant against whom suit dismissed, whether lies.*

No suit will lie for the removal of an obstruction to a public road except upon proof of special damage to the plaintiff.

An admission in the pleading of one defendant is in no way admissible against or binding on a co-defendant (a).

The appeal of a defendant against whom a suit had been dismissed with costs should not be entertained. *Haji Heyat Baksh v. Musammat Lachminia*, 22 Ind. Cas. 916.

COXE and CHATTERJEE, JJ.

References:—(a) 15 C. 460; 3 C. 20 (F.B.); 25 C. 793 and 5 C.W.N. 285, R.

- (7) *Application asking a Munsif to take criminal action himself against a person—Sanction to prosecute—Appeal to the District Judge—Jurisdiction.*

Where an application was made to a Munsif asking him to take action himself against a certain party and to send him to a Criminal Court to be tried there for various offences,

Appeal—(Continued).**—1.—General—(Continued).**

without asking the Court for sanction to prosecute those persons, and the Munsif declined to take any action, held that no appeal lay to the District Judge against the order of the Munsif. **Bhagirathi v. Suraj Mal**, 12 A.L.J. 684 = 15 Cr. L.J. 575 = 25 Ind. Cas. 827.

CHAMBER, J.

- (8) *Practice—Second appeal—Appeal from decision of appellate Court rejecting appeal as time-barred is a second appeal—Limitation Act (IX of 1908), S. 5.*

An appeal from the decision of the lower appellate Court rejecting an appeal as barred by limitation is a second appeal.

Where a Judge once provisionally admits an appeal to the file in the absence of the respondent, it is competent to him to entertain at the hearing the objection that the appeal was presented beyond time. **Raoji Keshav Deshmukh v. Krishna Rao Anand Rao**, 16 Bom. L.R. 516 = 38 B. 613.

SCOTT, C.J., and BATCHELOR, J.

- (9) *Admission of appeal presented after time—Discretion of Court—Discretion must be legal and regular—Presentation of appeal to a wrong Court not sufficient cause—Ss. 5, 14, Limitation Act (1908).*

Discretion when applied to a Court of law means discretion guided by law. It must not be arbitrary, vague and fanciful, but legal and regular.

The presentation of an appeal to a wrong Court through a mistake in or ignorance of law is not a sufficient cause for admitting an appeal after time.

In an appeal filed after its time, the appellant should file his memorandum of appeal and state in it the grounds on which he asks the Court to admit it after time. **Nga Po Kan v. Nga Shwe Dat**, 7 Bur. L.T. 250.

MCCOLL, J.C.

- (10) *Practice—Madras High Court—Admission Court excusing delay—Order subject to objection.*

An order of the Admission Court excusing delay in the payment of a deficient Court-fees on an appeal is, according to the practice of the High Court of Madras, made subject to objection before the Court hearing the appeal and its decision thereon. **Acharath Parakkat Kunhammad v. Acharath Bappan Karnavan**, 28 Ind. Cas. 946.

MILLER and TYABJI, JJ.

- (11) *Appeal—Decision in favour—Finding against—Appeal, whether competent.*

A party has no right to appeal against a decision in his favour on the ground that one of the findings is against him. **Ahmadunnissa v. Gulzari Lal**, 24 Ind. Cas. 86.

RAFIQUE and PIGGOTT, JJ.

Appeal—(Continued).**—1.—General—(Continued).**

- (12) *Appeal—Appealable cases—Judgment—Lower Court to pronounce opinion on all issues—Misconstruction of document—Ground for second appeal.*

In appealable cases, the Courts below should, as far as possible, pronounce their opinions on all the important points raised, so as not to necessitate a remand (a).

The mis-construction of a document is a ground for second appeal (b). **Palaniandy Chetty v. Kambaraya Chetty**, 24 Ind. Cas. 87.

TYABJI and SPENCER, JJ.

References:—(a) 10 M.L.A. 476 = 19 Eng. Rep. 1052 = 5 W.R. (P.C.) 63, F. (c) 18 C. 28 = 17 I.A. 122, R.

- (13) *Appeal—Two orders in two execution cases—One joint appeal, legality of.*

If there are two distinct orders in two separate execution proceedings, their propriety cannot be questioned in one joint appeal. **Rakhal Chandra Tewari v. Maumotha Nath Mitter**, 24 Ind. Cas. 438.

MOOKERJEE and BEACHCROFT, JJ.

*References:—*15 Ind. Cas. 897 = 16 C.L.J. 591 = 17 C.W.N. 526, Distd.; 10 Ind. Cas. 415 = 15 C.W.N. 994, F.

- (14) *Appeal, if lies—Appeal against preliminary decree—Final decree, passing of, before filing of appeal—Final decree signed after filing of appeal—Civ. Pro. Code (1908), S. 97.* **Khirodamoyi Dasi v. Adhar Chandra Ghose**, 18 C.L.J. 321 = 21 Ind. Cas. 516. See Final Part, 1913, Col. 237.

- (15) *Time requisite for obtaining copies—Intervention of Sundays—Time for appeal how to be calculated.* **Ramaswami Chetty v. Ramanathan Chetty**, 14 M.L.T. 194 = 25 M.L.J. 354 = (1913) M.W.N. 805 = 21 Ind. Cas. 192. See Final Part, 1913, Col. 238.

- (16) *Whether all appeals are by way of rehearing—English and Indian Law.* **Raja of Venkatagiri v. Mukhu Narasayya**, 8 M.L.T. 258 = 7 Ind. Cas. 202 = 37 M. 1. See Final Part, 1910, Col. 219.

- (17) *Practice—No appeal—Lower Court decrees entirely favourable—Not even when res judicata.* **Secretary of State for India v. Saminatha Kavundan**, 10 M.L.T. 291 = (1911) 2 M.W.N. 303 = 21 M.L.J. 947 = 12 Ind. Cas. 167 = 37 M. 25. See Final Part, 1911, Col. 185.

- (18) *Order refusing grant of Letters of Administration with will annexed—Decree—Appeal—Court-fees.* See ACT X OF 1865 (SUCCESSION), No. 15, 22 Ind. Cas. 98.

- (19) *Appeal against order passed under the Companies Act—Three weeks' notice—Appellant's duty to be prompt.* See ACT VI OF 1882 (COMPANIES), No. 16, 100 P.L.R. 1914.

- (20) *Order appointing guardian—Appeal.* See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 85, 7 S.L.R. 90.

Appeal—(Continued).**—1.—General—(Continued).**

(21) Ward of Court—Court's power to restrain unsuitable marriage—Appeal—Revision. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 22, 20 C.L.J. 91.

(22) Order removing guardian and appointing another guardian—Whether appeal lies. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 32, 20 C.L.J. 298.

(23) Order appointing guardian on furnishing security—Appeal. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 6, 24 Ind. Cas. 302.

(24) Order dismissing petition for adjudication for abuse of process whether appealable. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 46, 7 Bur. L.T. 53.

(25) Appeal from decision of Additional Judge whether lies to District Court or High Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 45, 12 A.L.J. 1105.

(26) Power of District Judge to dispossess third persons of property belonging to insolvent—Appeal—Leave to appeal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 20, 12 A.L.J. 1273.

(27) Suit under Dekkhan Agricultural Relief Act—Appeal—Revision—Jurisdiction. See ACT XVII OF 1879 (DEKKHAN AGRICULTURAL RELIEF), No. 2, 16 Bom. L.R. 756.

(28) Application for re-hearing of appeal refused—Whether appeal lies. See ACT VIII OF 1885 (BENGAL TENANCY), No. 74, 19 C.L.J. 310.

(29) Suit for ejectment in Revenue Court—Plaintiff denied that defendant entitled to possession as proprietor—Question of proprietary title—Appeal—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 20, 12 A.L.J. 251.

(30) Suit against ex-proprietary tenant for ejectment—Valuation. Court-fee—Appeal. See ACT II OF 1901 (AGRA TENANCY), No. 21, 12 A.L.J. 933.

(31) Preparation of partition proceeding—Objection as to land held in severalty—Proprietary title—Appeal—Jurisdiction. See ACT III OF 1901 (U.P. LAND REVENUE), No. 11, 22 Ind. Cas. 949.

(32) Order of Assistant Collector referring parties to Civil Court—Not a decree—No appeal. See ACT III OF 1901 (U.P. LAND REVENUE), No. 10, 23 Ind. Cas. 656.

(33) *Forum* of appeal from order of Revenue Court disallowing objection to partition. See ACT III OF 1901 (U.P. LAND REVENUE), No. 12, 23 Ind. Cas. 965.

(34) Order dismissing pre-emption suit for non-payment of purchase money within time appealable as decree—Revision against such order not entertainable by second appellate Court. See ACT XVIII OF 1876 (OUDE LAWS), No. 7, 24 Ind. Cas. 109.

Appeal—(Continued).**—1.—General—(Continued).**

(35) Powers of Chief Court under amending Act I of 1912. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 19, 44 P.L.R. 1914.

(36) Lower Appellate Court's duty in reversing judgment. See APPEAL (SECOND APPEAL), No. 4, 19 C.L.J. 385.

(37) Private arbitration—Appeal—Jurisdiction. See AWARD, No. 4, 19 C.L.J. 260.

(38) Award—Decree—No appeal. See AWARD, No. 9, (1914) M.W.N. 865.

(39) Party not appealing—Power to reverse decree against him—Ground of reversal common—Power of appellate Court. See BENAMI TRANSACTIONS, No. 5, 23 Ind. Cas. 620.

(40) Preliminary decree—Appeal—Final decree—Objection to preliminary decree without appealing from same. See CIV. PRO. CODE, (1882), No. 3, 24 Ind. Cas. 18.

(41) Execution of decree—Sale proclamation—Valuation of mortgaged properties to be sold—Acceptance of decree-holder's valuation—Order whether appealable. See CIV. PRO. CODE (1908), No. 88, 22 Ind. Cas. 548.

(42) Order of remand—Appeal when lies. See CIV. PRO. CODE (1908), No. 451, 162 P.L.R. 1914.

(43) Trial on issues—Remand order—Direction to call for particular kind of evidence—Power of appellate Court. See CIV. PRO. CODE (1908), No. 453, 22 Ind. Cas. 128.

(44) Findings in an account suit—Preliminary decree—Final decree passed after completion of accounts—Appeal—Practice. See CIV. PRO. CODE (1908), No. 8, 16 Bom. L.R. 206.

(45) Grant of review—Appeal—Insufficient stamp—Court hearing insufficiently stamped application for review if acts without jurisdiction. See CIV. PRO. CODE (1908), No. 468, 21 Ind. Cas. 943.

(46) Appeal—Remand order—Incidental proceedings in—When can be questioned. See CIV. PRO. CODE (1908), No. 138, 10 N.L.R. 28.

(47) Preliminary findings—No preliminary decree drawn up—Appeal—Duty of Court to draw up decree—Practice. See CIV. PRO. CODE (1908), No. 136, 16 Bom. L.R. 67.

(48) Conditional order setting aside *ex-parte* decree—Condition not fulfilled—Extension of time—Effect of conditional order—Appeal from order. See CIV. PRO. CODE (1908), No. 287, 12 A.L.J. 38.

(49) Order of appellate Court returning plaint for presentation to proper Court—Legality—Appeal. See CIV. PRO. CODE (1908), No. 163, 12 A.L.J. 21.

(50) Decree for possession on condition of paying an amount of money—Extension of time for payment—Objections of judgment-debtor disallowed—Appeal. See CIV. PRO. CODE (1908), No. 90, 12 A.L.J. 12.

Appeal—(Continued).**—1.—General—(Continued).**

(51) Claim petition filed by trustees claiming under trust deed—Trust deed found to be for benefit of judgment-debtor—Claim disallowed—Finality of order—Appeal. See CIV. PRO. CODE (1908), No. 335, 21 Ind. Cas. 748.

(52) Appeal from order granting review when lies. See CIV. PRO. CODE (1908), No. 157, 22 Ind. Cas. 773.

(53) Order under O. XLI, r. 11, (1), Civ. Pro. Code—Appeal—Revision. See CIV. PRO. CODE (1908), No. 443, 191 P.L.R. 1914.

(54) Execution of Small Cause Court decree—Order directing arrest of surety if appealable. See CIV. PRO. CODE (1908), No. 68, 20 C.L.J. 129.

(55) Partition suit—Preliminary decree—Appeal—Final decree—No appeal against it—No bar to the hearing of appeal against preliminary decree. See CIV. PRO. CODE (1908), No. 13, 12 A.L.J. 876.

(56) Appellate Court's order refusing to stay execution pending appeal—Whether appeal lies against the order. See CIV. PRO. CODE (1908), No. 441, 27 M.L.J. 171.

(57) Application for rateable distribution—Order whether appealable. See CIV. PRO. CODE (1908), No. 116, 23 Ind. Cas. 422.

(58) Order rejecting plaint—Appeal. See CIV. PRO. CODE (1908), No. 271, 80 P.R. 1914.

(59) Decree against wrong representative—Execution—Property recovered—Rightful representative substituted—Property restored to person who had been in possession—Order not appealable. See CIV. PRO. CODE (1908), No. 375, 222 P.L.R. 1914.

(60) Revision application treated as appeal. See CIV. PRO. CODE (1908), No. 73, 18 C.W.N. 1266.

(61) Finding of lower Court objected to in appeal but not disposed of by the Appellate Court—Whether such a finding is final. See CIV. PRO. CODE (1908), No. 26, 7 Bur.L.T. 249.

(62) Suit dismissed in lower Court and appeal preferred—Power of Appellate Court to permit appellant to withdraw from appeal with liberty to bring fresh suit. See CIV. PRO. CODE (1908), No. 380, 16 M.L.T. 186.

(63) Order granting review of judgment—Appeal. See CIV. PRO. CODE (1908), No. 462, 41 C. 746.

(64) Instalment decree—Appeal—Court fees how to be calculated. See CIV. PRO. CODE (1908), No. 40, 226 P.L.R. 1914.

(65) Appellate Court—Mode of letting in additional evidence. See CIV. PRO. CODE (1908), No. 454, 16 Bom. L.R. 641.

(66) No evidence offered in Court of first instance—Power of Appellate Court to call for additional evidence. See CIV. PRO. CODE (1908), No. 455, 16 M.L.T. 301.

Appeal—(Continued).**—1.—General—(Continued).**

(67) Order refusing to enforce security bond against surety—Appeal—Scope of S. 145, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 208, (1914) M.W.N. 714.

(68) Refusal by Court to remit award—Appeal. See CIV. PRO. CODE (1908), No. 155, 23 Ind. Cas. 862.

(69) Appellate Court's power to vary decree in favour of party not appealing. See CIV. PRO. CODE (1908), No. 459, 23 Ind. Cas. 886.

(70) Order directing abatement of suit—No appeal lies—Court entertaining appeal in non-appealable cases—Effect—Interference in second appeal. See CIV. PRO. CODE (1908), No. 2, 12 A.L.J. 1113.

(71) Order cancelling order for delivery of possession—Appeal whether lies. See CIV. PRO. CODE (1908), No. 80, 20 C.L.J. 433.

(72) Preliminary and final decrees, nature of—Omission of Court to embody decision in formal expression—Effect—Appeal. See CIV. PRO. CODE (1908), No. 14, 20 C.L.J. 476.

(73) Additional evidence admitted at hearing of appeal—Legality—Judgment of appellate Court when to be set aside. See CIV. PRO. CODE (1908), No. 456, (1914) M.W.N. 795.

(74) Right of appeal governed by Act in force at time of filing appeal. See CIV. PRO. CODE (1908), No. 340, 253 P.L.R. 1914.

(75) Respondent whether can support judgment appealed from without filing cross objections—Matters not opened by either party cannot be reopened by appellate Court itself. See CIV. PRO. CODE (1908), No. 448, 24 Ind. Cas. 68.

(76) Dispossession by auction-purchaser—Application by dispossessed mortgagor for restoration of possession disallowed—Appeal. See CIV. PRO. CODE (1908), No. 89, 24 Ind. Cas. 93.

(77) Application to set aside execution sale—Dismissal for default—Dismissal of application for restoration—No appeal. See CIV. PRO. CODE (1908), No. 360, 19 C.W.N. 25.

(78) Decree against defendants on ground common to all—Appeal by all the defendants—Death of one of the appellants—Failure to bring his representative on record within 6 months—Partial abatement—Effect on surviving appellants. See CIV. PRO. CODE (1908), No. 314, 88 P.R. 1914.

(79) Order conditionally setting aside an order dismissing a suit for default—Appeal. See CIV. PRO. CODE (1908), No. 285, 12 A.L.J. 1270.

(80) Appeal out of time when proper Court-fee is paid—Delay if could be excused—Discretion of Court. See CIV. PRO. CODE (1908), No. 212, 27 M.L.J. 677.

(81) Reception of additional evidence in appeal—When appellants Court will not interfere even if wrongly admitted. See CIV. PRO. CODE (1908), No. 457, (1914) M.W.N. 864.

Appeal—(Continued).**—1.—General—(Continued).**

(82) Decisions when amount to preliminary decrees—Appeal. See CIV. PRO. CODE (1908), No. 137, 16 Bom. L. R. 954.

(83) Relief against co-respondent whether can be claimed by way of cross-objections. See CIV. PRO. CODE (1908), No. 449, 27 M. L. J. 740.

(84) Order of Court directing compulsory winding up—Persons entitled to appeal from order—Liquidators appointed *pendente lite* not competent to appeal. See COMPANY, No. 2, 73 P. R. 1914.

(85) Order to record compromise in decree—Appeal. See COMPROMISE, No. 7, 212 P. L. R. 1914.

(86) Decree in terms of compromise—Appeal—Second appeal—Decree itself not passed by consent of parties, but Court passing decree holding that there was a consent—Appeal whether lies. See COMPROMISE, No. 6, 16 M. L. T. 125.

(87) Appeal by some of the unsuccessful plaintiffs—Common ground—Power of appellate Court to set aside whole decrees. See CONTRACT ACT, No. 39, 11 P. L. R. 1914.

(88) Loan for bribe—Suit for money lent—Maintainability—Plea not raised before first Court cannot be ground of appeal. See CONTRACT ACT, No. 22, 84 P. W. R. 1914.

(89) Letters Patent—Appeal as to costs from Original side—Limitation—Time occupied in review not deducted—Reasonable cause for non-presentation within time, what is—When appellate Court should interfere with first Court's order as to costs. See COSTS, No. 2, 26 M. L. J. 356.

(90) Deficiency in Court-fees—Extension of time to make it good—Judicial discretion—Appellate Court not to interfere. See COURT-FEES, No. 2, 12 A. L. J. 709.

(91) Suit for possession—Plea of defendant that she was in possession in lieu of dower—Plea incidental—Appeal by defendant—Subject-matter in dispute in appeal—Court-fee payable—Court-fee not payable on amount of dower. See COURT FEES ACT, No. 17, 12 A. L. J. 481.

(92) Importance of document realized in Court of appeal—Opportunity to be given for proving document. See EVIDENCE, No. 6, 22 Ind. Cas. 833.

(93) Parentage as given in memo of appeal whether proof of legitimacy. See EVIDENCE ACT, No. 20, 21 Ind. Cas. 274.

(94) Power of appellate Court to add respondent after time. See HINDU LAW (ALIENTATION), No. 9, 215 P. L. R. 1914.

(95) Injunction—Discretionary order—Appeal—Appellant what to prove. See INJUNCTION, No. 2, 19 C. L. J. 305.

(96) Suit tried by one Court—Venue transferred to another Court after decree—Forum of appeal. See JURISDICTION (GENERAL), No. 2, 37 M. 477.

Appeal—(Continued).**—1.—General—(Continued).**

(97) Plaintiff claiming alternative reliefs obtaining a decree—Right of appeal. See KHORPOSH GRANT, No. 1, 19 C. W. N. 102.

(98) Appeal filed with delay—Appeal filed in wrong Court—Gross carelessness of pleader—Whether sufficient cause. See LIMITATION ACT (1908), No. 6, 9 P. L. R. 1914.

(99) Suit against several defendants decreed against some and dismissed with costs against others—Appeal by former set—Application for execution against plaintiff by latter set made 3 years after original decree but within 8 years of disposal of appeal—Whether application barred. See LIMITATION ACT (1908), No. 161, 22 Ind. Cas. 685.

(100) Delay in filing appeal—Circumstances of delay not explained in affidavit—Discretion of Court—Interference in appeal. See LIMITATION ACT (1908), No. 8, 12 A. L. J. 837.

(101) Memorandum of appeal—Some respondents' names omitted—*Bona fide* mistake—Time extended. See LIMITATION ACT (1908), No. 9, 12 A. L. J. 941.

(102) Failure to apply for copies at proper place—Negligence of pleader's clerk—Delay in filing appeal—No ground to excuse delay. See LIMITATION ACT (1908), No. 11, 7 S. L. R. 201.

(103) *Ex parte* order of predecessor excusing delay and admitting appeal—Jurisdiction of successor to consider question of delay at the final hearing of appeal after notice. See LIMITATION ACT (1908), No. 10, 16 M. L. T. 100.

(104) Appeals from decisions of Revenue Courts to District Judge—Applicability of Limitation Act. See LIMITATION ACT (1908), No. 1, 17 O. C. 254.

(105) Appeal filed beyond time—Sufficient cause—Application for copies—Time allowed. See LIMITATION ACT (1908), No. 18, 23 Ind. Cas. 874.

(106) Appellate Court can take cognizance of limitation when no further evidence required for decision. See LIMITATION ACT (1908), No. 3, 259 P. L. R. 1914.

(107) Duty of person applying for copies of Civil Court judgment and decrees—Application through agent—Application through post office—Calculation of time spent in obtaining copies—Time when may be extended—Discretion of appellate Court—Revision. See LIMITATION ACT (1908), No. 32, 10 N. L. R. 189.

(108) Mortgage—Foreclosure—Redemption—Order granting or refusing extension of time for payment—Appeal. See MORTGAGE (GENERAL), No. 40, 10 N. L. R. 150.

(109) Agreement to refer not originally binding becoming binding by acquiescence or acceptance of benefit—Question if should be allowed to be taken for the first time on appeal. See PARTNERSHIP, No. 4, 18 C. W. N. 1035.

Appeal—(Continued).**—1.—General—(Concluded).**

(110) Addition of party defendant at hearing of appeal—Effect on other defendants—Absence of prejudice. See *PUTNI*, No. 1, 18 C.W.N. 259.

(111) Order increasing remuneration of Receiver whether appealable. See *RECEIVER*, No. 4, 22 Ind. Cas. 352.

(112) Determination of course of appeal in land suits—Criterion. See *VALUATION OF SUIT*, No. 1, 10 P.L.R. 1914.

(113) Water—Use by villagers—Appeal by Government or parties interested. See *WATER*, No. 1, (1914) M.W.N. 788.

(114) Decree passed on award—Whether appeal lies. See *ARBITRATION*, No. 3-a, 17 O.C. 386.

—2.—Second Appeal.**(1) Findings of fact, when to be questioned—Value of evidence.**

The findings of fact cannot be disturbed by the second appellate Court, unless the appellant succeeds in showing that the Court below committed some error of law in arriving at its conclusions.

The question of what value should be attached to the evidence produced by the parties respectively is not a matter to be decided in second appeal. *Dulare Singh v. Sumer Singh*, 21 Ind. Cas. 95.

LINDSAY, J.C.

(2) Material irregularity—Second appeal on the ground of the lower Court refusing to take whole evidence—Party closing his case—Practice.

Held, that, where the first Court has recorded that a party has closed his case, that party cannot successfully urge in appeal that the Court refused to receive the whole of his evidence without proving conclusively that the record is wrong, specially when the objector is represented by counsel in the lower Court.

Held, also that the lower appellate Court ought specifically to dispose of the grounds of appeal urged before it. *Bhiwani v. Das Jhanda Ram*, 3 P.W.R. 1914=27 P.L.R. 1914=23 Ind. Cas. 352.

REID, C.J.

(3) Second appeal—Necessity—Previous mortgage—Act XVIII of 1884, as amended by Act IV of 1912, S. 40.

Held, that, where the lower appellate Court has found as a fact, after discussing each item of consideration, that no necessity has been proved, the Chief Court would not interfere with those findings on second appeal.

Held, also that the fact that a previous mortgage is more than 12 years old is of no importance when it is not shown that mutation with regard to it was effected more than 12 years

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

before suit. *Diwan Singh v. Bishna*, 31 P. W.R. 1914=111 P.L.R. 1914=23 Ind. Cas. 940.
SCOTT-SMITH, J.

(4) Second appeal—Lower Appellate Court's duty in reversing judgment.

The lower appellate Court is not bound to dispose *seriatim* of all the reasons given by the first Court, if it gave special reasons of its own for coming to an opposite conclusion. *Jatra Mohan Nandi v. Pitambar Mistri*, 19 C.L.J. 385.

JENKINS, C.J., and MOOKERJEE, J.

Reference:—12 W.R. 361 (362), *F*.

(5) Second Appeal—Court ignoring important evidence—Good ground of appeal—Pre-emption—Absence of good faith—Market value where to be allowed—Act XVIII of 1884, as amended by the Punjab Acts I and IV of 1912, S. 40.

Held, that, it is a good ground for, and a finding of fact is liable to be set aside in, a second appeal, where the lower appellate Court decides a question of fact by too exclusive attention to one particular piece of evidence, ignoring other important proof relating thereto (a).

Held, also, that, where in a pre-emption suit a ridiculously high price of the pre-empted property is alleged to have been paid and the circumstances also show that it has been inflated, the Court is justified in concluding that it has not been fixed in good faith and allowing only its market value. *Gobind Ram v. Hakim*, 76 P.W.R. 1914=174 P.L.R. 1914=24 Ind. Cas. 880.

JOHNSTONE, J.

Reference:—(a) 37 O. 293, *R*.

(6) Second appeal—Judgment—Meaning not clear.

The High Court set aside the judgment of the lower Court, not on the ground that it was erroneous, but on the ground of not knowing what it meant. *Debendra Nath Chowdhry v. Annada Hadl*, 19 C.L.J. 545.

JENKINS, C.J., and MOOKERJEE, J.

(7) Second appeal—Decision based on evidence not on the record—Admission by pleader in another suit—Weight to be attached.

In second appeal, the High Court reversed the judgment of the lower appellate Court based on evidence not on the record.

If a plaintiff relies upon any statement by the defendant or his pleader made in a previous litigation between the parties, that statement must be regularly proved. On proof of such statement, question arises as to the weight to be attached to it. *Moni Lal v. Uma Charan*, 19 C.L.J. 541.

JENKINS, C.J., and MOOKERJEE, J.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(8) *Second appeal—Mixed question of fact and law—Ownership.*

The defendants purchased the disputed land in execution of a money-decree against one B. Subsequently the predecessor of the plaintiffs purchased a half share of the said property from one G, who claimed to be co-sharer of B. In a question between the parties whether G had any interest in the property :

Held, that the mere fact that the cousins G and B, who were Mahomedans, lived together on the land, would not indicate that they were joint owners thereof.

That it was necessary to consider whether G was in possession of the land ; if so, what was the nature of that possession ? Was he in possession in his own right or by sufferance ? Did he ever cultivate the land ? Did he ever pay rent in respect thereof ? *Radha Kristo Saha v. Umesh Chunder Chuckerbutty*, 19 C.L.J. 539.

JENKINS, C.J., and MOOKERJEE, J.

(9) *Appeal—Execution proceedings—Second appeal—Party not allowed in second appeal to contest order setting-off decree—Practice.*

An appellant will not be allowed to raise for the first time in second appeal, the contention that a decree obtained by one of his judgment-debtors against the appellant's father, on whose death the appellant was brought on the record as his legal representative, cannot be set-off against a decree obtained by the appellant in his own right. *Raghunathasami Iyengar v. Janaki Ammal*, 23 Ind. Cas. 923.

SANKARAN NAIR and AYLING, JJ.

(10) *Appeal—Declaratory suit to protect reverendary interest in land—Value for purposes of appeal—Punjab Courts Act (XVIII of 1884), S. 40. Harnam Singh v. Ram Ditta*, 178 P. W.R. 1913 = 311 P.L.R. 1913 = 21 Ind Cas. 308. See Final Part, 1913, Col. 248.

(11) *Suit for rent (other than house-rent) if a suit of Small Cause nature—Second appeal if lies. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 12, 20 C.L.J. 494.*

(12) *Land Acquisition case—Second appeal when not allowed. See ACT I OF 1894 (LAND ACQUISITION), No. 28, 16 Bom. L.R. 72.*

(13) *Sale in contravention of terms of S. 46 (2), Central Provinces Tenancy Act, 1898—Point raised for first time in second appeal—Legality. See ACT XI OF 1898 (C. P. TENANCY), No. 3, 10 N.L.R. 42.*

(14) *Rent-suit below Rs. 100—Decision of amount of rent annually payable—Second appeal. See ACT VIII OF 1885 (BENGAL TENANCY), No. 56, 23 Ind. Cas. 416.*

(15) *Withdrawal of portion of claim in suit—Application for withdrawal in second appeal whether can be granted. See ACT VIII OF 1885 (BENGAL TENANCY), No. 38, 23 Ind. Cas. 777.*

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(16) *Decree on appeal under S. 69, Act VIII 1865—Second appeal—Interference with concurrent finding of lower Courts—Practice. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 4, (1914) M.W.N. 695.*

(17) *Suit of the kind mentioned in S. 180, Act II of 1901—Second appeal. See ACT II OF 1901 (AGRA TENANCY), No. 22, 12 A.L.J. 367.*

(18) *Suit for arrears of rent by assignee—Second appeal. See ACT II OF 1901 (AGRA TENANCY), No. 18, 12 A.L.J. 99.*

(19) *Fresh case set up in second appeal—Entertainability. See ACT III OF 1901 (U. P. LAND REVENUE), No. 16, 23 Ind. Cas. 860.*

(20) *Small Cause suit of value less than Rs. 2,500—Divisional Court confirming decree of first Court—Whether further appeal lies. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 10, 160 P.L.R. 1914.*

(21) *Unclassed suit—Same question involved in two decrees—Each decree less than Rs. 2,500—Both decrees combined exceeding Rs. 2,500—Further appeal whether lies. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 2, 129 P.L.R. 1914.*

(22) *Suit for succession to the holding of an occupancy tenant—Question whether common ancestor occupied it or not—Question of fact—No second appeal. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 6, 92 P.W.R. 1914.*

(23) *Suit for pre-emption—Land in dispute—Value at thirty years' Government revenue below Rs. 250—Pre-emptive price above that sum—Further appeal—Maintainability. See PUNJAB ACT II OF 1905 (PRE-EMPTION), No. 2, 26 P.R. 1914.*

(24) *Appeal from decision of Appellate Court rejecting appeal as time-barred is a second appeal. See APPEAL (GENERAL), No. 8, 16 Bom. L.R. 516.*

(25) *Misconstruction of document whether a ground for second appeal. See APPEAL (GENERAL), No. 12, 24 Ind. Cas. 87.*

(26) *Discretion exercised by Lower Appellate Court—Interference in second appeal. See CIV. PRO. CODE (1908), No. 438, 12 A.L.J. 889.*

(27) *Plea of res judicata whether may be taken for first time in second appeal. See CIV. PRO. CODE (1908), No. 21, 24 Ind. Cas. 12.*

(28) *Gaucher Land—Grant by Government whether inconsistent with the wishes and well being of the village community—Question of fact—No second appeal. See CIV. PRO. CODE (1908), No. 141, 12 A.L.J. 378.*

(29) *Misjoinder of parties and causes of action—Dismissal of suit—No second appeal. See CIV. PRO. CODE (1908), No. 280, 19 C.L.J. 316.*

(30) *Suit for declaration of title and recovery of possession—Ascertainment of mesne profits—Appeal—Remand—Decision with regard to*

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

possession whether a preliminary decree — Second appeal. See CIV. PRO. CODE (1908), No. 7, 19 C.L.J. 346.

(31) Vinchar Court — Decision — Appeal — Special appeal. See CIV. PRO. CODE (1908), No. 144, 16 Bom. L.R. 75.

(32) Compensation awarded under S. 95, Civ. Pro. Code—Appeal—Second appeal. See CIV. PRO. CODE (1908), No. 131, 21 Ind. Cas. 756.

(33) Appellant not to be allowed to raise new point in second appeal. See CIV. PRO. CODE (1908), No. 375, 292 P.L.R. 1914.

(34) Execution proceedings started against deceased judgment-debtor—Sale if may be set aside—S. 153, Bengal Tenancy Act, if bars second appeal in application to set aside sale. See CIV. PRO. CODE (1908), No. 73, 18 C.W.N. 1266.

(35) Dismissal of application for admission of second appeal—Order whether can be reviewed on the ground of new and important evidence. See CIV. PRO. CODE (1908), No. 444, 41 C. 809.

(36) Party not before lower appellate Court—Whether can be joined in second appeal. See CIV. PRO. CODE (1908), No. 288, 12 A.L.J. 1277.

(37) Power to grant adjournment—Discretion of Court—Interference in second appeal. See CIV. PRO. CODE (1908), No. 296, 24 Ind. Cas. 206.

(38) Lower appellate Court not giving as much weight to certain circumstances as High Court might have done if it were first appellate Court—Finding of first appellate Court based also on other facts—Legality. See CIV. PRO. CODE (1908), No. 142, 24 Ind. Cas. 383.

(39) Decree in terms of compromise—Appeal—Second appeal—Decree itself not passed by consent of parties, but Court passing decree holding that there was a consent—Appeal whether lies. See COMPROMISE, No. 6, 16 M.L.T. 125.

(40) Question of custom when can be taken up in second appeal. See CUSTOMS (PUNJAB—GENERAL), No. 1, 94 P.W.R. 1914.

(41) Alienation—Necessity—Question of fact—Second appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 12, 60 P.W.R. 1914.

(42) Concurrent finding as to receipts of consideration cannot be questioned in second appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 15, 86 P.W.R. 1914.

(43) Alienation—Question of necessity whether can be gone into in second appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 16, 88 P.W.R. 1914.

(44) Question of Mahomedan law being a defence to suit—Plea not taken in lower Courts not in grounds of appeal to Chief Court, whether to be allowed at hearing. See DECLARATORY SUIT, No. 4, 217 P.L.R. 1914.

Appeal—(Continued).**—2.—Second Appeal—(Concluded).**

(45) Recital in mortgage deed as to consideration—Admissibility in evidence against transferee of mortgagor—Finding based on such recital—Second appeal. See EVIDENCE ACT, No. 12, 21 Ind. Cas. 841.

(46) Point not raised in grounds of appeal not to be taken up in second appeal. See EVIDENCE ACT, No. 23, 47 P.L.R. 1914.

(47) Power of High Court to decide a case on merits in second appeal. See EVIDENCE ACT, No. 11, 108 P.W.R. 1914.

(48) Findings of fact arrived at on an erroneous view of law—Interference in second appeal. See FRAUDULENT TRANSFERS, No. 2, 23 Ind. Cas. 796.

(49) Question of fact—Whether can be made subject of second appeal on ground that the evidence raises a presumption or shifts the burden of proof. See INAM, No. 1, 22 Ind. Cas. 369.

(50) Finding on fact without evidence—Interference in second appeal. See INJUNCTION, No. 4, 80 P.W.R. 1914.

(51) Claim cognizable by Small Cause Court—Second appeal—High Court's power to treat it as revision petition. See LIMITATION ACT (1908), No. 101, 7 L.B.R. 133.

(52) Concurrent findings of fact—Finding not based on evidence—Power of High Court to interfere in second appeal. See MAHOMEDAN LAW (JOINT FAMILY), No. 1, 239 P.L.R. 1914.

(53) Question of fact cannot be raised or argued in second appeal. See MAHOMEDAN LAW (MARRIAGE), No. 1, 50 P.W.R. 1914.

(54) Point taken for the first time in second appeal—Maintainability—Question as to payment of consideration whether can be raised in second appeal. See MORTGAGE (GENERAL), No. 4, 21 Ind. Cas. 554.

(55) Finding of fact when can be questioned in second appeal. See MORTGAGE (REDEMPTION), No. 2, 21 Ind. Cas. 251.

(56) Second appeal only against one of two decrees in cross appeals disposed of by one judgment when maintainable. See RES JUDICATA, No. 2, 21 Ind. Cas. 264.

(57) Question whether time is of the essence of contract—Finding of fact—Interference in second appeal—Contract for sale of immoveable property—Breach—Default of purchaser—Earnest money—Forfeiture. See SALE, No. 11, 27 M.L.J. 482.

(58) Question whether a person is ostensible owner—Second appeal. See TRANSFER OF PROPERTY ACT, No. 13, 12 A.L.J. 411.

(59) Misapprehending evidence whether ground for second appeal. See WATER, No. 2, 21 Ind. Cas. 893.

—3.—To Privy Council.

(1) *Interlocutory matters—Leave to appeal.*

Their Lordships would be very slow to give leave to appeal to bring up a case at an

Appeal—(Continued).**—3.—To Privy Council—(Continued).**

interlocutory stage. *Nayan Yanika Ranga Rau v. Ramakrishnaiah*, (1914) M.W.N. 170 = 23 Ind. Cas. 896 (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

(2) *Concurrent findings of fact by Courts in India—Ordinary presumption therefrom—Question relating thereto—Not a substantial question of Law* S. 110, Civ. Pro. Code, 1908.

Where, from certain facts proved, two Courts arrived at a concurrent finding of fact, viz., that the appellant authorised a certain person to pledge certain jewels on her behalf, and where the appellant sought to obtain leave to appeal to the Privy Council,

Held, that the question whether the Courts were entitled to draw this very ordinary presumption does not involve a substantial question of law and that leave ought to be refused.

A question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is not a substantial question of law which the appeal to the Privy Council involves (a). (*Vide* S. 110 Civ. Pro. Code 1908). *Thein Noo v. Ramasawmy Chetty*, 7 L.B.R. 103.

HARTNOLL, OFFG. C.J. and YOUNG, J.

References:—(a) 23 A. 94 (98), R.

(3) *Appeal to His Majesty in Council against an order rejecting an application for review, maintainability of—Civ. Pro. Code, S. 109, cl. (a)*. *Madabir Bakhsh Singh v. Sheoraj Singh*, 16 O.C. 264 = 22 Ind. Cas. 259. See Final Part, 1913, Col. 252.

(4) *Document, printing of—Exclusion—Privy Council appeal—Irrelevant to subject matter of appeal—High Court Rules, Appellate Side, r. 17*. *Khironamoyee Das v. Frodyot Kumar Adday*, 18 C.L.J. 122 = 21 Ind. Cas. 425. See Final Part, 1913, Col. 252.

(5) *Leave to appeal to Privy Council—Appeal, if lies—Decree in apportionment case—Land Acquisition Act (1 of 1894), S. 54*. *Ram Soshi Ray v. C. E. Grey*, 18 C.L.J. 123 = 21 Ind. Cas. 427. See Final Part, 1913, Col. 252.

(6) *Leave to appeal to Privy Council—Interlocutory order—Order not deciding rights of parties—Order of remand—Final order—Civ. Pro. Code (1908), S. 109—Suit, frame of, not bad—S. 91, Chota Nagpur Tenancy Act, Krishna Chandra Ghosh v. Maharajah Ram Narain Singh Bahadur*, 18 C.L.J. 124 = 21 Ind. Cas. 430. See Final Part, 1913, Col. 255.

(7) *Interference with concurrent findings on issues of fact—Practice of Privy Council. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.*

Appeal—(Concluded).**—3.—To Privy Council—(Concluded).**

(8) *Jurisdiction of High Court to set aside concurrent findings of lower Courts—Interference of Privy Council. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 4, (1914) M.W.N. 695.*

(9) *Practice—Point not taken before Courts below—Privy Council—Refusal by, to consider the point. See ASSIGNMENT, No. 2, 26 M.L. J. 473.*

(10) *Special leave to appeal when may be granted—Consolidated suits—Value. See CIV. PRO. CODE (1908), No. 169, (1914) M.W.N. 162.*

(11) *Failure to furnish security for costs—Dismissal of appeal—Appeal to Privy Council whether lies. See CIV. PRO. CODE (1908), No. 146, 12 A.L.J. 451.*

(12) *Grant of certificate under S. 103 (c), Civ. Pro. Code, 1903—Cases where the grant can properly be made. See CIV. PRO. CODE, (1908), No. 166, 7 S.L.R. 92.*

(13) *Application by representatives of deceased party to an appeal to have them brought on record—Application rejected by High Court—Whether appeal lies to the Privy Council. See LETTERS PATENT (BOMBAY), No. 1, 16 Bom. L.R. 195.*

(14) *High Court—Disciplinary jurisdiction—High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of the Letters Patent—Order granting leave to appeal whether may be reviewed at instance of Public Prosecutor. See LETTERS PATENT (CALCUTTA), No. 3, 41 C. 734.*

(15) *Order of Registrar of Privy Council dismissing appeal for non-prosecution if decree or order of Appellate Court—Limitation. See LIMITATION ACT (1877), No. 27, 18 C.W.N. 740.*

(16) *Order of Privy Council dismissing appeal for want of prosecution—Such an order is not an affirmance of the decree appealed from—Decree nisi for sale—Application for order absolute for sale—Limitation. See LIMITATION ACT (1877), No. 29, 16 Bom. L.R. 395.*

(17) *Application for leave to appeal—Time taken for obtaining copy of decree if may be excluded. See LIMITATION ACT (1908), No. 30, 18 C.W.N. 1066.*

(18) *Concurrent finding of fact based on no evidence—Right of Privy Council to interfere. See REGISTRATION, No. 2, 18 C.W.N. 817.*

Appointment.

(1) *Temporary appointment if signifies approval of fitness for permanent post. See DIGWARI TENURE, No. 1, 18 C.W.N. 1086.*

(2) *Writ of mandamus—Person holding office on conditional appointment if entitled to relief—Validity of appointment in question—If application entertainable before validity declared by suit. See MANDAMUS, No. 1, 18 C.W.N. 430.*

Arbitration.

- (1) *Arbitration—Submission—Contract that parties or their witnesses shall be heard or not as arbitrators chose—When valid—Parties' power to restrict or exclude evidence—How far exercisable—Failure to pay a claim—Whether a 'matter in difference.'*

A mere failure to pay a claim constitutes a matter in difference (a).

Where the reference provides for the arbitrators hearing the parties or their witnesses or not as they chose, *held* that the submission is not necessarily invalid *qua* a submission under the Indian Arbitration Act.

Where there are alternative methods of performing an agreement one of which is legal and the other illegal, the Court will presume that the parties intended to carry it out in the legal rather than in the illegal manner (b).

Parties are allowed to contract to curtail an inquiry before arbitrators by agreeing to rest their case on documentary evidence alone, provided it is sufficient to enable the arbitrators to really exercise a judicial discretion and not to decide haphazard or by chance (c). *Basrio Fadhoo Attorney of H. H. Sir Aga Sultan Mahomed Shah v. Mahomed Ladha*, 7 S.L.R. 113=24 Ind. Cas. 264.

PRATT, J.C., and KEMP, A.J.C.

References:—(a) 5 S.L.R. 4, R. (b) L.R. 8 Q.B. 202, R. (c) 49 L.T. 535, R.

- (2) *Arbitration—Party cannot revoke reference except on good cause.*

A party to a reference to an arbitration cannot revoke it except for good cause, as it stands on the same footing as all other lawful agreements. *In re M. A. Yappu Rowther*, (1914) M.W.N. 52=22 Ind. Cas. 548.

SADASIVA IYER, J.

References:—29 A. 13, F.; 12 M.I.A. 112, R.

- (3) *Reference to arbitration—Scope of words of reference—Joint Hindu family—Reference by manager whether binds other members of the family.*

Held that the words "debts whether due in virtue of mortgage bonds or other deeds or not" in a reference to arbitration were wide enough to cover a lease or usufructuary mortgage, the consideration of which was old debts.

The father or manager fully represents the family and a reference to arbitration by the father or manager will, in the absence of fraud or collusion, be binding on the other members of the family. What we have to look to is whether the reference was for the benefit of the family. To seek an adjudication on a claim disputed or liable to be disputed, in the cheapest way possible, would be the act of a prudent manager, especially if he believes that part of the claim is irrecoverable in law or in regard to the debtor's ability to pay (a). *Ramdayal v. Motiram*, 10 N.L.R. 74=24 Ind. Cas. 868.

MITTRA, OFFG. A.J.C.

References:—(a) 16 A. 231; 27 B. 187, F.

Arbitration—(Continued).

- (3-a) *Arbitration—Reference to arbitration, resiling from—Appeal against decree passed on award, grounds for.*

Held, that a party cannot resile from a reference to arbitration at his sweet will and pleasure, and it cannot avail him to show that having once agreed to the reference he afterwards repented of his action.

Where the parties to a suit referred the case to arbitration and a decree was made in accordance with the award of the arbitrators, *held*, that no appeal lies from such a decree except where the decree is in excess of or not in accordance with the award. *Chet Kunwar (Musammatt) v. Puttu Singh*, 17 O.C. 386.

LINDSAY, J.C.

- (4) *Arbitration—Reference by Court—No formal order of supersession—Proceeding after time with suit amounts to one.* *Chockkappa Mudaliar v. Ahmedullah Sahib*, 14 M.L.T. 388=(1913) M.W.N. 863=21 Ind. Cas. 558. See Final Part, 1913, Col. 254.

(5) *Agricultural land—Application to file agreement to refer to arbitration—Matter not cognizable by Civil Court—Agreement not to be accepted in part.* See CIV. PRO. CODE (1908), No. 473, 46 P.L.R. 1914.

(6) *Arbitration proceedings—Setting aside of reference during pendency of proceedings—Inherent jurisdiction wrongly exercised—Interference in revision.* See CIV. PRO. CODE (1908), No. 202, 12 A.L.J. 529.

(7) *Agreement to refer to—Suit filed notwithstanding—Procedure.* See CIV. PRO. CODE (1908), No. 476, 12 A.L.J. 757.

(8) *Pending suit—Private reference to arbitration—Stay of suit—Legality.* See CIV. PRO. CODE (1908), No. 477, 16 Bom. L.R. 653.

(9) *Reference by only some of parties—No objection as to non-joinder—Effect—Waiver—Refusal by Court to remit award—Appeal.* See CIV. PRO. CODE (1908), No. 155, 23 Ind. Cas. 862.

(10) *Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, if would invalidate award.* See CIV. PRO. CODE (1908), No. 469, 19 C.W.N. 165.

(11) *Reference of dispute with customers to arbitration by one partner—Others if bound—Question if one of law—Agreement to refer not originally binding becoming binding by acquiescence or acceptance of benefit—Partner charged with entering into agreement to refer negligently and improperly—Measure of damages—Onus of proof.* See PARTNERSHIP, No. 4, 18 C.W.N. 1025.

(12) *Examination of arbitrator as witness—Statements obtained as bearing on charge of*

Arbitration—(Concluded).

corruption if admissible to question award on the merits—Irregularity of procedure precluding proper inquiry—Award when may be set aside. See **AWARD**, No. 6, 18 C.W.N. 755.

Arbitration Act.

See **ACT IX OF 1899**.

Army Act (44 and 45 Vic., C. 58).

S. 136—Attachment of salary of Honorary Commissioned Officer in the Indian Subordinate Medical Department. See **CIV. PRO. CODE** (1908), No. 103, 17 O.C. 99.

Arrest.

Civil warrant not addressed to bailiff by name—Arrest—Legality. See **WARRANT**, No. 1, 15 Cr.L.J. 439.

Assam Labour and Emigration Act.

See **ACT VI OF 1901**.

Assam Land and Revenue Regulation.

See **REG. I OF 1886**.

Assessment.

Rate of—Jurisdiction of Civil Courts to question. See **SHIVAJIAMA TENURE**, No. 1, (1914) M.W.N. 388.

Assessors.

Judge asking two members of Bar present to appraise evidence—Procedure illegal. See **EVIDENCE**, No. 1, 21 Ind. Cas. 427.

Assignment.

- (1) *Assignment—Mortgagee assigning his rights to stranger—Communication of fact of assignment to debtor—No suit to set aside assignment afterwards—Payments to assignee—Validity.*

V, the plaintiff, obtained a mortgage from S, the 1st defendant and assigned it in October 1897 in favour of D. S got a notice in November 1897 from V, that the assignment in favour of D was obtained by coercion and undue influence. S paid a portion of the mortgage debt to D before he got the notice from V and had the balance of the debt paid by A, who obtained a second usufructuary mortgage of the properties from S, after he got the notice.

Held, that payments made to the plaintiff's assignee before any suit to set aside the assignment was brought were binding on the plaintiff (a).

Payments made by a third person, who is the owner of a land and who treated the assignees of a mortgagee over the land as the mortgagees entitled to receive the mortgage amount, before the assignment was set aside by the assignor through the instrumentality of the decision of a Court of Justice, could not be questioned by the assignor as payment made to a person who had no right to receive such payments.

Held also, that the first defendant was not bound to bring an interpleader suit, as the suit, on the assignor's own case, was

Assignment—(Continued).

merely voidable and not void (b). **Yenkatasubbaiyar v. Subbarathinam Aiyar**, 15 M.L. T. 331=27 M.L.J. 134=23 Ind. Cas. 607.

SADASIVA IYER and TYABJI, JJ.

References :—(a) 36 B. 37; 24 M.L.J. 592; 24 M.L.J. 469, R. (b) 33 M. 123 (130), R.

- (2) *Fraud of creditors—Invalidity—Rights not based on assignment—Questions not taken before lower Courts—Privy Council not expressing any opinion.*

Held that the High Court acted rightly in setting aside the two assignments as being invalid on the ground that they were intended to defeat or delay creditors.

The Privy Council did not consider the question whether any of the parties can establish rights based, not on assignments, but on other grounds such as actual payment of debts because the point was not taken before the Courts below. **Chidambaram Chettiar v. Srinivasa Sastriar**, 26 M.L.J. 473=18 C.W.N. 841=37 M. 297=23 Ind. Cas. 714=16 M.L.T. 286=(1914) M. W.N. 754=16 Bom L.R. 733=20 C.L.J. 571 (P.C.).

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- (3) *Charge—Equitable assignment—Deposit in one Bank—Receipt not transferable—Money borrowed from another Bank on its security—Charge acknowledged by the first Bank.*

An agreement between a debtor and a creditor that a debt shall be paid out of a specific fund coming to the debtor is a good equitable assignment.

One M deposited money in Bank K for three years. He borrowed money from Bank G on security of the fixed deposit receipt and assigned it over to G. G informed K of the transaction and obtained their consent to the transfer. *Held*, that there was an effective transfer of the debt in favour of G who had a charge on the money. **Gur Prasad v. The Gorakhpur Bank Ltd.**, 12 A.L.J. 886=36 A. 507=24 Ind. Cas. 385.

CHAMIER and RAFIQ, JJ.

References :—1905 A.C. 454, R.; 25 C. 9, D.

- (4) *Decree—Assignment—Decree for possession and mesne profits—Assignors not substituted in suit—Applicator for substitution within three years from assignment but amendment of application after that period—Limitation—Civ. Pro. Code (1908), O. XXII, r. 10 whether applicable where assignor not substituted—Right to mesne profits under decree, whether assignable—Judgment-debtor, if competent to challenge assignment of decree on ground of non-payment or inadequacy of consideration. **Prasanna Kumar Panja v. Asutosh Roy**, 20 Ind. Cas. 685=18 C.W.N. 450. See Final Part, 1918, col. 256.*

- (5) *Agreement to pay money out of cheques coming into possession at a future date—*

Assignment—(Concluded).

Creates a valid equitable assignment. See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), No. 3, 22 Ind. Cas. 566.

(6) Benefit under contract when may be assigned. See CONTRACT, No. 1, 7 L.B.R. 95.

(7) Assignee whether can deny assignor's title. See DANDIDARI RIGHT, No. 1, 18 C.W. N. 1194.

(8) Application by subsequent transferee of decree—Objection by judgment-debtor—Courts' duty to enquire. See EXECUTION OF DECREE, No. 13, 23 Ind. Cas. 951.

(9) Property under mortgage—Assignment of property—Non-payment of consideration—Mortgagor whether can take advantage of non-payment. See HINDU LAW (JOINT FAMILY), No. 9, (1914) M.W.N. 684.

(10) Assignor's right to plead invalidity—Right to question consideration for the—See HINDU LAW (WIDOW), No. 1, 21 Ind. Cas. 8.

(11) Breach of contract—Claim for damages—Whether an actionable claim—Assignment—Right of assignee to sue. See TRANSFER OF PROPERTY ACT, No. 9, 106 P.R. 1914.

Attachment.

(1) *Attachment of a security deposit of a Railway employee in the hands of the Auditor—Lien of the Railway Company on such deposit—Disbursing officers' duty, on receipt of a prohibitory order—Result of disregarding such order.*

When the auditor of the Burma Railways Company paid out an employee's security deposit after receipt of prohibitory orders from Court; held that the Railway Company are liable to make good the loss caused to the person at whose instance the prohibitory orders were issued.

A security deposit can be attached subject to the Railway Company's lien, though it could not be realised free from that lien.

Though the salary of an employee is not disbursed before the end of the month in which it is earned, a disbursing officer receiving during that month an order attaching that salary is bound to give effect to it when the salary comes to be disbursed. *Burma Railways Company v. Hira Lal*, 7 Bur. L. T. 238=24 Ind. Cas. 725.

PARLETT, J.

(2) Of property as that of insolvent—Claim proceedings—Procedure applicable. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 11, 12 A.L.J. 24.

(3) Attachment not released—Effect under the old Code—Attachment by two Courts—Sale by Court without jurisdiction—Setting aside sale. See CIV. PRO. CODE (1882), No. 35, (1914) M.W.N. 796.

(4) Fund in Court—Attachment by several creditors—Not entitled to rateable distribution

Attachment—(Concluded).

—First attaching-creditor in point of time—Right to payment in full—Attachment before money is paid into Court—Validity. See CIV. PRO. CODE (1908), No. 118, 26 M.L.J. 364.

(5) Salary of officer of Indian Army not liable to attachment—Salary attached and distributed among decree-holders cannot be refunded. See CIV. PRO. CODE (1908), No. 102, 16 Bom. L. R. 233.

(6) Sale without attachment—Irregularity. See CIV. PRO. CODE (1908), No. 358, 21 Ind. Cas. 46.

(7) Salary of Honorary Commissioned Officer in the Indian Subordinate Medical Department—Liability to attachment. See CIV. PRO. CODE (1908), No. 103, 17 O.C. 99.

(8) Attachment of mortgage debt—Mode of. See CIV. PRO. CODE (1908), No. 330, 27 M.L.J. 239.

(9) Shahnas delivering attached property without permission—Remedy. See CIV. PRO. CODE (1908), No. 193, 23 Ind. Cas. 907.

(10) Attachment of money lying in Court in another district—Legality—Procedure. See CIV. PRO. CODE (1908), No. 107, 7 Bur. L.T. 277.

(11) Interest of a co-parcener attached in execution of decree against him—Death of judgment-debtor before order for sale—Effect on accrual of title by survivorship. See HINDU LAW (JOINT FAMILY), No. 6, 16 M.L.T. 123.

(12) Effect of—Insolvency of judgment debtor after attachment—Official Assignee if takes subject to the—Stay-of-execution proceedings when judgment-debtor declared insolvent—Sale without serving notice—Effect. See INSOLVENCY, No. 4, 18 C.W.N. 1058.

(13) Attachment of debt—Payment in pursuance of attachment—Effect—Suit by claimant to the attached debt—Limitation. See LIMITATION ACT (1908), No. 74, 26 M.L.J. 166.

Attachment before judgment.

(1) *Civ. Pro. Code (1908), O. XXI, r. 57—Attachment before judgment—Application for arrest of judgment-debtor upon decree—Dismissal in default—Attachment not dissolved.*

O. XXI, r. 57, of the Code applies only to attachment in "execution of a decree." Where, therefore, a plaintiff attaches property of the judgment-debtor before judgment, and after obtaining the decree, applies for his arrest, but allows the application to be dismissed for default, the attachment is not thereby dissolved but continues effective.

Where a decree-holder applies in another execution petition to be allowed to share rateably in the proceeds of the sale of the property attached by him before judgment, but which is proposed to be brought to sale by another decree-holder, who had also attached it in execution of his decree, it cannot be said

Attachment before judgment—(Concluded).

that the decree-holder has converted the attachment before judgment into an attachment in execution. *Banuddin Sahib v. Arunachalla Mudali*, 26 M.L.J. 215=22 Ind. Cas. 351.

SADASIVA IYER and SPENCER, JJ.

References:—14 Ind. Cas. 345=16 C.L.J. 86=16 C.W.N. 1097, R.

(3) *Decree following attachment before judgment—Effect upon accrual of title by survivorship under Hindu Law.*

Attachment alone without an order for sale precludes the accrual of title by survivorship in the event of the death of the judgment-debtor after attachment and before the order for sale.

An attachment before judgment followed by a decree likewise precludes the accrual of the title by survivorship for the same reasons as an attachment after decree. *Muthusami Chetty v. Chinnammal*, 26 M.L.J. 517=24 Ind. Cas. 320.

SANKARAN NAIR and AYLING, JJ.

References:—4 M. 305 (307), F.; 17 M. 144, R.

(3) Conditions to be fulfilled—Conditional attachment when determines. See CIV. PRO. CODE (1908), No. 425, 23 Ind. Cas. 107.

(4) Of property outside Court's jurisdiction—Legality. See CIV. PRO. CODE (1908), No. 428, U.B.R. (1914), 2nd Qr., p. 16.

(5) Money attached before judgment—Whether liable to rateable distribution. See CIV. PRO. CODE (1908), No. 107, 7 Bur. L.T. 277.

Attestation.

(1) Attestation whether implies assent. See ACT VIII OF 1885 (BENGAL TENANCY), No. 105, 21 Ind. Cas. 367.

(2) Document marked by illiterate witness—Proof of document—Mortgage—Two witnesses to the deed—Only one called—Effect. See EVIDENCE ACT, No. 41, 12 A.L.J. 1114.

(3) Attestors not seeing executant sign or touch the pen of the scribe—Signature of witnesses after subsequent acknowledgment of execution by executant—Validity—Effect on instrument creating charge or mortgage. See TRANSFER OF PROPERTY ACT, No. 59, 10 N.L.R. 81.

Attorney.

(1) *Letters Patent, Cl. 10—Attorney—Striking attorney's name off the rolls—Rule, service of—Practice—Grounds, copy of, to be served on attorney personally—Sufficient time to be given—Disciplinary action against attorney—Misconduct of attorney by whom to be brought to Court's notice—Verification, importance of—Suspicion not enough to justify disciplinary action.*

The rules of the High Court make no special provision for the disciplinary procedure of the Court. The English procedure in its entirety cannot be adopted.

Attorney—(Concluded).

When the alleged misconduct of an attorney is the subject of consideration it is expedient to initiate proceedings by a rule, or motion or notice, calling on the attorney to answer the matter in the affidavits of the applicant. Service should be personal, a copy of the affidavits should be served with the rule or notice of motion, and the returnable date should allow sufficient time for an answer to be put in. Ordinarily ten days should suffice.

Disciplinary action against an attorney rests on the principle that the Court deems him an unfit person to act as an attorney, and not by way of punishment.

Anybody is entitled to inform the Court of the misconduct of an attorney (a).

A verification is a matter of great importance as possessing the security of being made under the sanction of a solemn declaration, for which the person making it would be liable to the penalties attaching to the crime of giving false evidence, if the declaration were false to his knowledge (b).

Even a strong case of suspicion is not enough to justify the disciplinary action on a summary proceeding, especially when there is a positive sworn denial and repudiation of the misconduct imputed. *In re an Attorney*, 14 Cr.L.J. 305=19 Ind. Cas. 993=41 C. 113 (S.B.)

JENKINS, C.J., STEPHEN and CHAUDHURI, JJ.

References:—(a) 25 Q.B.D. 17=59 L.J.Q.B. 298=39 W.R. 533, F. (b) 15 A. 59=A.W.N. (1892) 235; W.R. Sp. No. 54=Ind. Jur. (O.S.) 63=1 Hay 379, R.

(2) Attorney if can make affidavit in answer to rule against him under Court's disciplinary jurisdiction—Liability for false statement in affidavit. See SANCTION TO PROSECUTE, No. 3, 41 C. 446.

Auditor.

Whether an auditor is an officer of the company. See ACT VI OF 1882 (COMPANIES), No. 19, 7 Bur. L.T. 230.

Award.

(1) *Arbitration without intervention of Court—Award—Order filing award, if appealable after decree in accordance with award—Civ. Pro. Code (1908), S. 104, cl. (f), Sch. II, S. 21.*

An appeal lies against an order filing an award made upon an arbitration without the intervention of the Court, even after a decree is passed upon the award.

The decree based upon the award is no doubt final, if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed, and if the latter is set aside, the decree must be declared inoperative. *Khettra Nath Gangopadhyay v. Ushabala Das*, 18 C.W. N. 861=22 Ind. Cas. 321.

CHATTERJEE and TRUNON, JJ.

Award—(Continued).

- (2) *Joint family business—Dissolution and accounts—Private arbitration—Award, operation of, on moneys realised by member on behalf of family—“Cash,” meaning of—Equitable set-off—Order made before remand, if binds Court at final hearing.*

The members of a joint family business referred their disputes (in view of dissolution), to an arbitrator before whom on 31st July 1895 they stated *inter alia* that they had divided amongst themselves all the moveables consisting of cash and kind, etc., that a sum of Rs. 5,650 was payable to one of them B; that they had understood the accounts among themselves and that “now no co-sharer has any right to demand accounts from another,” and the arbitrator made his award on 5th August, 1895. At the date of the award there was an undischarged usufructuary mortgage executed on 16th June 1883, for 14 years, by one M., in favour of B as representing the family, to be discharged by receipt of the usufruct:

Held, that the terms and intent of the award precluded the other co-sharers from asking for an account of moneys realised previous to the date of the award.

The word “cash” referred to all moneys received by the parties before the statement was made to the arbitrator.

Held, further, that in the circumstances of the case, the Court of the Judicial Commissioner was right in allowing the defendant's plea of equitable set-off at the final hearing after a remand it had ordered for certain inquiries, although at the previous hearing it had upheld the decision of the lower Court rejecting the plea. *Thakur Sheo Narain Singh v. Thakur Bishunath Singh*, 18 C.W.N. 426 = 17 O.C. 33 = 22 Ind. Cas. 315 = 27 M.L.J. 128 (P.C.).

LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI.

- (3) *Award—Revision—Private arbitration—Application to fill it in Court—Decree based thereon—S. 70 of Act XVIII of 1884, as amended by Act IV of 1912—S. 151, Civ. Pro. Code (1908).*

Held, that, a decree based on a private award filed in Court is not open to revision under S. 70 of Act XVIII of 1884, as amended by Act IV of 1912, particularly when there is no *prima facie* material irregularity or illegality in the award.

Held, also, that an award is not defective simply because that a finding therein is not based on any evidence; all that the Court has to see is the *bona fides* of the arbitrator (a).

Held, also, that a mere clerical error can be put right by a Court under the powers conferred on it by S. 151 of Civ. Pro. Code (1908). *Thakurda v. Ramdas*, 18 P.W.R. 1914 = 114 P.L.R. 1914 = 23 Ind. Cas. 950.

JOHNSTONE, J.

References:—(a) 88 P.R. 1902; 58 P.W.R. 1907 = 1 P.R. 1908, F.

Award—(Continued).

- (4) *Appeal—Private arbitration—“Subject-matter of award”—Civ. Pro. Code (1908), Sch. II, Para 20—Bengal, Agra and Assam Civil Courts Act (XII of 1887), S. 21, sub-S. (1), cl. (a).*

The petitioner to the rule claimed Rs. 6,000 odd as the balance due to him on various transactions from the opposite party. The latter, on the other hand, claimed that there was a balance of Rs. 5,000 odd due to him on the transaction. The dispute was referred to an arbitrator without the intervention of the Court, and the arbitrator eventually awarded Rs. 2,005 as due to the opposite party from the petitioner:

Held, that, by reason of the application to have the award in his favour filed in Court, the opposite party was to be regarded as a plaintiff suing for the amount of the award, that is, for Rs. 2,005, and an appeal against an order allowing the application of the opposite party by the Subordinate Judge lay to the District Judge and not to the High Court. *Mohes Chunder Kundu v. Amas Chand Kundu*, 19 C.L.J. 260 = 18 C.W.N. 867 = 22 Ind. Cas. 798.

CARNDUFF and RICHARDSON, JJ.

Reference:—31 C. 203, Expl.

- (5) *Civ. Pro. Code (1908), O. XXIII, r. 17 of the 2nd Schedule—Compromise amending award—Decree to be based thereon—Ten days' time for objection not necessary.*

Held, that the proceedings under r. 17 of Sch. II, Civ. Pro. Code (1908), can be compromised by amending the award, and the parties are entitled to get a decree based on the amended award (a).

Held, also, that there is no necessity to allow ten days for objections when the parties have accepted the award (b). *Musammatt Shahamari Bai v. Chatta Ram*, 27 P.W.R. 1914 = 69 P.L.R. 1914 = 23 Ind. Cas. 591.

SCOTT SMITH, J.

References:—(a) 38 P.W.R. 1910, F. (b) 15 P.R. 1899; 176 P.W.R. 1913 = 21 Ind. Cas. 298, F.

- (6) *Arbitrator's award—Misconduct—Irregularity of procedure precluding proper inquiry—Corruption and partiality—Proof—Onus—Partition of property—Arbitrator, not assisted by parties seeking information as to valuation from outsider—Failure to keep notes of proceedings, not objected to, till after award—Examination of arbitrator as witness—Statements obtained as bearing on charge of corruption if admissible to question award on the merits—Arbitrator holding property claimed to be exclusive, as joint—Decision if binds owner—Error in subh decision if vitiates award—Property subject to mortgage, allotment of, to me with direction that all co-sharers should pay proportionately—Decision if vitiates award, apart from corrupt motive.*

When a separable portion of an award is bad, the remainder, if good, can be maintained.

Award—(Continued).

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator.

The burden of proving that there had been no proper enquiry by the arbitrator is on the person who alleges it.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of proceedings before him; but there is no warrant for holding that, in the absence of such notes, an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied.

An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is properly admissible. But evidence so admitted as relevant on a charge of dishonesty or partiality cannot be used to scrutinize the decision of the arbitrator on matters within his jurisdiction and on which his decision is final, e.g., to criticise methods adopted by him in determining the *quantum* of his valuations, for purposes of partition—a matter within his discretion (a).

Apart from examining its bearing on the charge of corruption, it is beyond the competency of the Court to scrutinise the estimate of value appearing on the face of the award.

An arbitrator appointed by the parties to partition their joint estate decided that a house claimed by one of the parties to be exclusively hers was in fact joint and allotted it to one of the other parties.

Held—that the decision whether right or wrong did not in this case support the inference that he was actuated by dishonest motive. If he was wrong, the allottees would suffer as the award could have no effect whatever in defeating the title of the true owner.

The arbitrator allotted to one of the parties properties subject to a heavy charge, but at the same time provided that the mortgage-debt and interest should be a charge on the entire property and each co-sharer was to be liable to pay in proportion to his share and should pay that share to the mortgagee as soon as possible:

Held—that it was not within the province of the Court to decide whether this provision gave full protection to the allottee. The matter having been considered by the arbitrator, his decision could not be questioned by the Court unless the charge of corruption or misconduct was established. *Musammam Amir Begam v. Khwaja Sayad Badruddin Husain*, 18 C.W.N. 755=19 C.L.J. 494=17 O.C. 130=12 A.L.J.

Award—(Continued).

537=16 Bom L. R. 418=86 A. 886=28 Ind. Cas. 625=16 M.L.T. 35=(1914) M.W.N. 472=27 M.L.J. 181 (P.C.).

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Reference:—(a) (1879) L.R. 5 H.L. 418, F.

(7) *Award set aside on ground of legal misconduct of arbitrator—Court's power to remit award to arbitrator for re-consideration—Ss. 13, 14, Arbitration Act (IX of 1899).*

Where the arbitrator gives no notice to the parties of his intention to enter upon the reference or of the time or place of his doing so and he otherwise acts irregularly in the discharge of his duties, he is guilty of legal misconduct (as distinguished from moral misconduct in the case of corruption, partiality, etc.) and the award must be set aside, and the Court has the power to remit the award to the arbitrator for re-consideration.

Where the award is bad on the face of it, where there has been misconduct on the part of the arbitrator, where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, and where additional evidence has been discovered after the making of the award, the award could be remitted to the arbitrator for re-consideration (a).

The award must be definite with regard to all points in dispute between the parties. *Re Arbitration between Crompton & Co. Ltd. and Mohan Lal*, 41 C. 313.

CHAUDHURI, J.

Reference:—(a) (1893) 1 Q. B. 405; (1898) 78 L. T. 406; (1868) 27 L. J. Exch. 145, R.

(8) *Award—Decree—Payment to defendant directed to be made within a time and thereafter ejectment of defendant—Executory and not declaratory—Nature of decrees.*

The plaintiff was directed by an award decree to pay the defendant a sum of Rs. 500 and odd within three months and thereon to eject the defendant from a certain house.

Held, that the decree was executory and not merely declaratory, and that the plaintiff was directed absolutely to make the payment of Rs. 500 within 3 months and thereon the defendant was to be absolutely ejected from the house.

Neither the payment nor the ejectment has been made dependant on any uncertain future events (a).

Held, also that, under the decree, payment was permitted to be made voluntarily at any time within 3 months, but thereafter would be enforceable by execution. Similarly there was to be no forcible ejectment before payment, but after payment ejectment should be enforceable by execution through Court. *Heendragmal Chatomal v. Dhanoomal Chatomal*, 8 S.L.R. 58.

HAYWARD, J.C. and BOYD, A.J.C.

References:—(a) 1 S.L.R. 184; 2 S.L.R. 33, R.

Award—(Continued).

- (9) *Appeal—Award—Decree—Not appealable—Revision by High Court—Not ordinarily competent.*

No question can arise as to the regularity of arbitration proceedings in pending litigation, because the agreement to refer and the application to the Court must have the concurrence of all parties and the actual reference is the order of the Court. No appeal on the ground that the award was void *ab initio* would lie. Where a decree based on an award is in question, the decreeing Court is made the sole Judge of its propriety and no appeal lies. In such a case *O. XXXIII, r. 3, Civ. Pro. Code*, has no application. The High Court will not also ordinarily interfere with such a decree in revision. *Nidamurthi Krishnamurthi v. Gargiparthi Ganapathi Lingam*, (1914) M.W.N. 865.

OLDFIELD, J.

- (10) *Distinction between application to file an award and a regular suit to enforce it—Difference in Court fee, limitation and right of appeal—Revocation of submission to arbitration—Notice of hearing to party withdrawing from arbitration not necessary.*

Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award by paying an *ad valorem* fee on the value of the property in dispute.

Where a party to a reference gave the arbitrators notice that he withdrew from the reference and did not attend the hearing, *held*, it was not incumbent on the arbitrators to give him any further notice of hearing, and the omission to give notice of subsequent meeting or meetings of the arbitrators to that party does not invalidate the award. *Nga Hla Gyaw v. Nga Aing*, 7 Bur. L.T. 279.

SHAW, J.C.

- (11) *Award, setting aside of—Misconduct on the part of the arbitrator—Admission of a document in violation of a rule of evidence, not sufficient ground for setting aside an award.* *Aishabai v. Essaji Tajbhai*, 15 Bom. L.R. 392 = 19 Ind. Cas. 934 = 38 B. 60. See Final Part, 1913, Col. 260.

- (12) *Arbitration—Award—Decree based on award if appealable on ground that there was no valid award—Application to set aside award—Period of limitation, if Court can extend—“If no application has been made to set aside award,” meaning of—Civ. Pro. Code, 1882, S. 522—Limitation Act (1908), S. 5, Sch. I, Art. 158.* *Surya Narain Jha v. Banwari Jha*, 17 Ind. Cas. 7 = 18 C.L.J. 85 = 18 C.W.N. 626. See Final Part, 1913, Col. 261.

- (13) *Award—Appeal or Revision—Decree based on award given without intervention of the Court—Civ. Pro. Code, 1908, S. 104 (1) (6)—Sch. II, Paras. 10, 16 and 20—Court fee.* *Ghulam Mustafa v. Halima Bibi*, 176 P.W.R. 1913 = 810 P.L.R. 1913 = 21 Ind. Cas. 298. See Final Part, 1913, Col. 263.

Award—(Continued).

- (14) *Award—Private award not filed in Court, whether compulsorily registrable—Registration Act (1877), S. 17, cl. (6)—Partition deed and award of partition, difference between, pointed out.* *Tek Lal Singh v. Sripati Chowdhry*, 20 Ind. Cas. 860 = 19 C.L.J. 123 = 18 C.W.N. 475. See Final Part, 1913, Col. 264.

- (15) *Award and relinquishment—Construction.* See ACT I OF 1869 (OUDH ESTATES), No. 1, 22 Ind. Cas. 129.

- (16) *Decree passed in accordance with award—No objection taken before first Court as to reference being illegal—Appeal—Agreement to refer—Parties minors—Whether leave of Court necessary.* See CIV. PRO. CODE (1908), No. 398, 12 A.L.J. 57.

- (17) *Private arbitration—Arbitrators determining matters not referred to them—Effect.* See CIV. PRO. CODE (1908), No. 471, 11 P.W.R. 1914.

- (18) *Award defective—Abandonment by agreement of parties—Joint application for reference by Court to new arbitrators—Reference by Court—Award—Decree—No appeal.* See CIV. PRO. CODE (1908), No. 474, 14 P.L.R. 1914.

- (19) *Arbitration without intervention of Court during pending litigation—Award filed—Appeal—Jurisdiction of appellate Court—Decision right or wrong—Revision by High Court.* See CIV. PRO. CODE (1908), No. 154, 22 Ind. Cas. 690.

- (20) *Award filed out of time—Delay due to translating award from Hindi into English—Agreement of parties not to dispute award—Effect.* See CIV. PRO. CODE (1908), No. 214, 18 C.W.N. 1325.

- (21) *Arbitrator—Non-submission of award within time fixed—Neglect or refusal—Appointment of second arbitrator without discharging the first—Validity of reference—Agreement by parties to be bound by opinion of majority—Omission of Court to record that fact—Effect.* See CIV. PRO. CODE (1908), No. 470, 23 Ind. Cas. 842.

- (22) *Reference by only some of parties—No objection as to non joinder—Waiver—Refusal by Court to remit award—Appeal.* See CIV. PRO. CODE (1908), No. 155, 23 Ind. Cas. 862.

- (23) *Arbitration—Award—Conditional purchase of partnership outstandings by one partner—Remission of private award.* See CIV. PRO. CODE (1908), No. 156, 24 Ind. Cas. 132.

- (24) *Appellate Court allowing party to file an award—Decree passed thereon—Appeal—Revision.* See CIV. PRO. CODE (1908), No. 158, 143 P.W.R. 1914.

- (25) *Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if *functus officio*—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject.*

Award—(Concluded).

matter in suit, when insignificant and unknown to him, it would invalidate award. See CIV. PRO. CODE (1908), No. 469, 19 O.W.N. 165.

(36) Award fixing rate of maintenance—Decree in terms of—Decree merely declaratory—Not executable. See EXECUTION OF DECREES, No. 10, 7 S.L.R. 192.

(37) Claim against military officer—Reference to arbitration—Decree in terms of award—Interference by High Court. See HIGH COURT RULES (BOMBAY), No. 2, 16 Bom. L.R. 517.

(38) Effect of oral award—Award when can operate to transfer property. See HINDU LAW (WIDOW), No. 8, 17 O.C. 108.

(39) Award dictated and signed by the parties—Registration—Parties whether allowed to pick holes in the award. See REGISTRATION ACT (1877), No. 2, 184 P.L.R. 1914.

(30) Resiling from reference to arbitration—Grounds for appeal against decree passed on award. See ARBITRATION, No. 3-a, 17 O.C. 286.

Babuana Property.

(1) *Babuana grant by Darbhanga Raj—Liability to pay its share of revenue and cesses if a charge on subject of grant—Partition by two sons of grantee with concurrence of Raj subject to condition that non-defaulting share would be sold for arrears after sale-proceeds of defaulting share found insufficient—Condition if creates a charge—Suit for arrears of one share—Death of owner thereof—Substitution of the other co-sharer as representative, and widow not admitted as party at plaintiff's instance—Decree against other co-sharer only—Civ. Pro. Code (1882), Ss. 367, 368—Plaintiff to choose representative of deceased defendant at his own risk—Claim to represent by person other than plaintiff's nominee—Proper procedure—Suit thereon, against estate in widow's possession if maintainable—Limitation—Limitation Act (1877), Sch II, Arts. 122, 132. Maharaja Sir Rameshwar Singh Bahadur v. Sreemuty Janeshwari Bahadur, 19 C.W.N. 129 = 19 C.L.J. 19 = 21 Ind. Cas. 397. See Final Part, 1913. Col. 267.*

(2) Darbhanga Raj—Incidents of. See HINDU LAW (SUCCESSION), No. 6, 18 C.W.N. 1249.

Bairagis.

Of Ramanandi class—Death of Head of the Mutt—Succession—Status of Bairagis—Succession to Sanyasis. See HINDU LAW (SUCCESSION), No. 7, 16 Bom. L.R. 757.

Banjar Land.

Paper possession of banjar land in execution—Whether subsequent possession—Limitation. See RES JUDICATA, No. 6, 19 P.W.R. 1914.

Banker and Customer.

(1) *Paper Currency Act (II of 1910), S. 26—Banker—Deposit of money—Value of deposit receipt payable to bearer—Deposit receipt stolen—Money paid to bearer—Banker's liability—Good faith.*

Banker and Customer—(Concluded).

According to the terms of a deposit receipt issued by a private banker, the deposit money was payable on the production of the receipt. The receipt, being stolen from the depositor, was presented to the banker, by a cooly who, according to the banker, was paid the whole of the money due under it without any inquiry as to how he came by the receipt:

Held, on depositor suing the banker for recovery of his money, that, even if the banker paid anything to that cooly who produced the receipt it was not in the *bona fide* belief that the cooly was authorised by the depositor to receive it.

Doubted whether the receipt in question could be held to be an engagement for the payment of money within the meaning of S. 26 of Paper Currency Act. *Gaggeero Francesco v. L.P.R. Chetty Firm*, 24 Ind. Cas. 201 = 7 Bur. L.T. 266.

PARLETT, J.

(2) Nature of relation between. See LIMITATION ACT (1908), No. 28, 22 Ind. Cas. 986.

Benami Transactions.

(1) *Benamidar and real owner—Transaction entered into by benamidar alleged to be unauthorized by real owner—Effect—Estoppel by fraud.*

Where property is held *benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act: So if the property is purchased in the name of a *benamidar*, and the indicia of ownership are placed in his hands, the true owner can only get rid of the effects of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact.

The consideration of Rs. 650 of the conveyance of the 12th May 1903, whereby the 1st defendant purported to purchase the land in suit, proceeded from the former owner; this conveyance was in his possession and showed him to be the purchaser and he was recorded as in possession in the Revenue registers. The only fact which can be alleged as existing which should have put plaintiff on enquiry is the 2nd defendant's claim that he was in possession of the land; but as at that season, the 12th June, probably agricultural operations had not commenced, it may be doubted whether he or any one was in actual occupation of the land.

Held that the plaintiff cannot be fixed with constructive notice of the alleged defect in his mortgagor's title and that accordingly the mortgage was good. *Maung Kya v. Y.P.L. Y.N. Firm*, 7 Bur. L.T. 8 = 23 Ind. Cas. 368.

PARLETT, J.

(2) *Benami transfer made to defeat claim of creditors—Real owner suing for possession from benamidar on the ground that the*

Benami Transactions—(Continued).

intended fraud was wholly inoperative—Burden of proof—Real owner to prove that fraud was inoperative.

The respondents sought to recover some land which they alleged they had transferred *benami* to the appellant and another by a registered deed in order to defeat the claims of their creditors. The first Court dismissed their suit, but the Divisional Court granted them possession, without, however, ordering the cancellation of the sale deed which they also asked for, on the ground that the fraud contemplated was wholly inoperative.

Held that, if this be so, they are entitled to recover the land under the Privy Council Ruling in *T.P. Pethepermal Chetty v. R. Muniandy Siva*.

As to the question upon whom the burden of proof on the point lay, *held* that it lay upon the plaintiff to prove that no part of the intended fraud had in fact been carried out; that as the plaintiff was alleging an intended fraud on his own part and seeking to escape the consequences of it, he was bound to allege and to prove that the intended fraud was in fact wholly inoperative; and further that, unless he alleged and proved that fact, his suit must fail, and therefore the burden lies on him to prove it. *Sweydali v. Enall*, 7 Bur. L.T. 12=23 Ind. Cas. 370.

PARLETT, J.

Reference:—(a) 4 L.B.R. 266, R.

(3) *Criterion—Source of purchase-money—Onus probandi—Party alleging benami to prove it—Father of infant vendee paying purchase money—Not necessarily benami transaction.*

The real criterion of determining whether or not a given transaction of sale and purchase of property is *benami* is to see the source from which the purchase-money comes.

The *onus* of proving that the vendee mentioned as such in a deed of sale is only *benamidar* and not the real purchaser lies upon the party alleging it.

The fact that the father of an infant vendee paid the purchase-money entered in sale-deed executed in favour of the infant is not sufficient of itself to shew that the infant was a *benamidar* only. *Habibullah Khan v. Musammat Nayab Khanam*, 74 P.L.R. 1914=22 Ind. Cas. 536.

JOHNSTONE and SHAH DIN, JJ.

(4) *Landlord and tenant—Rent deed in the name of benamidar—Payment of rent to real owner—Effect.*

Defendant executed a rent deed to plaintiff at the instance of one K and on K's behalf, but he paid the rent to K. In a suit for rent by plaintiff, *held* that, the money having been paid to K, the defendant was discharged from liability to the plaintiff.

The plea of estoppel available against a tenant is only in favour of the real owner and

Benami Transactions—(Continued).

not in favour of the *benamidar*. *Muthusawmy Aiyar v. Selai Konan*, 26 M.L.J. 597.

SESHAGIRI AIYAR, J.

References:—30 M. 245; 31 M. 461, F.; 7 B. L.R. 723 (Note), R.

(5) *Benami—Transfer to defraud creditors—Creditors not defrauded—Estoppel—Oiv. Pro Code (1908), O. XLI, r. 4—Powers of Appellate Court—Party not appealing—Power to reverse decree against him—Ground of reversal common.*

Property transferred to another, *benami*, to defraud creditors is still the transferor's when no creditor is defrauded by the transfer, and the transferor is not estopped from proving that the transferee has no title and that the property is the transferor's (a).

Where the ground of reversal is common, an appellate Court can under O. XLI, r. 4, reverse the decree not only against the party appealing, but also against those who have not appealed. *Sokkappa Reddi v. Singana Reddi*, 23 Ind. Cas. 620.

SADASIVA AIYAR and SPENCER, JJ.

References:—(a) 35 C. 551=12 O.W.N. 562=35 I.A. 98=7 C.L.J. 528=5 A.L.J. 260=14 Bur. L.R. 108=10 Bom. L.R. 590=18 M.L.J. 277=4 M.L.T. 12=4 L.B.R. 266 (P.C.), F.

(6) *Benami transactions—Resulting trust—Presumption when property purchased in name of wife and daughter—Gift—Presumption, how rebutted—Muhammadan law—Gift of undivided share.*

A *benami* purchase is in the nature of resulting trust in favour of the person from whose funds the purchase is made.

Where a Muhammadan purchased properties in the name of his wife and daughters, there is a strong presumption that they were intended as gifts to them, and the burden of proving the contrary lies on the person who asserts it. Where it is proved that the funds out of which the properties were purchased were all his and that he treated all the properties and the income derived therefrom as his own by entering them in his own accounts and ostensibly appeared towards the public as the owner, the presumption of a gift arising from the title-deeds is rebutted.

There cannot be, under the Muhammadan law, a gift of undivided share in immoveable property, as such share is not capable of actual physical possession. *Abdul Rahiman Nachiyal v. Mirathayar Ammal*, 24 Ind. Cas. 10.

MILLER and SADASIVA AIYAR, JJ.

References:—14 Ind. Cas. 998=35 M. 120, F.

(7) *Benamidar—Mortgagee—Suit by ostensible mortgagee—Beneficial owner not made party—Owner bound by decree—Benamidar not entitled to sue for possession.* *Kirtibash Das v. Gopal Joo*, 20 Ind. Cas. 499=19 C.L.J. 198=18 O.W.N. 814. See Final Part, 1913, Col. 269.

Benami Transactions—(Concluded).

(8) Proof of—Circumstantial evidence, value of. See ACT XI OF 1859 (BENGAL REVENUE SALE LAW), No. 6, 18 C.W.N. 1071.

(9) Nature of evidence required to prove—Direct evidence of, not to be expected. See ACT XI OF 1859 (BENGAL REVENUE SALE LAW), No. 7, 24 Ind. Cas. 276.

(10) Benami purchase—Real purchaser if can sue for possession and annulment of incumbrance. See ACT XI OF 1859 (BENGAL LAND REVENUE SALES), No. 9, 23 Ind. Cas. 917.

(11) Kobala from *benamidar* if necessary to complete title of real purchaser. See CIV. PRO. CODE (1908), No. 28, 24 Ind. Cas. 17.

(12) Property purchased *benami*—Real purchaser obtaining and remaining in possession—Declaratory suit by real purchaser whether barred. See CIV. PRO. CODE (1908), No. 109, 7 L.B.R. 260.

(13) Mortgagee's right to deny mortgagor's title—Plea that mortgage was a *benami* transaction. See ESTOPPEL, No. 5, 22 Ind. Cas. 655.

(14) Purchase in the name of wife and son—Presumption. See HINDU LAW (WIDOW), No. 15, 16 M.L.T. 26.

(15) Mortgagor taking *benami* in revenue sale—Subsequent sale in execution of mortgage decree—Effect. See MORTGAGE (GENERAL), No. 46, (1914) M.W.N. 916.

(16) Suit by ostensible owner—Judgment whether bars a subsequent suit by the real owner. See RES JUDICATA, No. 1, 19 C.L.J. 34.

(17) Suit against *benamidar*—Defendant pleading that he is a *benamidar*—Decree against him as a real owner—Real owner whether bound—Subsequent suit by real owner. See RES JUDICATA, No. 12, 12 A.L.J. 701.

(18) Estoppel against *benamidar* whether binds beneficiary. See TRANSFER OF PROPERTY ACT, No. 93, 23 Ind. Cas. 762.

Bengal.

English Law of waters—Applicability to Lower Bengal—Rule of law affecting property rights established by Courts in Bengal, if should be upset in the absence of proof that rule unjust or flagrantly inexpedient. See JALKAR, No. 2, 18 C.W.N. 1217.

Bengal, N.W.P., and Assam Civil Courts Act.

See ACT XII OF 1887.

Berar Inam Rules.

Rule V (2)—*Inam* granted under—Alienation in favour of a member of the family—Validity. *Aman Ali v. Imambi*, 9 N.L.R. 188—22 Ind. Cas. 89. See Final Part, 1913, Col. 371.

Berar Land Revenue Code.

(1) S. 69—Sale in Berar—Document creating occupancy rights—Registration—Registered occupant relinquishing right of occupancy—Effect—S. 64, Transfer of Property Act.

Berar Land Revenue Code—(Concluded).

The Transfer of Property Act was made applicable to Berar by Notification dated 16th May 1907. Since then, a sale as such in Berar, the consideration for which is above Rs. 100, can only be effected by a registered instrument.

Under S. 69 of the Berar Land Revenue Code, 1896, a registered occupant may, by giving a notice in writing to the *Tabsildar*, relinquish the occupancy either absolutely or in favour of a specified person. S. 69 of the Berar Land Revenue Code has not been abrogated by the Transfer of Property Act by implication.

The Transfer of Property Act merely lays down that a particular kind of transfer—a sale—can only be created by observing certain forms, but it does not say that results somewhat similar to those flowing from such a transfer cannot be attained under the authority of another Act without observing the forms laid down by the Transfer of Property Act.

The relinquishment in favour of a specified person does not carry with it all the incidents of a sale under the Transfer of Property Act. The person in whose favour the relinquishment has been made must take the holding subject to the prior mortgages validly created.

The procedure laid down by the Berar Land Revenue Code seems to be exhaustive and does not contemplate the registration of any document for the creation of occupancy rights under the Government. *Zingu v. Gosawi*, 10 N.L.R. 78=24 Ind. Cas. 868.

MITTRA, A.J.C.

Reference to—31 A. 73, R.

(2) S. 69—Relinquishment by registered co-occupant—Effect upon rights of other co-occupants. *Kisan v. Ramchandra*, 9 N.L.R. 168=21 Ind. Cas. 851. See Final Part, 1913, Col. 271.

Berar Patels and Patwaris Law, 1900.

Ss. 8 (5), 9, 11, 20, 21—Agreement between *Patwari* and his substitute for dividing the emoluments of the office of *Patwari*—Agreement void—Public policy—Status of *Patwari* and his substitute. *Tatia v. Gangaram*, 9 N.L.R. 175=21 Ind. Cas. 855. See Final Part, 1913, Col. 272.

Betrothal.

Breach of betrothal contract—Amount of damages. See CONTRACT ACT, No. 70, 86 P. L.R. 1914.

Bhagdari Act (Bombay).

See BOM. ACT V OF 1862.

Bill of exchange.

Bill of exchange—*Shah Jog Hundi*—Payment of forged *Hundi*—Rights of person who makes payment—Payee bound to refund.

According to the well-established custom among *shroffs* relating to *Shah Jog Hundi*,

Bill of Exchange—(Concluded).

the Shah who obtains payment of a Shah Jog-Hundi is, in the event of the Hundi turning out to be a false, fraudulent, stolen or forged Hundi, bound to refund the amount of the Hundi with interest, unless he produces the actual drawer, or the person who committed the fraud.

The Shah does not guarantee the solvency of the drawer, he guarantees the genuineness of the Hundi. A drawee will not pay a Hundi unless he has funds in his hands belonging to the drawer, or is willing to give him credit. And he will not pay on presentation of a Shah Jog-Hundi to a Shah unless he is satisfied as to the respectability of the Shah, as he looks to him in case of anything afterwards going wrong with the Hundi. The respectability of the Shah is a matter only for the drawee to consider, as it is difficult to conceive that a defendant would repudiate his liability to refund on the ground that he was not a respectable person.

The claim to a refund against a Shah who has received payment of a Hundi on the ground that the Hundi is a forgery must be made as soon as possible after the forgery has been discovered so as to enable the Shah to protect himself. *Bansidhar Lachhminarayan v. Jwalaprasad Gayaprasad*, 16 Bom. L.R. 434.

MACLEOD, J.

Bill of Lading.

Failure to produce it on the part of the consignee—Does it justify the carrying Company in refusing delivery of goods or exempt it from liability for not delivering the goods?

Where the consignee, having lost the bill of lading, was unable to produce it and where the carrying Company consequently refused to deliver the goods although the Company's manifest clearly showed the shipment of these goods to the consignee.

Held that, under the circumstances, the Company was bound to deliver the goods for their price after making certain that the loss of the bill of lading was a *bona fide* one. *Eng Leong & Co. v. B I S N. & Co.*, 7 Bur. L.T. 92=24 Ind. Cas. 70.

ORMOND, J.

Birth.

Statement by deceased person as to date of birth of another person—Admissibility. See EVIDENCE ACT, No. 5, 20 C.L.J. 304.

Births and Deaths Register.

Kept by illiterate village chowkidar—Entries written to his dictation—Corroboration. See EVIDENCE ACT, No. 81, 14 A.L.J. 945.

Birt Jijmani.

Sweepers—Jarobakshi—Birt Jijmani, a well known form of tenure—How proved.

The plaintiffs sued the defendants for ownership and possession of *birt jijmani* to perform

Birt Jijmani—(Concluded).

the services of sweepers in a particular locality. The defendants pleaded that they themselves were *birt-dars* and had been performing the services of *jarob-kshi* for more than sixty years.

Held, that *jijmani birts* are a well-known form of tenure in this country (a).

Held further, that where a claim to *birt jijmani* is put forward, plaintiff must prove either a grant or else some custom or such long continued possession as raises the presumption of a lost grant (b). *Khushya v. Mangala*, 12 A.L.J. 267=22 Ind. Cas. 957.

KYVES, J.

References:—(a) 8 O.C. 339, R. (b) 9 M.L.A. 344, R.

Birt Shankalp.

Granting heritable and transferable rights in lieu of Nazrana, etc.—Effect. See PRE EMP-TION, No. 24, 17 O.C. 299.

Board's Standing Orders.

Force and binding nature of the—. See SHROTRIAM GRANT, No. 1, 15 M.L.T. 277.

Bombay Revenue Jurisdiction Act.

See ACT X OF 1876.

Bond.

(1) Valuation of suits for cancellation of bond. See ACT VII OF 1887 (SUITS VALUATION), No. 3, (1914) M.W.N. 767.

(2) Registered bond—Suit to recover money due on bond—Limitation. See LIMITATION ACT (1908), No. 53, 16 Bom. L.R. 20.

Boundary.

(1) Decision of Boundary Settlement officer—*Res judicata*. See ACT XXVIII OF 1860 (MADRAS SURVEYS AND BOUNDARIES), No. 1, 27 M.L.J. 549.

(2) Boundary dispute—Decision of Revenue Officers when not binding on parties. See ADVERSE POSSESSION, No. 12, 240 P.L.R. 1914.

(3) Court if may vary boundaries in title-deeds. See TITLE-DEEDS, No. 1, 18 C.W.N. 593.

Bribe.

Loan for bribe—Suit for money lent—Maintainability—Plea not raised before first Court cannot be ground of appeal. See CONTRACT ACT, No. 22, 84 P.W.R. 1914.

Broker.

Sale—Liability of broker for false representation. See FRAUD, No. 4, 22 Ind. Cas. 818.

Buddhist Law.

1.—ALIENATION.

2.—DIVORCE.

3.—GIFT.

4.—INHERITANCE.

5.—MARRIAGE.

6.—RELIGIOUS ENDOWMENTS.

Buddhist Law—(Continued).**—1.—Alienation.**

Burman Buddhists—Mortgage by husband—Authority to bind wife's share—Presumption—Suit upon mortgage—Omission to join wife as party—Decree not affecting her rights. See CIV. PRO. CODE (1908) No. 405, 7 L.B.R. 135.

—2.—Divorce.**(1) Mere caprice and petty quarrels not sufficient ground for granting a divorce.**

A divorce cannot be granted on mere caprice and petty quarrels must not be magnified into acts of cruelty and ill-treatment of a nature sufficiently grave to justify divorce (a).

Respondent sued appellant for a divorce on the ground of ill-treatment and obtained a decree for divorce as if by mutual consent which has been confirmed on appeal. This appeal was lodged on the ground that the decree was passed on grounds insufficient in law.

The facts in the present case were that the parties had both been married before, the appellant being 53 and the respondent 40 years of age, the latter having a family by her former marriage. They lived together for two years, perhaps not as amicably as might be. On the 28th October 1911, the appellant missed rice, plantains and coconuts and accused his wife of taking them to give to her children and told her to go away from his house. She did so and went to her parents' house. She then attempted to get a divorce before the headman without success and on the 11th November 1911, the 14th day after the quarrel, she filed this suit.

Held that the facts stated above did not constitute such cruelty as entitled her to a divorce, even as by mutual consent, and that the matter was a petty quarrel such as a Court should not treat as sufficient ground for a divorce on any terms. *Maung Kyaw Yan v. Ma Nyo U*, 7 Bur. L. T. 16=23 Ind. Cas. 380.

PARLETT, J.

References:—(a) L.B.R.S.J. 607, F.; 5 L.B. R. 87, R.

(2) Burmese Buddhist Law—Divorce, suit for, based on desertion and cruelty.

Desertion for the statutory periods does not of itself dissolve a marriage tie without any further and expressed act of volition on the part of either party to the marriage (a).

Beating one's wife and charging her falsely with adultery is sufficient cruelty.

Obiter—An innocent party can obtain a legal divorce by suit on the ground of desertion for the statutory period alone. *Mg Yin Kye v. Ma Sein*, 22 Ind. Cas. 945.

ROBINSON, J.

Reference:—(a) 3 L.B.R. 175 (F.B.), Rel.

(3) Divorce—Desertion—Convict, whether deemed to desert wife—Wife of convict taking another husband, effect of—Evidence—Arbitration proceedings—Clerk taking note of evidence—Note, whether admissible.**Buddhist Law—(Continued).****—2.—Divorce—(Concluded).**

Under Buddhist Law a man sentenced to imprisonment is not to be deemed to have deserted his wife; nor does desertion *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie.

Therefore, the wife of a convict in possession of sufficient joint property to maintain herself and children is not entitled to take another husband to herself, but if she does so, her conduct amounts to desertion and adultery and the husband on return is entitled to treat the marriage tie as at an end and to demand all the property (a).

A note of evidence taken by a clerk in the course of abortive arbitration proceedings is not admissible in evidence. *Ma Aung Byu v. Maung The Hnia*, 23 Ind. Cas. 940=7 Bur. L.T. 240.

HARTNOLL, OFFG. C.J., and TWOMEY, J.

References:—(a) 3 L.B.R. 175 (F.B.); U.B. R. (1992), 11, 96, R.

(4) Divorce—Desertion—Ill-treatment—Pleadings—Absence of specific issue—Civ. Pro. Code, (1908), O. XLI, r. 24. *Maung Po Han v. Ma Ta Lok*, 20 Ind. Cas. 674=6 Bur. L.T. 184=7 L.B.R. 79. See Final Part, 1913, Col. 276.

(5) Husband's abandonment of a wife and children no proof of divorce. See BUDDHIST LAW (INHERITANCE), No. 2, 7 Bur. L.T. 80.

—3.—Gift.

Gift—Poggalika Withathagaha—Gift of land on which monastery stands to a monk—Extent of rights taken by latter—Incompetency to make gift of such land to others—Essentials of Withathagaha gift—Dispute between layman and monk regarding monastery land—Suit—Civil Court's jurisdiction—Civ. Pro. Code (1908), S. 9.

T, the plaintiff, sued for the recovery of land on which a monastery stands, on the ground that it was the poggalika property of a monk A, who made withathagaha gift of it to another monk P who was his pupil, from whom T, the plaintiff, obtained by way of gift.

Held that, in a dispute between a layman and a monk regarding the land on which a monastery stands, the jurisdiction of the Civil Courts is not ousted (a).

The proper basis for the decision of such dispute should be the texts of the *Vinaya* so far as they can be properly applied (b).

There is no authority in the *Vinaya* for the proposition that a monastery can be poggalika property, though some of the *Dhammathats* assume such a proposition and though in some cases the Courts have followed these *Dhammathats* (c).

A monk could act as owner of a monastery, whether dedicated to him personally by the *kyaungtaga* or allotted to him by other monks, for 12 years at most.

Buddhist Law—(Continued).**—3.—Gift—(Concluded).**

But according to the *Vinaya*, it is clear that a monk cannot give away to an individual, either monk or layman, a monastery dedicated to him personally.

If a monk takes the property of another monk and appropriates it to his own use, the appropriation is valid and is called a *withathagaha* gift, provided (according to the *Vinaya*) five conditions are fulfilled, *vis.*, (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property; (4) the owner must be alive when the property is taken; and (5) the taker must know that the owner would be pleased at the taking.

Held, that, in the present case, as A was on the point of death and insensible, he was incapable of being either glad or sorry at the appropriation, and that therefore the *withathagaha* gift in favour of P, from whom the plaintiff claimed was invalid. *Nga Po Thin v. U. Thi Hia*, U.B.R. (1913). 3rd Qr., 183=7 Bur. L.T. 27=23 Ind. Cas. 157.

MC COLL, J.C.

References:—(a) U.B.R. (1892-1896) II, p. 59; U.B.R. (1897-1901), p. 42; U.B.R. (1910) I, p. 78, R. (b) U.B.R. (1892-1896) II, p. 397 and p. P.J.L.B. 614, R. (c) U.B.R. (1892-1896) II, p. 59; U.B.R. (1892-1896) II, p. 78, R.

—4.—Inheritance.**(1) Payin property changes its character—Presumption.**

When *payin* property changes its character during a marriage the presumption is that it has become *lettetpwa* of that marriage (a). But this presumption may be rebutted by particular facts of any case. *Ma Tah v. Ma Ka Yin*, 21 Ind. Cas. 227.

PARLETT, J.

References:—(a) 2 I.J. B. R. 174; 2 U. B. R. (1892-1896) 184, F.; 2 U.B.R. (1892-1896) 184, *Expl.*

(2) Exclusion of children from inheritance for neglect in the performance of filial duties—Husband's abandonment of wife and children no proof of divorce.

X, being tired of his first wife who was older than he and had an unpleasant voice, brought her and their two children, the plaintiffs, appellants who were respectively about 7 and 2 years to the house of his father-in-law and left them there and married one Ma Gyi from whom he had the second defendant and after Ma Gyi's death married the first defendant, Ma Dwe. The plaintiffs lived with their mother till her death and then with her relations. In a suit brought by them for $\frac{1}{4}$ th share of the *lettetpwa* of X and 1st defendant respondent,

Held, that there was no divorce of the first marriage, that the first wife never ceased to regard herself as his wife; also that the separation was entirely the act of the father and

Buddhist Law—(Continued).**—5.—Inheritance—(Continued).**

not of the children and that it cannot therefore be said that the children (plaintiffs, appellants) voluntarily separated themselves from him or that the cessation of filial relation between them was due to any act or omission on their part.

Held that no child can be excluded from inheritance unless desertion or neglect of filial duties is proved against it. *Ma Tin Lun v. Ma Dwe*, 7 Bur. L.T. 20=23 Ind. Cas. 915.

ORMOND and PARLETT, JJ.

(3) Right of the children of a divorced wife to inherit—Maintenance of filial relations an essential condition—Immaterial whether property is ancestral or non-ancestral.

X married three wives in succession. Plaintiff, the only child of the first marriage, sued the third wife for half the *lettetpwa* of the 1st marriage. It was found that plaintiff was taken away by her mother at the time of her divorce from X and never afterwards maintained filial relations with her father.

Held, that the plaintiff respondent is not entitled to share in the property left by her father irrespective of the question as to whether the property is ancestral or non-ancestral. *Mi Ah Pu Ma v. Mi Hnin Zi R*, 7 Bur. L. T. 83=23 Ind. Cas. 948. .

TWOMEY, J.

(4) Father and sister of the deceased—Right of succession on the death of one or more of the daughters who were all separated from their father—Sources and development of Burmese Buddhist law - Dhammathats—Authority of Manu Kyay.

Three sisters were completely separated from their father and lived together apart from him and were independent traders. The life lived for years by them was lived as a life separate from and independent of their father. On the death of the youngest of them, her elder sister took out letters of administration and took possession of her property. Subsequently the elder sister died.

Held, that, according to Burmese Buddhist law, the eldest sister, as the surviving sister, was entitled to succeed to the property of the deceased sisters as heir to her sisters in preference to her father.

The authority of Manu Kyay, where it is clear, as among the Dhammathats, is of the highest rank.

Sources and development of Burmese Buddhist law discussed and stated. *Ma Nhin Bwin v. U Shwe Goue*, 16 Bom. L.R. 377= (1914) M.W.N. 449=27 M.L.J. 41=18 C.W.N. 1121=23 Ind. Cas. 433=16 M.L.T. 142=7 Bur. L.T. 105=20 C.L.J. 264=41 C. 887, (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

References:—(a) 5 I.B.R. 231, *Reversed*; (1894) P.J.L.B. 116; 2 U.B.R. (1892-96), 184; 2 U.B.R. (1897-1901), 66; 2 U.B.R. (1897-1901) 109; (1899) P.C.L.B. 624, D.

Buddhist Law—(Continued).**— 4.-Inheritance—(Concluded).**

- (5) *Inheritance—Succession among Chinese Buddhists—Exclusion of females—Indian Succession Act not applicable to Chinese Buddhists—Absence of written law on inheritance among Chinese Buddhists—Justice, equity and good conscience.*

Where a son by a former wife of a Chinese Buddhist claimed to inherit all the father's property to the total exclusion of his step-mother and her daughter,

Held that, in the absence of any written law on the subject to inheritance among Chinese Buddhists and in the absence of definite evidence as to the customs prevailing in such matters, the proper course is to proceed according to justice, equity and good conscience and that the mother be awarded one third and the plaintiff two-thirds of his father's estate.

Though Parker in his Comparative Chinese Family Law mentions six preliminary steps as essential to a first class marriage, the evidence of Chinese Elders in this case shows that the customs are not insisted on in the case of Chinese marriages in Burma and that relaxation is permitted also in the case of poor people. *Ma Thin Shin v. Ah Shein*, 7 Bur. L.T. 246=24 Ind. Cas. 367.

TWOMEY and PARLETT, JJ.

— 5.—Marriage.

- (1) *Husband and wife—Desertion for more than a year—Dissolution of the marriage—Effect of a subsequent suit for restitution of conjugal rights.*

Where the wife left her husband and lived separate from him for a period of 6 years, and where in the meantime the wife sought a divorce from the husband for cruelty and the husband from the wife for adultery but no divorce was granted, and where 17 months after separation the husband took a second wife,

Held, on a consideration of the facts, that the conditions contemplated by S 17 of Chap. V of the *Manu* for the dissolution of a marriage were contemplated in this case, and when the woman died in 1909 the status of husband and wife did not exist between the parties. *Maung Tha Kado v. Ma Thin Myaing*, 7 Bur. L.T. 197.

HARTNOLL, OFFG. C.J., and ORMOND, J.

(2) *Breach of contract of marriage—Suit for damages—Maintainability—Measure of damages.* See DAMAGES, No. 1, 7 Bur. L.T. 14.

(3) *Mortgage by one of joint property of himself and his mistress—Absence of mistress's consent—Effect of acquiescence.* See MORTGAGE (GENERAL), No. 18, 7 Bur. L.T. 88.

— 6.—Religious Endowments.

Buddhist Law—Religious offering when irrevocable.

A verbal declaration or delivery of possession renders a Buddhist religious offering irrevocable

Buddhist Law—(Concluded).**— 6.—Religious Endowments—(Concluded).**

even without the formal dedication ceremony. A building erected on religious land with the permission of the presiding monk partakes of the nature of the ground on which it stands and becomes ecclesiastical property. *Yeo Kyew Sum v. U Ke Tu*, 7 Bur. L.T. 63=24 Ind. Cas. 465.

FOX, C.J., and PARLETT, J.

Building.

- (1) *Acquiescence—Costly buildings built on plaintiff's land—Removal of buildings—Money compensation—Obstruction to public highway—Special damage.*

No one can, by merely trespassing upon the land of another and constructing costly building on it, claim a right to retain possession or to compel the owner to receive compensation for the land (a).

Where a plaintiff seeks to remove an obstruction to a public way or street, he must prove special damage to himself (b). *Ganga Din Sonar v. Jagat Tewari*, 12 A.L.J. 1026.

SUNDAR LAL, J.

References:—(a) 28 B. 298 and Satish Chandra Banerji's Law of Specific Relief relied upon (b) (1904) L.R.K.B. 341; 11 Bom. L. R. 372; 6 A.L.J. 499, R.

(2) *Building used for stabling temple coaches and horses—Exemption from tax.* See MADRAS ACT IV OF 1884 (DT. MUNICIPALITIES), No. 2, 16 M.L.T. 98.

Bundelkhand Land Alienation Act.

See N.W.P. ACT II OF 1903.

Burden of Proof.

(1) *Khas possession suit for—Plaintiff's title as ratnidar admitted—Defendant to prove tenancy—Burden of proof—Land in suit contiguous to holding of defendant—Shifting of onus.* *Gopini Debi v. Lokenath*, 11 Ind. Cas. 696=19 C.L.J. 414=19 O.W.N. 140. See Final Part, 1912, Col. 256.

(2) *Acceptance of burden of proof by a party—Second appeal—Plea of having no duty to call evidence.* See EVIDENCE, No. 7, 17 O. C. 134.

(3) *Whole evidence on both sides let in—Whether stress can be laid on burden of proof.* See FRAUDULENT TRANSFERS, No. 1, (1914) M.W.N. 595.

(4) *Redemption suit—Subsisting mortgage—Onus on plaintiff.* See MORTGAGE (REDEMPTION), No. 11, 12 A.L.J. 769.

(5) *Onus wrongly thrown—Revision.* See PROMISSORY NOTE, No. 1, 8 P.W.R. 1914.

Canals Act.

See ACT VIII OF 1878.

Canal Colonies.

Canal colony—Existence for a long period—Permanently established by reason of—Grantees' liability to fulfil condition, of personal residence—Existence of habitable house—Sufficient compliance—No confiscation.

When a colony has become firmly established, say after 12 or 15 years of its existence, the presence or absence of a particular grantee becomes a matter of little or no public importance. If he has not acquired proprietary right, he retains his technical liability to fulfil the condition of personal residence, but it becomes very undesirable to enforce this by confiscation, and the proper course is to accept the existence of a habitable house as sufficient evidence of residence and to make no further inquisition into the habits of the grantee. *Bahadari and Bagari v. Crown*, 3 P.R. 1914 (Rev.).

MAYNARD, F.C.

Cancellation.

Valuation of suits for cancellation of bond. See ACT VII OF 1887 (SUITS VALUATION), No. 3, (1914) M.W.N. 767.

Cantonment Taxing Regulations (Poona).

Cantonment—Rating—Poona Cantonment Taxation Regulations, 1881—Increase in assessment on Race-course ground—Objections to the increase to be filed in three days—Time fixed by the Regulation as not less than fifteen days—Want of sufficient notice—Cantonment Magistrate—Levy of assessment illegal—Jurisdiction—Civil Court—Payment of assessment under protest—Payment by cheque—Payment is effective only when the cheque is cashed—Limitation runs from the date the cheque is cashed—Limitation Act (1908), Art. 62.

The Western India Turf Club at Poona was taxed at Rs. 201 per year up to 1903 upon an estimated gross letting value of the Race-course property at Rs. 5,018. A notice was served upon them, on the 8th October 1903, by the Cantonment Magistrate, Poona, that the said property was, under the Poona Cantonment Taxation Regulations, valued at Rs. 2,46,000, and rated at Rs. 9,440 per annum. The notice further required that, if any complaint was to be made against the taxation, it should be made to the Cantonment Magistrate within three days from the receipt thereof. The rules regulating the Magistrate's action in this respect required that the complaint against his valuations should be made to him within three days before the date fixed in the public notice, and that the date so fixed must not be less than fifteen days from the publication of the notice. The Magistrate confirmed the assessment. The plaintiffs appealed to the Cantonment Committee, but the appeal was rejected. The plaintiffs thereupon paid under protest, on the 28th November 1903, a cheque for Rs. 4,819-8-10 being assessment for one half year. The cheque was cashed on the 27th

**Cantonment Taxing Regulations (Poona)
—(Concluded).**

May 1909. The plaintiffs filed the present suit, on the 28th March 1912, to have it declared that the increased assessment was illegally levied from them and to recover back the increase paid by them under protest. The lower Court decreed the claim. The Secretary of State appealed contending that the Court had no jurisdiction to entertain the suit and that a portion of the claim was barred by Art. 62 of the Limitation Act, 1908:—

Held, (1) that the action of the Cantonment Magistrate was not warranted by the Regulations, inasmuch as reasonable time was not given to the plaintiffs to take advice as to the increase in the rate from Rs. 201 to Rs. 9,840, and that he had wholly disregarded the basis upon which the rate was to be assessed, and that, therefore, the jurisdiction of the Civil Court was not ousted, the money having been claimed and received from the plaintiff without the shadow of a right.

(2) That the claim to have a refund of the excess in the payment of Rs. 4,819-8-10 was not barred by the provisions of Art. 62 of the Limitation Act, 1908, for the limitation ran, not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee. *Secretary of State v. Hughes*, 16 Bom. L.R. 121=38 B. 293=23 Ind. Cas. 779.

SCOTT, C.J., and BATCHELOR, J.

Carriers.

Liability of carriers for wrong delivery of goods—Duty of consignee—S. 91, Act IX of 1890 (Calcutta Port Act).

Plaintiff, Nigel W. Freeman, sued to recover from the defendant company for the loss of certain articles contained in 2 packages entrusted to the latter company in London to be delivered to plaintiff at Calcutta under a bill of lading. The bill of lading provided that the packages were "to be delivered at the Port of Calcutta into Mr. N. W. Freeman or his assigns." The consignee in the bill of lading was "N.W. Freeman, Calcutta." Plaintiff did nothing with regard to taking delivery of the packages on arrival either by notifying the defendant company or by instructing an agent to clear the goods on his behalf. The packages were in the ordinary course landed by the defendant company and made over to the Port Commissioners. As no one appeared to take delivery, the defendant company sent a notice of arrival addressed, as was the bill of lading, to "N. W. Freeman, Esq., Calcutta." This was delivered by the post office to one Nigel W. Freeman who attended at the defendant company's office and received a delivery order and wrongfully got delivery of the goods. Nigel Freeman was then addressed both by the defendant company and the plaintiff, and he at last returned a portion of the goods to the plaintiff in a damaged condition. The consignee (Noel W. Freeman) sued the defendant company for damages for misdelivery.

Carriers—(Concluded).

Held, the defendant company was not liable. The contract of carriage was at an end when the packages were made over by the defendant company to the Port Commissioners, and the responsibility of the defendant company thereby ceased under S. 91 of the Calcutta Port Act.

The act of the defendant company in sending out the notice of arrival and issuing a delivery order to a person whom they *bona fide* thought to be the person entitled to the possession of the goods was not an unauthorized act for which they can be made liable.

It is clearly the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery.

What the Court has to see is whether the defendant company in doing what they did acted in a reasonable and proper manner. If they did, they cannot be held liable, simply because the notice got into the hands of a wrong person who acted fraudulently in the matter. *Freeman v. P. & O. S. N. Co., Ltd.*, 41 C. 703.

CHITTY, J.

References;—(1870) L.R. 5 Ex. 51, R; (1874) L.R. 9 Ex. 86; (1889) 14 P.D. 141, D.

(9) Railway company—Loss of goods by fire—Liability of company. See RAILWAY, No. 1 16 Bom L.R. 467.

Carriers Act.

See ACT III OF 1865.

Cash.

Meaning of 'cash.' See AWARD, No. 2, 18 C.W.N. 426.

Caste.

(1) *Caste—Panchayat, power of—Excommunication Jurisdiction—Natural justice—Defamation.*

To say that a man has been outcasted is *prima facie* to defame him. But where the Chaudhri of a community, duly recognized and acknowledged as such, convened a regular Panchayat according to the custom of the caste, and in fulfilment of his duties as Chauthri, communicated a resolution, passed by the Panchayat, temporarily excluding the plaintiff from social intercourse with the members of the caste, and it was not shown that he was actuated by any ill-will or ulterior or improper motive:

Held, that the Chaudhri was not liable in damages for libel or defamation.

The Courts in India should refuse to interfere with the autonomy of caste, or, in other words, with the decisions of a Panchayat, provided that those decisions affect matters within the jurisdiction of the Panchayat and are not contrary to natural justice.

Some members of a caste refused to subscribe to a declaration of faith issued by the Panchayat, and instead issued over their signatures a leaflet calculated to bring the Panchayat into contempt. Upon this the

Caste—(Concluded).

Panchayat convened a meeting. Notice of this meeting was not served upon those members personally though other members of their families were served. The Panchayat decided to temporarily exclude from all social intercourse their families until those persons appeared before the Panchayat and cleared themselves. It was contended that the order of the Panchayat was without jurisdiction in that no caste offence had been committed, and that the Panchayat had acted contrary to natural justice in not giving the persons concerned an opportunity of defending themselves before passing the order of temporary exclusion:

Held, (1) that the issue of the leaflet and the refusal to sign the declaration of faith were both social questions, closely concerning the community and well within the jurisdiction of the Panchayat;

(2) that personal service upon the persons complained against was unnecessary, inasmuch as other members of their family had been served with notice of the meeting, and that, as Panchayats deal with families as units and not with individuals and as any member of a family can appear on its behalf and defend, the procedure of the Panchayat was not contrary to natural justice;

(3) that, as the family had been suspended pending the appearance before the Panchayat of the offending members, there was no denial of justice. *Bishambar Das v. Gobind Das*, 23 Ind. Cas. 301=12 A.L.J. 552.

TUDBALL and RAFIQUE, JJ.

(2) *Caste—Way, right of—Prescription—User by a few on behalf of caste.*

A caste, in India, is a Corporation with civil rights and can acquire title by user to a right of way, even if that user be by a few members of the caste, provided it is exercised on behalf of and for the caste. *Suppan Acharry v. Yanna Konar*, 27 M.L.J. 110=24 Ind. Cas. 467.

SANKARAN NAIR and AYLING, JJ.

(3) Decision that suit is not barred as caste question—Whether a preliminary decree—Appeal. See CIV. PRO. CODE (1908), No. 137, 16 Bom. L.R. 954.

Cause of Action.

(1) New cause of action arising subsequent to suit—Remedy of plaintiff. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 1, 16 M.L.T. 244.

(2) Cause of action different though claim same—Agreement admitting liability and prescribing payment by promissory notes—Promissory notes materially altered—Suit on pro-notes dismissed—Suit upon agreement if lies. See CEYLON CIVIL PROCEDURE ACT, No. 1, 18 C.W.N. 617.

(3) How arises—Misjoinder of. See CIV. PRO. CODE (1908), No. 50, 21 Ind. Cas. 488.

(4) What it consists of. See CIV. PRO. CODE (1908), No. 51, 12 A.L.J. 955.

Cause of Action—(Concluded).

(5) Pro-note given in discharge of certain debt—Suit on pro-note—Subsequent suit on debt due—Causes of action whether different. See CIV. PRO. CODE (1908), No. 241, 12 A.L.J. 959.

(6) Meaning of. See CIV. PRO. CODE (1908), No. 248, 16 Bom. L.R. 454.

(7) Suit to be tried on the cause of action as it existed at the date of its commencement—Court when may take notice of events which have happened since the institution of the suit. See CIV. PRO. CODE (1908), No. 379, 20 O.L.J. 107.

(8) If can be prolonged by transfer of title. See SALE, No. 12, 24 Ind. Cas. 216.

(9) Suit under S. 42, Specific Relief Act—Denial of title enough—Acts done in consequence of such denial not different cause of action. See SPECIFIC RELIEF ACT, No. 23, 22 Ind. Cas. 883.

Cess Act (Bengal).

See BEN. ACT IX OF 1880.

Ceylon Civil Procedure Act.

S. 34 — *Causes of action, different, though claim same—Agreement admitting liability and prescribing payment by promissory notes—Promissory notes, materially altered—Suit on promissory notes dismissed—Suit upon agreement if lies—"Accord and satisfaction by substituted agreement"—Claim on prior rights extinguished—Suit on such claim, if lies—Ceylon Civil Procedure Act, S. 34 (Cf. Civ. Pro. Code, O. II, r. 2)—Pleadings faulty—Claim in plaint based on wrong grounds—No objection by defendant—Amendment.*

A, whose claim to receive certain items of moneys from B was disputed by the latter, agreed with B to refer the disputes to arbitrators who, after an informally conducted investigation, drew up what was termed a "receipt," which B signed, the arbitrators witnessed and A accepted and acted upon. The document dealt *seriatim* with seven sums thereby admitted to be due from B to A amounting in all to Rs. 28,214, odd, and prescribed the mode in which it was to be paid, namely, by a cash payment of Rs. 224 odd (which was immediately paid) and by passing two promissory notes for Rs. 14,000 each "payable with interest" on two dates. The amount of interest was (probably by oversight) not specified but there was no doubt that the parties intended that it would be at a certain customary rate which worked out to between 6 and 7 *per cent. per annum*. A, however, subsequently, and without communication with B, went to one of the arbitrators and (without bad faith either on his part or the arbitrators) persuaded him to alter both promissory notes by inserting therein 9 per cent. as the rate of interest. A's action on the two promissory notes having been dismissed on the ground of material alteration, he sued B for two items of moneys amounting to Rs. 12,297 odd

Ceylon Civil Procedure Act—(Concluded).

which he had claimed before the arbitrators which were included in their award:

Held—that the "receipt" constituted the award of the arbitrators.

That whether it did or did not amount to an award, it was clearly an "accord and satisfaction by a substituted agreement," whereby the respective rights of the parties *inter se* were abandoned in consideration of the acceptance by all of a new agreement.

That the arrangement for the discharge of the unpaid balance of the amount found due by means of the promissory notes only expressed the mode of payment, which was essentially a matter of form only, the substance of the award being that the specified amount was actually due; the plaintiff could, therefore, sue for the balance due upon the agreement when his action on the promissory notes failed.

That the form of the plaintiff's action which was based on rights already extinguished by the agreement was faulty. But the present action should be treated as one based on the new agreement, the defendant not having taken exception to plaintiff's statement of the grounds of his claim, so as to give him an opportunity to amend them at an earlier stage.

That a claim on the promissory notes and a claim for the amount found due under the award were not the same cause of action, but were really inconsistent and mutually exclusive causes of action, and the plaintiff was not required in his suit on the promissory notes to ask for relief on the cause of action arising out of the agreement, by S. 34 of the Ceylon Civil Procedure Act.

That the plaintiff's suit which was for a part only of the unpaid balance should be decreed. But he would be precluded by S. 34 of the Ceylon Civil Procedure Act from bringing a fresh action for the remainder.

The object and meaning of S. 34 of the Ceylon Civil Procedure Act (*which is very similar to O. II, r. 2 of the Indian Code*) explained.

This section is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph (*Explanation in the Indian Code*) is not intended to be an illustration of the foregoing provisions, but a substantive enactment making what otherwise would be independent causes of action, one cause of action for the purposes of the section. *Saminathan Chetti v. Pana Lana Pana Lana Palaniappa Chetty*, 18 O.W.N. 617 (P.C.).

LORD DUNEDIN, LORD SHAW and LORD MOULTON.

Charge.

(1) Words essential to create a charge. See ACT II OF 1874 (ADMINISTRATOR GENERALS), No. 8, 22 Ind. Cas. 566.

(2) Deposit in one Bank—Receipt not transferable—Money borrowed from another Bank on its security—Charge acknowledged by the first bank—Effect—Equitable assignment. See ASSIGNMENT, No. 3, 12 A.L.J. 886.

(3) Charge how created. See HINDU LAW (GENERAL), No. 1, 27 M.L.J. 694.

(4) Mortgage—Surplus sale-proceeds—Suit to recover—Suit for money charged on immoveable property—Limitation. See LIMITATION ACT (1877), No. 15, 15 M.L.T. 62.

(5) Will creating charge by way of annuity—Charge upon immoveable property whether enforceable against *bona fide* transferee for value without notice—Distinction between mortgage and charge—Registration of charge not compulsory—Creation of charge by document not compulsory. See TRANSFER OF PROPERTY ACT, No. 85, 23 Ind. Cas. 867.

(6) Applicability of S. 68, Transfer of Property Act to charge holder. See TRANSFER OF PROPERTY ACT, No. 67, 27 M.L.J. 494.

(7) Document not valid as a mortgage whether can be treated as charge—Proof of execution of charge by attestors—Charge and mortgage—Distinction between. See TRANSFER OF PROPERTY ACT, No. 59, 10 N.L.R. 81.

Charter Act (24 and 25 Vic. C. 104).

(1) S. 15—Occurrence of mere errors of fact or law—Perverse decision—Interference in revision—Test of perversity. See CIV. PRO. CODE (1908), No. 179, 16 M.L.T. 156.

(2) S. 15—Building by co-owner—Prejudice to other co-owners—Suit for partition—Right to obtain temporary injunction. See CO-OWNERS, No. 3, 24 Ind. Cas. 313.

(3) S. 15—Powers of superintendence—Order allowing withdrawal of suit—Revision. See WITHDRAWAL OF SUIT, No. 3, 41 C. 632.

(4) S. 15—Sonthal Perganahs—Suit valued over Rs. 1,000—Proceedings in such suit if subject to High Court's superintendence—Order in execution proceeding if may be revised. See ACT XXXVII OF 1855 (SONTHAL PERGANNAHS), No. 2, 18 C.W.N. 662.

(5) S. 15—Service by affixture—Order holding service sufficient—High Court when will interfere with the order. See CIV. PRO. CODE (1908), No. 257, 15 M.L.T. 217.

(6) S. 15—Order refusing to issue commission to examine witnesses—Not open to revision. See COMMISSION, No. 1, 15 M.L.T. 339.

(7) See HIGH COURTS ACT.

Charter Party.

Interference with the performance of—Injunction. See SPECIFIC RELIEF ACT, No. 37, 16 Bom. L.R. 178.

Chaukidari Chakran Lands.

Chaukidari chakran lands, resumption by Government of—What Chaukidari lands are resumable—Onus on Government to show that land was set apart under its direction for grant to chaukidars and not taken into account in assessing revenue—Village Chaukidari Act (VI B.C. of 1870—"Assigned, appropriated," meaning of—Reg. I of 1793, S. 9, cl. 4—Reg. VIII of 1793, S. 41.

As a zamindar as such has *prima facie* title to the full enjoyment of every parcel of land within the zamindari for which he pays revenue to Government, it rests on the Government to show that the settlement with the zamindar was subject to reservations in respect of any land which gave Government the power of resuming and assessing it.

The power of resumption had been reserved under cl. 4 of S. 8, Reg. I of 1793, and S. 41 of Reg. VIII of 1793, in respect of such Chaukidari Chakran Lands only as had been set apart by the zamindars with the permission of the Government and under its authority, and which although included in the mahal and annexed to the malguzari lands, were not taken into consideration for the assessment of revenue.

Held—That the Government had no authority to resume Chaukidari Chakran Lands within the zamindaries of Sukinda and Madhupur in Orissa when it failed to show that any parcel of land within the zamindaries was not taken into account in fixing the revenue payable for the zamindaries.

That the zamindars entertained the services of Chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. They were under no obligation to make such grants, when their only obligation under the terms of their *sanads* was to maintain peace and order within their zamindaries; and the mere fact that some appointments were made with the approval of a Government Officer cannot alter the nature of the grants and make them resumable by Government.

The word "assigned" in the definition section of Act VI of 1870 (B.C.), means lands assigned by Government appropriated under its authority or with its permission. *The Secretary of State for India in Council v. Kirtibas Bhupati Harichandan Mahapatra*, 19 C.W.N. 65=17 Bom. L.R. 32=41 C.L.J. 81=17 M.L.T. 1; (P.C.).

LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, SIR JOHN EDGE and MR. AMEER ALI.

Chota Nagpur Encumbered Estates Act.

See BEN. ACT VI OF 1870.

Chota Nagpur Landlord and Tenant Procedure Act.

See BEN. ACT I OF 1879.

Chota Nagpur Tenancy Act.

See BEN. ACT VI OF 1903.

Chukain Rights.

In Rangpore—Nature of—Permanent element—Development into occupancy right—Transferability. See CONTRACT, No. 8, 24 Ind. Cas. 193.

Cheque.

Payment by cheque when effective—Limitation runs from the date the cheque is cashed. See CANTONMENT TAXING REGULATIONS (POONA), No. 1, 16 Bom. L. R. 121.

Chetty Banking.

Usage of. See PRINCIPAL AND AGENT, No. 4, 23 Ind. Cas. 516.

Chinese Buddhists.

In Burma—Law relating to marriage and inheritance among. See BUDDHIST LAW (INHERITANCE), No. 5, 7 Bur. L.T. 246.

Chit Transactions.

Chit fund—Security to manager's satisfaction—Interference of Court.

Where the manager of a chit fund has entered into an arrangement that security by the prize winners should be given to his satisfaction and where property worth Rs. 3,000 was offered as security for Rs. 2,700 and the manager refused to accept the same, *held* that, even though a Court would consider it reasonable, the manager cannot be said to have acted capriciously and a Court will not interfere with his decision. *Krishna Iyer v. Ramasawmy Iyer*, (1914) M.W.N. 715 = 27 M.L.J. 447.

AYLING and NAIPER, JJ.

City Civil Courts Act (Madras).

See MAD. ACT VII OF 1892.

City Municipal Act (Bombay).

See BOM. ACT III OF 1888.

See MAD. ACT I OF 1884.

See MAD. ACT III OF 1904.

Civil Courts Act.

See BEN. ACT VI OF 1871.

See BOM. ACT XIV OF 1869.

See MAD. ACT III OF 1873.

Civil Courts Regulation.

See REG. IV OF 1827.

Civ. Pro. Code (1859).

Auction sale when the Code of 1859 was in force—Purchase by plaintiff's ancestor in name of defendant's ancestor—Dispute between the parties as to ownership of land when Code of 1908 was in force—New Code applicable. See CIV. PRO. CODE (1908), No. 108, 12 A.L.J. 1145.

Civ. Pro. Code (1882).

(1) Meaning of the words 'married woman' in. See HINDU LAW (WILL), No. 5, 17 O.O. 318.

(2) Code how far applicable in Sonthal Parganas. See SONTAL PARGANAS, No. 1, 18 C.W.N. 994.

Civ. Pro. Code (1882)—(Continued).

(3) S. 2—*Preliminary decree—Limitation Act (1908), Sch. I, Art. 182—Appeal—Final decree—Objection to preliminary decree without appealing from same—Limitation—Account—Suit for account against gomastha—Hypothecation of property for due performance of duties—Suit to recover amount found due from hypothecated property—Suit to enforce lien.*

Under the old Civ. Pro. Code, objections could be taken to a preliminary decree in an appeal against the final decree without appealing from the preliminary decree.

A suit against a gomastha or agent by the principal to recover the amount due on adjustment of accounts, from the immoveable properties pledged as security by the agent for due performance of his duties, is a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 182 of the first Schedule to the Limitation Act, and the period of limitation for such a suit is 12 years from the time when the money sued for became due. *Trollukhaynath Mandal v. Abanish Chandra Roy*, 24 Ind. Cas. 18.

FLETCHER and RICHARDSON, JJ.

References :—35 O. 298 = 12 C.W.N. 820 = 7 C.L.J. 279, F.; 5 Ind. Cas. 59 = 14 C.W.N. 122, Diss.

(4) S. 13—*Res judicata—Joint property partitioned by every individual co-sharer by suit—Property left in possession of last co-sharer less than his proper share—Suit by that co-sharer to correct previous allotments—That co-sharer defendant in all previous suits—Partition, effect of—Parties.*

If any co-sharer applies for a partition of a property, he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore, it is a decree against them and in favour of himself.

The co-sharers in a patni talook brought individual suits from time to time impleading the other co-sharers, including the present plaintiff, as defendants, and had their shares partitioned out by meets and bounds. Thus every co-sharer, other than the plaintiff, had his share partitioned out till the plaintiff was left with the remainder as representing his share. The plaintiff after satisfying himself correctly that this remainder was insufficient to represent his share of the original patni talook, brought this present suit to correct the apportionment to those of the previous plaintiffs or co-sharers who had received more than their proper share.

Held, that the suit was barred by the rule of *res judicata*. *Nalini Kanta Lahiri v. Sarnamoyi Debya*, 27 M.L.J. 76 = 24 Ind. Cas. 594 = 16 M.L.T. 544 = 17 Bom. L.R. 1 = (1914) M.W.N. 948 = 21 C.L.J. 23 (P.C.).

LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Civ. Pro. Code (1882)—(Continued).

(5) Ss. 13, 283—*Res judicata*—*Declaratory suit by claimant against decree-holder and judgment-debtor*—*Dismissal of suit*—*Attached property purchased by stranger at auction*—*Suit by purchaser for possession*—*Decree of declaratory suit, whether basis of auction-purchaser's title*—*Decree whether relevant and admissible in suit by auction-purchaser*—*Interpretation of statutes*. **Peari Mohan Shaha v. Durlavi Dassya**, 20 Ind. Cas. 815 = 18 C.W.N. 954 = 19 C.L.J. 441. See Final Part, 1913, Col. 288.

(6) S. 20—*Venue of suit*—*Plaintiff's option*—*Causes for transfer*—*Preponderance of convenience*. See RIGHT OF SUIT, No. 2, 7 Bur. L.T. 1.

(7) Ss. 27, 29—*Suit filed on last date of limitation*—*Addition of plaintiff after limitation*—*Addition of minor member of joint Mitaksbara family*—*Effect*. See LIMITATION, No. 1, 19 C.L.J. 5.

(8) S. 28. See No. 7, *supra*.

(9) S. 31—*Misjoinder of parties*—*Suit, dismissal of*—*Civ. Pro. Code (1908), O. 1, r. 9*.

A suit by one of the co-sharers in a jote instituted at a time when Act XIV of 1882 was in force, for a declaration that an entry in the record-of-rights, to the effect that the plaintiff and the defendant were joint tenants, was wrong on the ground that the plaintiff alone was the tenant and the defendant was his sub-tenant, is bad for misjoinder of parties.

S. 31 of the Code of 1882 which did not contain a saving clause in favour of non-joinder of parties as O. I. r. 9 of the Code of 1908, is applicable to such a suit. **Sheikh Faizu v. Sheikh Doman**, 19 C.L.J. 455.

JENKINS, C.J. and MOOKERJEE, J.

(10) Ss. 32, 248, 372—*Insolvency of judgment-debtor after attachment*—*Effect*—*Substitution of Official Assignee for judgment debtor if necessary*—*Necessity of summons on substituted party*—*Necessity of notice of proceedings to bind the Official Assignee*—*Stay of execution proceedings when judgment-debtor declared insolvent*—*Sale without serving notice*—*Effect*. See INSOLVENCY, No. 4, 18 C.W.N. 1058.

(11) Ss. 102, 103—*Dismissal of suit for default*—*Subsequent suit on different cause of action*—*Res judicata*. See CIV. PRO. CODE, (1908), No. 20, 12 A.L.J. 53.

(12) S. 103. See No. 11, *supra*.

(13) S. 211—*Decree awarding mesne profits*—*Period not prescribed*—*Decree to be construed as awarding mesne profits for three years*—*Application for mesne profits beyond three years treated as suit*—*Order*—*Appealable*. See MESNE PROFITS, No. 3, 24 Ind. Cas. 484.

(14) S. 212. See No. 19, *infra*.

(15) S. 244 (= Civ. Pro. Code, 1908, S. 47)—*Compromise by father—No leave of Court—Not binding on the son—Proper remedy of the latter—No suit but application under*

Civ. Pro. Code (1882)—(Continued).

S. 244—*The word 'determined' in S. 244*—*Effect*—*Hindu Law*—*Joint family*—*Father and son*—*Release of his share by father*—*Sons born subsequent to release*—*Residue*—*Right of all sons to equal shares*.

Where the Privy Council gave the plaintiff a declaration that the compromise entered into by his father in a former suit was not binding on him for want of sanction under S. 462, Civ. Pro. Code (1882), and where the plaintiff's father entered up satisfaction pursuant to the compromise now declared to be not binding.

Held, that the plaintiff ought not to have instituted a separate suit but ought to have proceeded under S. 244, Civ. Pro. Code, and that the Court has power in proceedings under S. 244, Civ. Pro. Code (1882), to reopen the satisfaction entered up by the plaintiff's father and to declare that the release given by the father was not binding on the plaintiff.

The word 'determined' in S. 244 shows that the questions of the nature specified in the section are to be finally disposed of, and the effect of the section is to give the Court executing the decree jurisdiction to dispose finally of such questions by granting appropriate relief. Where a Hindu father who formed a joint family along with his son, the plaintiff gave a release of his own share in the joint family property and where two more sons were born subsequently.

Held, that the residue of the property did not cease to be joint family property and that all the sons were entitled to participate in the property equally (a). **T.R. Ganesh Row alias Venkat Row v. T.Y. Tulja Ram Row**, 26 M.L.J. 460 = 24 Ind. Cas. 696.

WALLIS, J.

References:—5 M. 196; 25 M. 690; 13 M.L.J. 477; 34 M. 269; 35 M. 477 = 21 M.L.J. 476; 11 M.L.T. 312; 33 B. 267; 15 M.L.T. 186; 10 C. 626; 23 M.L.J. 64, R.

(16) S. 244—*Purchaser of portion of occupancy holding*—*Whether a 'representative' of judgment-debtor*. See OCCUPANCY, No. 2, 18 C.W.N. 971.

(17) S. 244—*Hindu widow succeeding to shebaitship*—*Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself*—*Suit by widow to set aside decree and sale as fraudulent*—*Dismissal of suit as barred under S. 244, if legal*. See SHEBAIT, No. 1, 18 C.W.N. 1029.

(18) S. 244—*Applicability to suit to set aside a decree and order for sale in execution thereof on the ground of fraud*. See SHEBAIT, No. 2, 16 M.L.T. 210.

(19) Ss. 244, 212—*Pleader's fees in appeal from order under*. See CIV. PRO. CODE (1908), No. 227, 24 Ind. Cas. 283.

(20) S. 248—*Date of notice*—*Running of time*. See EXECUTION OF DECREE, No. 8, 20 C.L.J. 15.

Civ. Pro. Code (1882)—(Continued).

(21) S. 248. See No. 10, *supra*.

(22) Ss. 248, 311, 313—*Non-service of notice, if an irregularity—Sale of putni mahal for arrears of rent—Purchase of putni mahal by executor of deceased dur-putnidar's estate in his personal capacity—Application under S. 311 for setting aside sale by executor as such and under S. 313 by purchaser in personal capacity—Lis pendens.*

D, the zamindar of a putni mahal, sold his interest in the property and then brought a suit against C, the putnidar, for the arrears of the putni rent that had accrued prior to the sale and obtained a decree. Shortly afterwards D died after having assigned all his properties including this decree to certain trustees for the payment of his debts. The putni was then put to sale under Reg. VIII of 1819 for non-payment of rent, and F, who was the executor to the estate of his deceased father who was dur-putnidar under C, deposited the arrears for saving the dur-putni interest from the effect of the sale and obtained possession as mortgagee. The putnidari interest in the putni was then sold in execution of a money decree and purchased by S. The trustees appointed by D took out execution and the putni was fixed for sale. F instituted regular suit for a declaration that the decree under execution was not a rent-decree and for a perpetual injunction upon the decree-holders not to execute the same against the putni mahal. The suit was decreed by the first Court but dismissed by the High Court on the 8th April 1908. F applied for leave to appeal to the Privy Council which was granted on the 30th June 1908. The trustees applied for the sale of the putni mahal and they impleaded C alone as judgment-debtor. The sale took place on the 6th July 1908 and the property was purchased by F in his personal capacity. For setting aside the sale, an application under S. 311, Civ. Pro. Code, was made by S, as also by F as executor to the estate of his deceased father. F also made an application in his personal capacity under S. 313, Civ. Pro. Code. The District Judge allowed these applications and set aside the sale. The judgment of the Privy Council was subsequently delivered on the 4th March 1914 and it was held that the suit instituted by F should have been decreed.

Held—That the facts were sufficient to attract the application of the doctrine of *lis pendens* and the act of the decree-holders in bringing about the sale could not prejudice F and make the judgment of the Privy Council nugatory (a).

That, although C, the former putnidar, had no subsisting interest in the property, the decree-holders having chosen to treat him alone as the judgment-debtor were bound to serve him with notice of the sale, though they were not bound to issue notice on S, the purchaser of the putni interest, whose suit failed, whom they were not willing to treat as the legal representative of C and against whom they did not want to execute the decree. .

Civ. Pro. Code (1882)—(Continued).

That non-service of notice under S. 248, Civ. Pro. Code, was not a mere irregularity and vitiated the sale (b).

That the auction purchase of the putni was made by F in his personal capacity and he was not debarred from applying under S. 313, Civ. Pro. Code, for setting aside the sale. *Moharaj Bahadur Singh v. Surendra Narain Singh*, 19 O W N. 152.

D. CHATTERJEE and WALMSLEY, JJ.

References :—(a) 29 B. 435 (1905), R. (b) 18 C.W.N. 1058 (1914), F.

(23) Ss. 253, 583, 610—*Civ. Pro. Code (1908), Ss. 50, 52—Hindu Law—Suretyship debt—Decree against father—Partition between father and son—Execution against property in hands of son—Liability of son to pay it.*

The provision contained in S. 253 of the Code of Civil Procedure, 1882, as to enforcement of the decree against a surety, applies also to appellate decrees, and the restitution of money paid to a surety can be ordered under S. 583 of the Code (a).

A son is liable for the surety debt of his father only if they lived as members of a joint Hindu family, but if there was a partition even if made after the date of the order passed against the father as surety, the property obtained by the son on such partition cannot be proceeded against to enforce such liability (b).

An order for restitution is tantamount to a decree (c).

The property obtained by son on partition, with his father cannot be said to be "assets" of the father in the hands of the son within the meaning of Ss. 50 and 52 of the Code of Civil Procedure (1908), so long as the father is living. *Devaguptapu Kameswaramma v. Vadaddi Yenkatasubba Rao*, 27 M.L.J. 112=24 Ind. Cas. 474= (1914) M.W.N. 742.

WALLIS and OLDFIELD, JJ.

References :—(a) 13 M. 1, F.; 28 M. 377, R. (b) 24 M. 555, R. (c) 8 Ind. Cas. 131; (1910) M.W.N. 565; 8 M.L.J. 349; 4 M.L.T. 277; 18 M.L.J. 599, F.; 11 B. 37; 4 I.A. 247 (P.C.)=3 C. 198=1 C.L.R. 49; 5 C. 148 (P.C.)=4 C.L.R. 226=6 I.A. 88; 13 C. 21 (P.C.)=13 I.A. 1; 28 B. 383=6 Bom. L.R. 344, Dist.

(24) S. 257-A. *repeal of—Effect of repeal—Execution of decree—Agreement to give time to judgment-debtor—Evidence Act, Ss. 91, 92—“Any matter required by law to be reduced to the form of a document,” whether covers case of decree—Oral agreement between decree holder and judgment debtor to give time—Oral evidence, if admissible—Contract Act, S. 63, where applicable.*

The effect of the repeal of S. 257-A of the Code of Civil Procedure of 1882, that is, of its non-production in the new Code of 1908, is to make an agreement to give time to a judgment-debtor an agreement the legality of which must be tested like that of any other agreement; in other words, an agreement to give time to a

Civ. Pro. Code (1882)—(Continued).

judgment-debtor may now be entered into between the decree-holder and the judgment-debtor without the sanction of the Court, and effect may be given to such an agreement as to any other agreement, if valid in law. Such an agreement to be valid must be an agreement for consideration, although its validity will not be affected by the circumstance that the consideration is not reasonable or that it has not received the sanction of the Court.

The expression "any matter required by law to be reduced to the form of a document" in S. 92 of the Evidence Act, if read, as it must be read, along with the expression "as between the parties to any such instrument or their representatives in interest," cannot cover the case of a decree. Therefore, oral evidence may be admissible in proof of an alleged oral agreement between a decree-holder and a judgment-debtor to the effect that, although only two years' time for payment was stipulated in a compromise between the parties, yet in reality no attempt would be made to execute the decree within twelve years.

S. 63 of the Contract Act does not apply where the parties stand in the position of decree-holder and judgment-debtor, and not in that of promisor and promisee. **Debendra Narain Sinha v. Sourindra Mohan Sinha**, 24 Ind. Cas. 391.

MOOKERJEE and BEACHCROFT, JJ.

(25) *S. 257-A—Decree, satisfaction of—Agreement to pay interest, on failure to pay an instalment, without the sanction of the Court is void—Void agreement if separable from the main agreement does not render the main agreement void—The Dekkhan Agriculturists' Relief Act (XVII of 1879), S. 13 (b).* **Chatru Abaji Patil v. Kondji Yithal Patil**, 15 Bom. L.R. 1129 = 22 Ind. Cas. 284 = 38 B. 219. See Final Part, 1913, Col. 292.

(26) *S. 263—Effect of substantial compliance with S. 263.*

If the provisions of S. 263, Civ. Pro. Code (1882), are substantially complied with, the transfer of possession, in the eye of the law, is complete, whether it is called symbolical possession, or not, and such delivery of possession would have the effect of interrupting the judgment-debtor's adverse possession. The possession of the judgment-debtor after such delivery can only be regarded as a fresh act of trespass-giving rise to a new cause of action. **Dhan Singh v. Ganpat**, 10 N.L.R. 60 = 24 Ind. Cas. 860.

MITTRA, A.J.C.

*References:—*36 B. 373, Diss.; 5 C. 584; 7 C. 418; 24 C. 715, R.

(27) *Ss. 268, 278—Decree—Execution—Attachment of debt—Garnishee claiming set-off—Set-off can be claimed by garnishee—Payment of Court-fees not necessary—The claim must be made within a year of the disallowing of the garnishee's objection by the executing Court.*

Civ. Pro. Code (1882)—(Continued).

In execution of a decree against a judgment-debtor, Rs. 1,028, which stood at his credit at the Chalisgaon shop of the defendants (garnishees) were attached by the plaintiff under S. 268 of the Civ. Pro. Code of 1882. The defendants contended that, although the Rs. 594 were due by them to the judgment-debtor at their Chalisgaon shop, Rs. 676 were due to them by the judgment-debtor at their Pachora shop, and claimed a set-off. The Court, however, ordered on the 4th September 1905 that the debt attached should be sold. At the sale, the debt was purchased by the plaintiff, who sued in 1908 to recover Rs. 594 from the defendants. The lower Court was of opinion that the Chalisgaon and Pachora accounts being separate the defendants could not claim that the Pachora debt should be taken into account, for the plaintiff had not made himself responsible for the judgment-debtor's debts having only purchased one of his assets. The Court also held that the question of set-off could not be gone into unless on payment of Court-fees as on a counter-claim:—

Held, (1) that, if a cross-debt were due to the defendants at the date of the attachment, it was obviously just that there should be a set-off in their favour;

(2) that the equity arising from the cross-debt could be set up by the defendants even in absence of payment of a Court-fee;

(3) that the defence of set-off was, however, not open to the defendants after their failure to raise the attachment, as no suit had been filed by them within a year from the 4th September 1905. **Tayabali Gulam Hussein v. Atmaram Sakharamvani**, 16 Bom. L.R. 520 = 38 B. 631.

SCOTT, C.J. and BATCHELOR, J.

*References:—*27 M. 67, F.; 4 B. 323, Not F.

(28) *S. 278.* See No. 27, *supra*.

(29) *Ss. 278, 281—Claim petition dismissed for default—Regular suit if must be brought within a year.* See LIMITATION ACT (1908), No. 66, 18 C.W.N. 770.

(30) *Ss. 278, 283—Two claim petitions—Joint order thereon—Construction—Attachment raised—Effect.*

Plaintiffs put in a claim petition stating that the property attached was purchased by them prior to attachment. Another party, put in another petition claiming the property by survivorship. Both the petitions were heard together. The Court found that, previous to the attachment, the property had by the law of survivorship passed out of the ownership of the judgment-debtor (then deceased), but that the plaintiffs did not make out their claim to be considered as the *bona fide* purchasers of the property attached. The Court however passed one order directing that the attachment sought to be raised should be raised.

Held that, though the Court expressed an opinion adverse to the grounds on which plaintiff's then relied, and came to conclusion that

Civ. Pro. Code (1882)—(Continued).

those grounds were not well founded, that did not make the plaintiffs "the party against whom an order was passed under Ss. 280, 281 or 282, Civ. Pro. Code," and the attachment having been raised, the plaintiffs were not bound to set aside the order. **Ponaka Balarami Reddi v. Hazi Mahomed Abdul Aziz Badshah Sahib**, 26 M.L.J. 499.

TYABJI and SPENCER, JJ.

(31) S. 281 See No. 29, *supra*.

- (32) Ss. 282, 283—*Evidence Act*, S. 44—
• Decree—Sale in execution—Sale subject to mortgage lien—Mortgagee suing on mortgage
• —Defence that the mortgage was fraudulent—Limitation.

The plaintiff was the mortgagee of certain property. Defendant No. 5 obtained a decree against the mortgagor and applied to execute it by attachment and also of the mortgaged property. The plaintiff intervened in the proceedings and put forward his mortgage lien. The Court, after hearing the parties, recognized the lien on the 6th March 1897. The lien was mentioned in the proclamation, and at the sale the property was knocked down to defendant 5. The plaintiff sued in 1907 to enforce his mortgage. The defendant No. 5 contended that the mortgage was fraudulent. The lower Court dismissed the suit on the ground that the mortgage was fraudulent. The plaintiff appealed contending that the order dated 6th March 1897 was conclusive, not having been set aside in a suit filed within a year from its date.

Held, reversing the decree and remanding issue, that the plaintiff's suit would be barred if defendant No. 5 was aware of the fraudulent nature of the plaintiff's mortgage transaction within a year of the date of the order of the 6th of March 1897.

S. 283 of the Civ. Pro. Code, 1882, can only contemplate a suit based upon facts known to the party against whom an order was passed under S. 282 within a year from the date of the order. If he was aware of the fraudulent nature of the mortgage, it was part of the cause of action he would have to allege in such a suit filed within a year; if, however, he was not aware of the fraud, and became aware of it afterwards, he can, under S. 44, *Evidence Act*, assert the fraudulent nature of the plaintiff's application and the consequent invalidity of the order passed upon it in any proceeding instituted by the plaintiff on the strength of such order. **Chinna Sadashiv v. Ram Dayal Preyagdas**, 16 Bom. L.R. 648.

SCOTT, C. J. and BEAMAN, J.

- (33) S. 288—Court-fee—Suit by claimant under S. 282 Civ. Pro. Code (1882)—Value of quantum of interest claimed.

In suits under S. 283 of Civ. Pro. Code, of 1882, the test for the purposes of Court fees is what is the value of the quantum of interest

Civ. Pro. Code (1882)—(Continued).

which the plaintiff wishes to establish. **Narayana Singh v. Ayyasamy Reddi**, (1914) M.W.N. 910.

KUMARASAMI SASTRI, J.

References—17 A. 69, F.

(34) S. 283. See Nos. 5, 30, 32, *supra*.

(35) S. 285—Attachment—By two Courts—Sale by Court without jurisdiction—Setting aside.

Under the Civ. Pro. Code (1882), an attachment not shown to have been released remained in force.

Where property is attached by two Courts and a sale is held in execution of the lower Court's attachment, by such Court the sale is liable to be set aside, and a suit is not necessary for that purpose. **Pettiyakkal Yatakke Pureyil Mulla v. Marakkarakath Ahamed**, (1914) M.W.N. 796.

AYLING and HANNAY, JJ.

- (36) S. 295—*Civil Rules of Practice*, 1905—R. 279, Cl. (6)—"Realized" meaning—By application for execution or actual execution.

The decree-holder can proceed against money paid into Court by the judgment debtor on application for execution. Though he cannot come strictly under r. 295, yet the money is realized within the meaning of r. 279, cl. (6) of the Civil Rules of Practice, 1905. **Uthami Chettiar v. Juthu Nagasawmi Iyer**, (1914) M.W.N. 309=23 Ind. Cas. 241.

SADASIVA IYER and SPENCER, JJ.

- (37) S. 295. See LIMITATION ACT (1877), No. 15, 15 M.L.T. 62.

(38) S. 311—Distinction between S. 311 and O. XXI, r. 90 of the new Code. See CIV. PRO. CODE (1908), No. 354. 23 Ind. Cas. 889.

(39) S. 311. See No. 22, *supra*.

(40) S. 313. See CIV. PRO. CODE (1908), No. 361, 21 Ind. Cas. 774.

(41) S. 313. See No. 22, *supra*.

(42) S. 317—"Certified purchaser," whether includes his successor in title—Judgment-debtor purchasing his own property in benami to defraud creditor—His suit for confirmation of possession—Defence by transferee of auction purchaser that plaintiff not entitled to relief as the defrauded creditor—Whether defence available to him. **Nisakar Das v. Bairagi Samal**, 19 Ind. Cas. 909=19 C.L.J. 330. See Final Part, 1913, Col. 295.

(43) S. 332—Limitation—Limitation Act in force at date of suit, applicable, not that which came into force during pendency of suit—Limitation Act, 1877, Sch. II, Arts. 11, 12, 13, 14—**Maula Bakh v. Bhabasundaria Das**, 19 Ind. Cas. 968=19 C.L.J. 187. See Final Part, 1913, Col. 296.

(44) S. 335—Claim disallowed—Order for joint possession—Claimant not evicted—Claimant's right to sue for sole possession.

Civ. Pro. Code (1882)—(Continued).

Where, in a petition under S. 335 of the Civ. Pro. Code, 1882, an order was passed for joint possession of the decree-holder with the claimant, such an order is final subject to the result of a suit by the claimant. Where the claimant continued in possession and was not evicted, the words of the section are wide enough to cover a suit by the claimant to establish his right to sole possession. **Rangaswami Iyer v. Subbaraya Iyer**, (1914) M.W.N. 897.

OLDFIELD and TYABJI, JJ.

(45) Ss. 351, 357—Appeal against adjudication order whether amounts to a step-in-aid of execution. See **LIMITATION ACT** (1908), No. 159, 16 Bom. L.R. 612.

(46) S. 357. See No. 45, *supra*.

(47) S. 672. See No. 10, *supra*.

(48) S. 373—Withdrawal of suit with liberty to bring a fresh suit on payment of costs—Proper order to be passed in such a case—Non-payment of costs—Subsequent suit whether barred. See **WITHDRAWAL OF SUIT**, No. 2, 19 C.L.J. 529.

(49) Ch. XXII, S. 375-A—Withdrawal of application for execution with permission to bring fresh application—Not allowed.

The provision of Ch. XXII of the Code of Civil Procedure (1882), which allowed withdrawal of suit with permission to bring a fresh suit, did not apply to any application subsequent to the decree and did not permit the withdrawal of an application for execution with permission to make a fresh application. **Matapalat v. Beni Madho**, 12 A.L.J. 235=36 A. 172=22 Ind. Cas. 961.

RICHARDS, C.J. and BANERJI, J.

(50) S. 375—Question whether a decree is against S. 375 and is erroneous, to be raised in appeal and not in execution—Question of jurisdiction of Court how determined—Decree passed without jurisdiction—Question not to be raised in execution proceedings.

A suit was brought in a Munsiff's Court to set aside a will as forgery. A decree was passed in terms of a razinamah according to which plaintiff was to pay Rs. 2,750 to the defendants. Defendants applied to recover this amount by execution of that decree, and it was objected that the decree was passed without jurisdiction, as it went beyond the terms of S. 375, Civ. Pro. Code, and it directed the payment of Rs. 2,750 which is beyond the pecuniary jurisdiction of the Munsiff's Court.

Held, that the question whether a decree is against the provisions of S. 375 of the old Civ. Pro. Code, 1882, and is therefore erroneous, must be raised by way of appeal, and not in execution proceedings (a).

As to the question whether the decree was passed without pecuniary jurisdiction, *held*, that the question of jurisdiction is determined

Civ. Pro. Code (1882)—(Continued).

not by the relief awarded but by the valuation of the suit in accordance with the terms of the plaint (b).

Held also that, even if the decree was passed without jurisdiction, the question cannot be raised in execution proceedings, as the objection does not relate to the execution of the decree but affects its subsistence and validity (c). **Ratnaswami Chetty v. Ratnammal**, 15 M.L.T. 415=27 M.L.J. 388=24 Ind. Cas. 135.

SANKARAN NAIR and AYBING, JJ.

References :—(a) 30 M. 421, R. (b) 25 M. 543; 16 A. 286; 21 C. 550, R. (c) 9 M. 80; 22 B. 475; 26 M. 31; 28 M. 84; 11 A. 314; 15 B. 217; 17 A. 478 and 28 B. 378, R.

(51) S. 375. See No. 49, *supra*.

(52) S. 424—Suit against the Secretary of State—Two months' notice—Suit for injunction also requires the notice. **The Secretary of State for India in Council v. Kalekhan**, (1912) M.W.N. 786=23 M.L.J. 181=12 M.L.T. 224=15 Ind. Cas. 947=37 M. 113. See Final Part, 1912, Col. 284.

(53) Ss. 441, 443, 462—Guardian, compromise by, without Court's leave—Leave by guardian to withdraw suit obtained in pursuance of agreement of compromise and without acquainting Court with material facts—Suit to declare that minors not represented by guardian in suit not bound by decree—**Specific Relief Act**, S. 42—Suit to set aside withdrawal—Rights of parties upon compromise decree being set aside. **Kunwar Partab Singh v. Bhabuti Singh**, 17 C.W.N. 1165=1913 M.W.N. 785=14 M.L.T. 299=25 M.L.J. 492=16 O.C. 247=18 C.L.J. 384=15 Bom. L.R. 1001=35 A. 487=21 Ind. Cas. 288=11 A.L.J. 901 (P.C.). See Final Part, 1913, Col. 298.

(54) S. 443—Guardian ad litem—Certificated guardian—Absence of formal order appointing guardian, whether fatal to suit—Hindu daughter, decree against—Direction that decretal amount be recovered from estate of father—Decree, whether personal or effectual against reversion.

A Court is bound to appoint the certificated guardian of a minor defendant as guardian *ad litem*, unless for reasons to be recorded it considers that for the minor's welfare some one else should be appointed.

The absence of a formal order appointing the certificated guardian to represent a minor defendant cannot be regarded as fatal to the suit, where the minor was effectually represented by him in the suit with the tacit sanction of the Court (a).

Where, in a decree for money against a Hindu daughter, there was a distinct direction that the whole of the decretal amount should be recovered from the estate of her father which was inherited by her after his death.

Held, that the daughter represented the estate and the decree against her was not merely a

Civ. Pro. Code (1882)—(Continued).

personal decree but was effectual against the reversioner (b). **Janki Das v. Mohabir Prosad**, 22 Ind. Cas. 240.

COXE and CHATTERJEE, JJ.

References:—(a) 30 Co. 1021=80 I.A. 182=7 C.W.N. 774=5 Bom. L.R. 822, *Rel.* (b) 6 C.L.J. 621, *Rel.*

(55) S. 443. See No. 53, *supra*.

(56) S. 462. See No. 53, *supra*.

(57) S. 493—Temporary injunction by one Court—Transfer of suit to another Court after injunction—Breach of injunction after transfer—Jurisdiction of latter Court to punish for contempt. See CIV. PRO. CODE (1908), No. 431, 19 C.W.N. 470.

(58) S. 503—Powers under—Receiver whether can bring and defend suits—Suit against Receiver without leave of Court whether maintainable. See RECEIVER, No. 1, 19 C.L.J. 191.

(59) S. 503—Receiver when may be appointed. See RECEIVER, No. 7, (1914) M.W.N. 771.

(60) S. 582-A. See APPEAL (GENERAL), No. 3, 21 Ind. Cas. 866.

(61) S. 583. See No. 22, *supra*.

(62) Ss. 584, 585—Jurisdiction of High Court to set aside concurrent findings of lower Courts—Interference of Privy Council. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 4, (1914) M.W.N. 695.

(63) S. 585. See No. 62, *supra*.

(64) S. 602—Surety for costs of Privy Council Appeal—Decree for costs in Privy Council if may be executed against properties charged by surety—Personal execution—Civ. Pro. Code (1908), O XXXIV, r. 14—Transfer of Property Act, Ss. 67, 99.

Under S. 145 of the Civ. Pro. Code, a party who has obtained a decree for costs in Privy Council can proceed by application to realize the amount of costs decreed against the surety (for the judgment debtor) personally, but not against the property which he had charged under S. 602 of the old Civ. Pro. Code.

Even under O. XXXIV, r. 14, of the Civ. Pro. Code, which has replaced S. 99 of the Transfer of Property Act, the properties charged cannot be sold except by instituting a mortgage suit. **Musst. Chandrabati v. Madho Prosad**, 19 C.W.N. 178.

D. CHATTERJEE and WALMSLEY, JJ.

(65) S. 610. See No. 23, *supra*.

(66) S. 622—Sub-divisional officer exercising jurisdiction under Sonthal Parganas Act—Revision. See ACT XXVIII OF 1855 (SONTHAL PARGANAS), No. 3, 19 C.L.J. 292.

(67) Ss. 629, 630—Review—Appeal against final decree—Propriety of order granting review to be challenged, on what grounds—Granting of review—Whether whole case open for decision.

Civ. Pro. Code (1882)—(Concluded).

Sadar-ud-din v. Ekram-ud-din, 20 Ind. Cas. 670=18 C.W.N. 22=19 C.L.J. 225. See Final Part, 1913, Col. 802.

(68) S. 630. See No. 67, *supra*.

Civ. Pro. Code (1908).

(1) The Code of 1908 would not revive a right already barred before its passing. See LIMITATION ACT, 1877, No. 29, 16 Bom. L.R. 385.

(2) S. 2—Decree—Order directing abatement of suit—Appeal—Court of first appeal entertaining an appeal in non-appellable case—Practice—Second appeal.

An order directing the abatement of suit is not a decree within the meaning of that term as defined in the Code of Civil Procedure and no appeal lies against such an order declaring a suit to have abated (a).

Where Court of first appeal entertains an appeal in a case in which no appeal lies, the Court in second appeal can interfere with the order passed by such Court (b). **Walayat Husain v. Ramlal**, 12 A.L.J. 1113.

SUNDAR LAL, J.

References:—(a) 17 A. 172, *F.* (b) 13 A. 576, *F.*

(3) S. 2.—Order refusing grant of Letters of Administration with will annexed—Decree—Appeal—Court-fee. See ACT X OF 1865 (SUCCESSION), No. 15, 22 Ind. Cas. 99.

(3-a) S. 2. See No. 137, *infra*.

(4) Ss. 2, 47, 144, 151—Decree—Sale in execution, set aside on account of fraud between auction-purchaser and decree-holder—Fraud—Abuse of the process of the Court—Application to executing Court by judgment debtor for mesne profits, if maintainable—Compensation.

When a sale in execution of a decree was set aside on account of fraud between the decree-holder and the auction-purchaser:

Held, that, on an application by the judgment-debtor to the executing Court for mesne profits from the auction-purchaser during the period the latter was in possession, the Court has jurisdiction, under S. 151 of the Civ. Pro. Code, to grant the application, as the auction-purchaser is guilty of an abuse of the process of the Court, and to order compensation instead of mesne profits as the use of the latter term is incorrect (a).

Obiter dictum:—The case does not fall within the terms of S. 144 of the Civ. Pro. Code, inasmuch as what is set aside is the sale itself, which is not a decree but a mere transfer of property. **Amrannessa Chowdhurain v. Krimannessa Chowdhurain**, 22 Ind. Cas. 839=18 C.W.N. 1299.

IMAM and CHAPMAN, JJ.

References:—14 Ind. Cas. 456=15 C.L.J. 187, *Fol.*; 16 Ind. Cas. 969=15 C.L.J. 88, *R.*

Civ. Pro. Code (1908)—(Continued).

- (5) Ss. 2, 47, O. XX, r. 14—*Oudh Laws Act (XVIII of 1876), S. 15—Order dismissing pre-emption suit for non-payment of purchase money within time, whether appealable as decree—Non payment of purchase money within time, whether relates to execution of decree.*

A decree, in so far as it declares that, in default of payment of the amount specified therein within a specified period, the suit shall stand dismissed with costs, becomes a decree for dismissal on the happening of such default and is appealable as such.

The question whether a pre-emptor has paid the amount fixed by a pre-emption decree within time or not is a matter affecting the operation of the decree and strictly does not relate to its execution within the meaning of S. 47 of the Civ. Pro. Code (a). *Bharath Singh v. Dharam Singh*, 21 Ind. Cas. 193=17 O.O. 14.

KANHAIYA LAL, A.J.C.

References:—(a) A.W.N. (1888) 4; 38 P.R. 1898; 4 A. 420=A.W.N. (1882) 94 and 11 O.C. 144. R.

- (6) Ss. 2, 47, O. XXXIV, r. 5—*Mortgage decree—Foreclosure—Foreclosed property, included in earlier mortgage of other properties—Application for exclusion of foreclosed property from sale under prior mortgage decree—Appeal—Ss. 52, 56, 81, Transfer of Property Act.*

Thirteen properties were mortgaged by the judgment-debtor (appellant) to the decree-holder (1st respondent) on 29-6-1905. The 1st respondent sued upon his mortgage on 4-12-1908 and on 22-4-1909 the usual mortgage decree was made therein for payment or in default for sale of the mortgage properties. On 24-6-1909, appellant mortgaged (property No. 11) one of the 13 properties, by conditional sale to the other respondents. These respondents sued upon their mortgage, foreclosed the mortgage and entered into possession of property No. 11. The 1st respondent having obtained in the execution department an order for the sale of the properties mortgaged to him, the other respondents (subsequent mortgagees) applied that the properties, other than No. 11, should be sold first and that No. 11 should be sold last. Held that the subsequent mortgagees were bound by the decree made in the suit brought by the 1st respondent, and they were, therefore, as regards property No. 11, the representatives of the mortgagor judgment-debtor within the meaning of S. 47, Civ. Pro. Code, and were at liberty to come in under S. 47 and apply as they did (a).

Held also that the order made at the instance of the subsequent mortgagees, who were not parties to the suit of the prior mortgagee, cannot be regarded merely as an order under r. 5 of O. XXXIV, but falls within S. 47, Civ. Pro. Code, and amounts to a decree and is appealable.

Held, further, that Courts have power, in appropriate circumstances, to make such order

Civ. Pro. Code (1908)—(Continued).

under Ss. 56 and 11 of the Transfer of Property Act. (b). *Tara Prasanna Bose v. Nimoni Khan*, 41 C. 418.

RICHARDSON and NEWBOULD, JJ.

References:—(a) 24 C. 62, R. (b) 31 M. 419, D.

- (7) Ss. 2, 97, O. XX, r. 12—*Declaration of title and recovery of possession, suit for—Mesne profits, ascertainment of—Appeal—Remand—Decision with regard to possession, whether a preliminary decree.*

Plaintiff brought a suit for recovery of possession of certain property on declaration of his title thereto, and for mesne profits. The Court of first instance granted the plaintiff a decree for possession declaring his title, and disallowed his claim for mesne profits, and also a portion of the costs incurred by him. On appeal by the defendants, the Lower Appellate Court dismissed the appeal, and allowed the cross appeal by the plaintiff to the extent that the latter was entitled to mesne profits, and remanded the case to the Court of first instance for ascertainment of mesne profits. The mesne profits being ascertained, the objections of the parties to the findings of the Court of first instance as regards the same were heard by the Lower Appellate Court, and a decree was passed to the effect that the plaintiff would get the ascertained amount in addition to the decree granted to him by the Court of first instance and upheld by the appellate Court on the previous occasion. Upon a second appeal being referred to the High Court by the defendants;

Held, that the appeal as regards the question whether the plaintiff was entitled to recovery of possession was barred, inasmuch as the decision with regard to possession was a preliminary decree within the meaning of S. 2 of the Code of Civil Procedure, and it was finally determined and decided between the parties by the Lower Appellate Court on the previous occasion. *Kumud Lal Roy Chowdhry v. Ramani Mohon Roy*, 19 C.L.J. 346.

COXE and ROY, JJ.

- (8) Ss. 2, 97, O. XXVI, r. 11—*Preliminary decree—Appeal—Findings in an account suit—Final decree passed after completion of accounts—Practice.*

In a suit for account under the provisions of the Dekkhan Agriculturists' Relief Act, the trial Judge investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land, and referred the making up of the final mortgage account to a Commissioner. The Commissioner having made his report, and neither party objecting, the trial Judge passed a decree. The defendant appealed against the decree; but the Lower Appellate Court rejected the appeal on the ground that the instructions recorded by the Judge for the benefit of the Commissioner at the time of the issue of commission constituted

Civ. Pro. Code (1908)—(Continued).

a preliminary decree, and that no appeal having been preferred from, the same the present appeal was barred. The defendant having appealed :—

• *Held*, that there was no preliminary decree in the case from which an appeal could be preferred; for no decree was passed upon the merits; but what was decided at the time of the issue of the commission was not any general question of right, but merely a number of different points in dispute upon the merits of the case between the parties. **Narayan Balkrishna Kulkarni v. Gopal Jiv Ghadi**, 16 Bom. L.R. 206=38 B. 392=23 Ind. Cas. 889.

SCOTT, C.J., and BATCHELOR, J.

Reference :—12 Bom. L.R. 762, *Expl.*

(9) Ss. 2, 104, 148—*Pre-emption decree fixing time for payment—Extension of time—Appeal—Decree or order.* **Suranjan Singh v. Rambahal Lal**, 11 A.L.J. 950=35 A. 582=21 Ind. Cas. 535 (F.B.). See Final Part, 1913, Col. 306.

(10) S. 2, cl. (2)—*Decree—Preliminary issues, decision on—Decree, whether includes such a decision—Appeal.* **Shib Sharan Sha v. Janaki Nath Dey**, 18 C. L. J. 78=21 Ind. Cas. 387. See Final Part, 1913, Col. 303.

(11) Ss. 2 (2), 47, 96—*Order by High Court for removal of attachment pending appeal on furnishing security—Order by lower Court accepting such security if appealable.* **Saraswati Barmania v. Moti Barmonya**, 17 C.W.N. 1240=20 Ind. Cas. 72=41 C. 160. See Final Part, 1913, Col. 304.

(12) Ss. 2 (2), 47, 144—*Application for restitution—Decision of question of limitation—Whether a “decree”—Appeal.* **Ram Chand v. Sham Parshad**, 110 P. R. 1913=117 P.L.R. 1914=22 Ind. Cas. 851. See Final Part, 1913, Col. 305.

(13) Ss. 2 (2), 96, 97—*Partition—Preliminary decree—Appeal—Final decree—No appeal against it—No bar to the hearing of appeal against preliminary decree.*

In a partition suit a preliminary decree was made and an appeal was preferred against it. Pending the decision of that appeal a final decree was also passed. No appeal, however, was preferred against the final decree.

Held that the fact that there was no appeal against the final decree was no bar to the hearing of the appeal against the preliminary decree.

Held also that, when the preliminary decree was set aside on appeal, the final decree which was based upon it fell to the ground. **Kanhaya Lal v. Tirbeni Sahai**, 12 A.L.J. 876=36 A. 532=24 Ind. Cas. 827 (F.B.).

RICHARDS, C.J., TUDBALL and CHAMIER, JJ.

References :—84 A. 493; 37 M. 29; 18 C.L.J. 228, R.; 32 A. 225; 18 C.L.J. 821, *Not F.*

Civ. Pro. Code (1908)—(Continued).

(14) S. 2 (2), O. XX, rr. 12 to 18—*Appeal—Decree—Preliminary and final decree—“Matter in controversy in the suit”—Issues in bar, trial of—Issues relating to reliefs claimed, undecided—Omission of Court to embody decision in formal expression.*

Where the trial Court first took up the issues in bar, decided them against the defendant, directed the investigation of the issues on the merits later on :

Held, that the order deciding the issues in bar was not an adjudication determining the rights of the parties with regard to the matters in controversy and was consequently not a preliminary decree within the meaning of S. 2 (2) of the Code, hence no appeal lay against the order.

The expression “matter in controversy in the suit” in the definition of ‘Decree’ in S. 2 (2) of the Code refers to the subject-matter of the litigation (a).

There can be only one preliminary decree in a suit to be followed by one final decree. The cases where the legislature contemplated the preparation of a preliminary decree are specified in rr. 12 to 18 of O. XX of the Code (b).

A preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree.

If a decision is in reality a preliminary decree, a mere omission on the part of the Court to embody its effect in a formal expression will not negative the right of the party affected to prefer an appeal. **Kamini Debi v. Promotho Nath Mookerjee**, 20 C.L.J. 476.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 37 B. 60, *Diss.* (b) 35 A. 159; 7 W.R. 222, R.

(15) S. 2, cl. 11—*Legal representative—Grove-holder and tenant dying without heirs—House and grove escheating to zemindar—Zemindar's liability for decree against grove-holder and tenant—Execution of decree.*

The judgment-debtor was a grove-holder and tenant possessing a dwelling-house in the *abadi*. On his death without heirs the grove and the house escheated under the village custom to the *zemindar*. The decree-holder sought to execute the decree against the *zemindar* by joining him in the proceedings as the legal representative of the judgment-debtor :

Held, that the *zemindar* was not the legal representative of the judgment-debtor. **Chhuranji Lal v. Biswa Nath**, 23 Ind. Cas. 969.

SUBONADIÈRE, A.J.C.

References :—3 Ind. Cas. 519=12 O.C. 197; 8 M.I.A. 500=2 W.R. P.C. 59=19 Eng. Rep. 620,*D.

(16) S. 2 (11)—*Intermeddling with part of deceased's estate—Intermeddler whether a “legal representative”—Wrongful conversion of property—Person in possession not producing it*

Civ. Pro. Code (1908)—(Continued).

—*Presumption*. *Musammam Daropadi v. Musammam Sada Kaur*, 115 P.R. 1918=99 P.L.R. 1914=22 Ind. Cas. 242. See Final Part, 1918, Col. 805.

(16-a) S. 2 (16). See No. 218, *infra*.

(16-b) S. 4. See No. 144, *infra*.

(17) S. 9—Monastery land—Dispute concerning. See BUDDHIST LAW (GIFT), No. 1, U.B.R. (1913), 3rd Qr., 183.

(18) S. 10—*Its inapplicability*.

Held, that, S. 10 of the Code does not apply where the previously instituted suit is pending in a Court not competent to try it. *Jahangir Singh v. Hira*, 157 P.W.R. 1914=283 P.L.R. 1914.

RATTIGAN, J.

(19) S. 10 and O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit on payment of costs—Proper order to be passed in such a case—Non-payment of costs—Subsequent suit whether barred. See WITHDRAWAL OF SUIT, No. 2, 19 C.L.J. 529.

(20) S. 11—*Code of Civil Procedure (1882)* Ss. 102 and 103—Dismissal of suit for default—Subsequent suit on different cause of action—*Res judicata*.

The present suit was by a co sharer against another for arrears of rent. The defence was that the land was held by the defendant as *sir* and not as a tenancy. In a previous suit between the parties, for arrears of rent with respect to the same land but for a different period of time the same defence was set up as in the present case. That case, however, was dismissed as the plaintiff did not appear on the day of the hearing. The defendants in the present case contended that the dismissal of the former suit operated as *res judicata*. *Held*, that the dismissal of the former suit for default of appearance on the part of the plaintiff could not be regarded as involving a finding in favour of the defendant on the question of facts raised by him and could not operate as *res judicata*; nor could it prevent the plaintiff from maintaining the present suit for arrears of rent for a period subsequent to the former suit and based on a different cause of action. *Bindrabun v. Moti*, 12 A.L.J. 53=22 Ind. Cas. 820.

PIGGOTT, J.

Reference:—16 C. 98 (P.C.), *F*.

(21) S. 11—*Res judicata*—Plea of *res judicata* taken for the first time at hearing of second appeal.

A plea of *res judicata* can be taken for the first time at the hearing of a second appeal, although it was not taken in the memorandum of appeal. *Chhadami Lal v. Shyama Charan*, 22 Ind. Cas. 12.

RAFIQUE, J.

Reference:—4 A. 69=A.W.N. (1831) 116, *F*.

Civ. Pro. Code (1908)—(Continued).

(22) S. 11—*Res judicata*.

Where, in a suit on a subsequent mortgage bond, a prior mortgagee was made a party and the plaintiff prayed for an account as to the amount due to the prior mortgagee, but the Court on the failure of the prior mortgagee to appear passed an *ex parte* decree, but no order was passed as to plaintiff's prayer for account as against the prior mortgagee:

Held, that the Court in passing this decree never intended to say that the absence of the prior mortgagee from the trial caused the mortgage security of the plaintiff to override the prior security which was held by the prior mortgagee. *Mohiruddin Mondal v. Srimati Indra Kumari Dasi*, 18 C.W.N. 1013=24 Ind. Cas. 42.

FLETCHER and RICHARDSON, JJ.

Reference:—(a) 35 A. 111, *F*.

(23) S. 11—*Res judicata*—Previous suit by two persons in respect of public right—Subsequent suit by nine persons, barred. *Title*.

Two persons representing themselves as members of the Mohammedan community brought a suit for declaration that certain property was *wagf* property and that one of them was the Mutawalli. The suit failed. In a subsequent suit by certain other Mohammedans for a declaration that a part of the same property was *wagf*, *held* that, where persons litigate *bona fide* in respect of a public right claimed in common for themselves and others, other members of the community interested in and claiming that public right must be deemed to be persons claiming under them, and any subsequent suit in respect of that public right is barred by the principle of *res judicata*. *Mahammad Amir v. Sumirra Kuar*, 12 A.L.J. 643=36 A. 424=24 Ind. Cas. 97.

RICHARDS, C.J., and BANERJI, J.

(24) S. 11—*Res judicata*—Suit dismissed for default.

A judgment dismissing a suit for profits for default of appearance, which does not decide any question directly and substantially raised between the parties, cannot operate as *res judicata* in a subsequent suit between the same parties. *Lachmi Narain Singh v. Dhondu Singh*, 12 A.L.J. 911=24 Ind. Cas. 490.

KNOX, J.

References:—25 A. 194; 23 A. 462; 10 M. 272, *D*.

(25) S. 11—Suit between plaintiff's vendor and another for mesne profits—Land sold pending the suit—Title to the land decided therein against the vendor—Subsequent suit by plaintiff against that other person for recovery of the land—Whether *res judicata*—Applicability of S. 52, Tr. P. Act, to moveables.

The immoveable property in dispute in this suit was alienated to the present plaintiff, pending a suit about its mesne profits between his vendor and the present 2nd defendant. That suit was dismissed, it having been held that the

Civ. Pro. Code (1908) — (Continued).

person in possession (the present 2nd defendant) had title to the lands and was not liable to account for its profits to the then plaintiff (vendor). The present plaintiff now sued to recover possession of the same land. *Held*, the title to the property was directly in question in the prior suit and the decision therein is *res judicata* against the present plaintiff and in favour of the 2nd defendant (a).

Per *Sadasiva Aiyer, J.* — The fact that S. 52 of the Transfer of Property Act relates only to immoveable property should not make us blind to the consideration that the legal principle underlying it might appropriately be applied to moveables also, in cases where the alienee of the moveables is proved to have had notice of the pending litigation at the time of the alienation. *Talari Kovali Nagadu v. Viswanathan Pedda Govindappa*, 16 M.L.T. 158.

SAPASIVA AIYER and TYABJI, JJ.

References: — (a) 86 B. 189, D.; 15 A. 108; (1894) 3 Ch. 483; (1834) 1 Ad. & E. 783; (1871) L. R. 6 C. P. 584, R.

(26) S. 11—*Res judicata*—*Finding of a lower Court objected to in appeal but not disposed of by the Appellate Court—Whether such a finding is final.*

Where an appeal is preferred against the finding of an issue but the Appellate Court had not decided finally on that point as the appeal was disposed of on other points, it cannot be held that the finding of the Lower Appellate Court is final and the decision cannot operate as *res judicata*. *Nga Ti v. Nga Pan*, 7 Bur. L. T. 249.

SHAW, J. C.

(27) S. 11—*Res judicata*—*Plaintiffs not represented in the former suit as minors—One of the plaintiffs a pro forma party to the former suit—Second suit not barred as res judicata.*

The plaintiffs sued to recover certain property alleging that it was their ancestral family property. There was a previous litigation for the purpose. In the first suit, two of the plaintiffs who were minors were not parties and were not adequately represented by their father who was a plaintiff there, whilst the third plaintiff was merely a *pro forma* defendant. That suit was decided against the then plaintiffs. The defendant contended that the second suit was barred by *res judicata*.

Held, (1) that the two minor plaintiffs were at liberty to proceed with the present litigation, for it was impossible to say that they, who were not parties to the former suit and not adequately represented at the trial, were bound by its result;

(2) that the third plaintiff also was not bound by the result of the former suit to which he was a *pro forma* defendant, and the decree, speaking generally, appeared to have been in his favour as one of the defendants. *Sundra Bhan Shetty v. Sakharan Gopalshet Gandhi*, 16 Bom. L. R. 616.

BEAMAN and HEATON, JJ.,

Civ. Pro. Code (1908) — (Continued).

(28) S. 11—*Res judicata*—*Dismissal of previous suit for default of plaintiff and in defendant's absence—Benamidar—Kubala from benamidar, if necessary to complete title of real purchaser.*

When a suit is dismissed for default of both parties the decree does not operate as *res judicata* (a).

A real purchaser of immoveable property does not require to have a conveyance of title from his *benamidar* in order to enable him to sue for possession. *Brij Nandan Singh v. Kailash Tewary*, 24 Ind. Cas. 17.

D. CHATTERJEE and MULLICK, JJ.

References: — (a) 10 C.W.N. 40, *Rel.*; 31 C. 428; 14 Ind. Cas. 496 = 39 C. 527 = 15 C.L.J. 411 = 11 M.L.T. 265 = (1912) M.W.N. 367 = 9 A.L.J. 332 = 14 Bom. L.R. 280 = 16 C.W.N. 505 = 22 M.L.J. 668; 16 Ind. Cas. 8 = 10 A.L.J. 244 = 34 A. 599, *Distd.*

(29) S. 11—*Res judicata*—*Universal application—Matters substantial though not formally in issue—Whether governed by the principle. See MADRAS ACT XXVIII OF 1860 (SURVEYS AND BOUNDARIES), No. 1, 27 M.L.J. 529.*

(30) S. 11—*Suit for declaration by landholder that lease granted by his agent was without authority—Jurisdiction of Civil or Revenue Court—Prior decision in Revenue Court—Whether res judicata. See ACT II OF 1901 (AGRA TENANCY), No. 9, 23 Ind. Cas. 705.*

(31) S. 11—*Order of Revenue Officer dealing with partition applications—Finality—Res judicata. See ACT XVII OF 1887 (PUNJAB LAND REVENUE), No. 1, 5 P.R. 1914 (Rev.).*

(32) S. 11—*Probate proceeding—Refusal of probate—Suit—Res judicata. See EVIDENCE ACT, No. 27, 16 Bom. L. R. 5.*

(33) S. 11—*Decision when operates as res judicata between co-defendants. See HINDU LAW (SUCCESSION), No. 2, 16 Bom. L.R. 283.*

(34) S. 11—*Res judicata between co-defendants. See HINDU LAW (WIDOW), No. 22, 24 Ind. Cas. 84.*

(35) S. 11—*Withdrawal of suit with permission to file fresh suit—Fresh suit instituted—Plea of res judicata cannot be raised. See MORTGAGE (REDEMPTION), No. 10, 22 Ind. Cas. 918.*

(36) S. 11—*Whole body of Pana suing whole body of another Pana—Difficulty in identifying predecessors of each and all parties in subsequent suit immaterial—Presumption of former suit being inter partes. See RES JUDICATA, No. 6, 19 P.W.R. 1914.*

(37) S. 11. See RES JUDICATA, No. 9, 18 C.W.N. 888.

(38) S. 11, *Expl. 1*—*Res judicata—Rule of res judicata, whether applicable to all stages of suit—Landlord and tenant—Suit for rent—Defence of eviction and consequent suspension of rent—Previous suit by tenant against landlord for possession of land as included within tenancy—Dismissal of suit.*

Civ. Pro. Code (1908)—(Continued).

If the same question is in controversy between the same parties in two distinct litigations instituted one after the other, but simultaneously pending the final decision in the latter suit if given earlier, operates as *res judicata* in the earlier suit whose final stage is reached later.

The rule of *res judicata* is applicable to all the stages of a suit till it is finally terminated and is not confined to Courts of first instance (a).

It cannot be laid down as a comprehensive rule of law that, because a tenant has failed in a suit for recovery of possession of certain lands alleged to be comprised in his holding as against his landlord, the defence of eviction and consequent suspension of rent is not available to him in a suit for rent.

But where the tenant specified certain lands in the plaint in a title suit against his landlord and asserted that those lands were included in his tenancy, and the claim was negatived:

Held, that this was a determination that the title of the tenant to the lands specified was not proved, and that, consequently, in any other litigation between the same parties, it would not be open to the tenant to plead that the lands described in the plaint of the former suit were included within her tenancy. *Midnapore Zemindary Co., Ltd. v. Nitaya Kali Dasi*, 24 Ind. Cas. 243.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 11 A. 148, F.; 16 C. 233, N.F.

(39) S. 11, Expl. IV—*Plaint in former suit claimed no relief against certain properties—Defendant interested in those properties did not appear—Subsequently plaint allowed to be amended so as to include those properties—No notice of amendment given to that defendant—Res judicata.*

Plaintiffs sued to enforce an annual charge against several persons and several properties. Two properties, K and G, which were owned by one of the defendants, A.H. were not included in the suit. A.H. was served with notice of the suit but he did not appear. At a late stage of the suit, plaintiffs applied for amendment of the plaint so as to include K and G in their claim. This was allowed, but no notice thereof was given to A.H. A decree under S. 88 of the Transfer of Property Act was passed as against the properties including K and G. Before the final decree under S. 89 was passed, A.H. received notice of the preliminary decree under S. 88. He raised no objection to the passing of the final decree. In a subsequent suit to enforce the charge, for certain other years, A.H. raised the plea that K and G were not liable under the charge at all. *Held*, that he was not entitled to raise this plea as it was barred by the rule of *res judicata*. *Muhammad Abdul Hamid v. Hedayetunnissa Bibi*, 12 A.L.J. 751.

TUDBALL, J.

(40) S. 11, Expl. IV—*Ex parte decree—Pleas raised in subsequent suit barred—Court Fees Act—Instalment decree—Appeal—Court-fees, how to be calculated.*

Civ. Pro. Code (1908)—(Continued).

Plaintiff sued defendant under the terms of a bond for interest and compound interest. Defendant did not appear and an *ex parte* decree was passed against him, disallowing, however, the compound interest.

Subsequently plaintiff brought a suit on the same bond for the principal and for interest and compound interest for the period beginning from institution of the former suit. Defendant pleaded undue influence, weakness of intellect, and want of consideration, and that interest was extortionate:

Held, that the decision in the former suit barred the pleas of the defendant as to undue influence, weakness of intellect, etc., except the plea as to compound interest not being claimable. The decision in the former suit, being in favour of the defendant on the point of compound interest, operated as a bar to the plaintiff and must be adhered to.

In an appeal by the decree-holder from a decree for money fixing instalments, Court-fees must be paid on the difference between the amount claimed in appeal and the amount decreed, and also on the difference to the appellant between getting his money on the date of the decree under appeal and getting it by instalments as ordered. *Lala Govind Lal v. Rao Baldeo Singh*, 226 P.L.R. 1914=128 P. W.R. 1914=24 Ind. Cas. 931.

JOHNSTONE and CHEVIS, JJ.

(41) S. 11, Expl. IV—*Suit for rent—Former suit for prior Fasli—Subsequent one for later Fasli—Questions as to terms of patta being proper and as to extent of jeryiti land—Res judicata—Principles.* *Bommididi Bayyan Naidu v. Bommididi Suryanarayana*, 12 M.L. T. 500=23 M.L.J. 543=(1913) M.W.N. 1=17 Ind. Cas. 445=37 M. 70 (F.B.). See Final Part, 1912. Col. 301.

(42) S. 11, Expl. IV—*Irrelevant point put in issue in former suit—Decision whether res judicata.* See MORTGAGE (REDEMPTION), No. 14, 213 P.L.R. 1914.

(43) Ss. 11, 13—*Res judicata—Decree passed by Bareilly Court—Second suit at Rampur—Rampur Court no jurisdiction over Bareilly property—Competent Court—Foreign judgment—Injunction—Meaning of judgment.*

N owned property situated partly at Bareilly and partly in Rampur State. After the death of N, the plaintiffs brought a suit at Bareilly for declaration of their right in respect of certain property situate at Bareilly. The defendants brought a suit against the plaintiffs at Rampur in respect of the property in Rampur only. The plaintiffs obtained a decree at Bareilly and then brought the present suit for declaration that the decree passed by the Subordinate Judge of Bareilly operated as *res judicata* in the Rampur suit and for an injunction restraining the defendants from carrying on that suit.

Civ. Pro. Code (1908)—(Continued).

Held that the decision of the Bareilly Court in the former suit did not and could not operate as *res judicata* in the suit pending in the Court of the Native State of Rampur.

The word 'judgment' in S. 13 of the Code of Civil Procedure is evidently used in the sense in which the word 'judgment' is used in England. *Magool Fatima v. Amir Husan Khan*, 12 A.L.J. 1074.

RICHARDS, C.J., and TUDBALL, J.

- (44) Ss. 11, 24 (4)—*Res judicata*—*Competent Court*—*Small Cause Court suit transferred to Munsiff's Court and tried along with cross suit filed before Munsiff*.

A suit was instituted against the plaintiff by the defendant in the Court of Small Causes. The present suit was instituted by the plaintiff in the Munsiff's Court. The defendant's suit was transferred to the Munsiff's file and tried along with this suit. The Munsiff decreed the suit of the defendant and dismissed the plaintiff's suit. There was no appeal against the decree in the defendant's suit but there was an appeal against the decree in the other suit. Held that the Small Cause Court suit retained its character as such even after the transfer to the Munsiff's Court and the decree passed in that suit could not operate as *res judicata* in the other suit which the Small Cause Court had no jurisdiction to entertain. *Dulare Lal v. Hazari Lal*, 12 A.L.J. 853.

SUNDAR LAL, J.

- (45) Ss. 11, 47. See MORTGAGE (REDEMPTION), No. 18, 16 Bom. L.R. 687.

- (46) S. 11, O. XXXII, rr. 3, 15—*Res judicata*—*Lunatic*—*Guardian ad litem not appointed, effect of—Transfer of Property Act, S. 41—Inquiry*.

The mere omission to appoint a guardian *ad litem* for a man of unsound mind does not make the whole suit void *ab initio*.

To maintain the plea of *res judicata* it must appear that the person whose interest it is sought to bind or his predecessor-in-title was properly represented (a).

S. 41 of the Transfer of Property Act does not apply where the neighbour who knew about the infirmity of the transferor's title omits to make necessary inquiry. *Saw Lan v. Maung Lun*, 24 Ind. Cas. 673.

ROBINSON, J.

- References :—(a) 28 A. 1 = 7 Bom. L.R. 912 = 2 C.L.J. 413 = 2 A.L.J. 813 = 10 C.W.N. 115 = 15 M.L.J. 407 = 9 O.C. 7 = 32 I.A. 229, F.

- (47) S. 13—*Foreign judgment—Defendant's failure to answer interrogatories—Defence struck out—Judgment for plaintiff—Judgment whether given on the merits—Right to sue on the foreign judgment—Causes of action*.

Plaintiff sued the defendant in the High Court in England. Defendant was ordered to answer interrogatories and failed to do so. His

Civ. Pro. Code (1908)—(Continued).

defence was struck out and judgment was given for plaintiff. Held that such a judgment cannot be considered to have been decided on the merits within the meaning of S. 13, Civ. Pro. Code, and that plaintiff was not entitled to sue on the foreign judgment in the British Indian Courts (a).

In a suit on the foreign judgment, the cause of action is the legal obligation to satisfy a foreign judgment which complies with the requisite conditions. Such a judgment is not conclusive unless the case be decided on the merits, and a judgment that is not conclusive for this reason cannot of itself constitute a cause of action (b). *Peruri Viswanatha Reddi v. D. T. Keymer*, 27 M.L.J. 670.

WALLIS, OFFG. C.J., and SESHAGIRI IYER, J.

- References :—(a) (1876) 1 P.D. 393 ; 81 Ch. D. 478 ; 23 Q.B.D. 124 ; 15 W.R. 500 ; 28 C. 641 ; 22 C. 222, R. (b) 8 W.R. 32 ; (1845) 13 M. & W. 628, R.

- (47-a) S. 13. See No. 43, *supra*.

- (48) Ss. 13, 44, O. XXI, r. 7—*Foreign judgment—Decree of Cochin Court—Transfer to British Indian Court for execution—Executing Court whether can question jurisdiction of foreign Court—Submission to jurisdiction when voluntary*.

A suit was instituted in the District Court of the Cochin State against the appellant for damages for breach of contract. Before he appeared, an application was made for an injunction restraining him from alienating certain timber owned by him and which were within the jurisdiction of the Cochin Court. The order was issued and notice served on him. Appellant applied to have this injunction order vacated. He took exception to the jurisdiction of the Court on the ground that he was permanently residing in British India and also pleaded that he was not liable to the suit claim. The Cochin Court overruled both the contentions and passed a decree against the appellant. This decree was sent to the District Munsiff's Court of Palghat (in British India) for execution under S. 44, Civ. Pro. Code (1908). Appellant contended before the Palghat Court that the decree of the Cochin Court was a nullity as it was passed without jurisdiction.

Held that the Courts in British India are competent to decide, before issuing execution, whether the Courts of a Native State had jurisdiction to pass the judgment which is sought to be enforced by them.

The decree of the Cochin Court does not by transfer to a British Indian Court become a decree of the latter Court for all purposes.

The words 'as if they had been passed by the Courts in British India' in S. 44, Civ. Pro. Code relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court.

Civ. Pro. Code (1908)—(Continued).

Under S. 18, Civ. Pro. Code, the recognition of foreign judgments is not absolute but is subject to certain reservations, and S. 44, Civ. Pro. Code, is subject to the same limitations as are contained in S. 13 (a).

Both the remedy by suit and the remedy by execution are open to persons who have obtained judgments in the favoured Native States coming within the Government Notification issued under S. 44, Civ. Pro. Code.

Held also that, as the appellant appeared before the Cochin Court in order to protect his property, the fact that he subsequently invoked the opinion of that Court on the merits did not amount to a voluntary submission to the jurisdiction of the Cochin Court and did not preclude him from pleading that the Cochin Court had no jurisdiction over him (b).

The decision in *Parry & Co. v. Appasami* (2 M. 407), that it is enough merely to object to jurisdiction to make the submission involuntary is probably no longer law. *S. Veerarahgava Aiyar v. J. D. Muga Selt*, 27 M.L.J. 535 = 16 M.L.T. 479.

WALLIS, OFFG. C.J., AYLING and SESHAGIRI IYER, JJ.

References:—(a) (1890) 15 A.C. 506; 17 Q. B. D. 171; (1891) 1 Q.B. 245; (1879) 12 Ch. D. 522; 15 B. 216; 38 B. 194; 28 B. 378; 7 M. 434; 26 M. 230, R. (b) 2 M. 407; 18 M. 327; 16 Bom. L. R. 620; (1885) 6 T.L.R. 85; (1885) 55 L.J.Q.B. 39, R.

(49) S. 13 (d)—*Suit for declaration that mortgage is not binding—Jurisdiction.* *Arunachella Chettiar v. Muthia Chettiar*, 23 M.L.J. 679 = 17 Ind. Cas. 758 = (1914) M W N. 52. See Final Part, 1912, Col. 303.

(50) Ss. 16, cl. (d), 17, 99; O. I, r. 3; O. II, r. 3—*Cause of action—Jurisdiction—Misjoinder of causes of action—Suit for declaration of plaintiffs' title to immovable properties situate in different districts—Suit brought in one district—Leave by one of several defendants.*

A Hindu boy died, leaving as his heirs his mother, A, and four brothers, B, C, D, and E. The property left by the deceased was situate in the Districts of Nadia, Burdwan, Gaya and Patna.

A brought a declaratory suit at Nadia against her four sons, and one F, residing at Gaya, praying that her title may be declared to 1-5th share of the property left by the deceased. It was alleged in the plaint that B, C, D and E had leased the property without any mention of A, and that, consequently, A's right had been prejudiced. Only one specific instance of a lease of the property was given, viz., a lease of the Gaya property granted by B to F. It was not specified what other property had been leased nor were the names of any other lessees given.

The suit was tried by the Nadia Court;

Civ. Pro. Code (1908)—(Continued).

Held, per Ray, J. (whose opinion prevailed, being in agreement with lower Court's opinion);

(1) that the invasion into A's right at Gaya could be properly considered as an attack on the whole of the property inherited by A from her deceased son;

(2) that, consequently, there was no misjoinder of causes of action;

(3) that, under S. 17 of the Civ. Pro. Code, the Nadia Court had jurisdiction to try the suit.

Per Cox, J., dissenting:—(a) that the suit was bad for misjoinder of causes of action;

(b) that the suit affecting the Gaya property must be tried in Gaya under S. 16, cl. (d), Civ. Pro. Code;

(c) that S. 17, Civ. Pro. Code, applied only when there was one cause of action with respect to property situated in different districts, and not to cases when the causes of action were in themselves distinct;

(d) that O. I, r. 3, dealt only with parties and not with causes of action, and did not justify the joinder of different causes of action;

(e) that O. II, r. 3, did not avail A, because the causes of action arising in Nadia, which she desired to unite with her cause of action against F, were not themselves causes of action against F;

(f) that S. 99 of the Civ. Pro. Code did not apply, because the objection to misjoinder in this case went to the jurisdiction of the Court.

A litigant's rights cannot give him any cause of action. He not only must have a right but that right must be infringed before his cause of action arises.

The defences and titles of the opposite party have nothing whatever to do with the cause of action which arises out of the infringement of the plaintiff's right and not out of the reasons for that infringement.

O. I, r. 3, does not mean that, if there is a series of unconnected transactions and the plaintiff is entitled to relief against one person with respect to one of these transactions and against another with respect to another, both persons can be joined as defendants. In order that both persons may be joined as defendants, both of them must be concerned in the whole series as a series, though their liability may arise from particular transaction in the series. *Bal Gobind Singh v. Gaja Lakshmi Dasi*, 21 Ind. Cas. 438.

COX and RAY, JJ.

(50-a) S. 17. See No. 50, *supra*.

(51) S. 20 (c)—*Suit in Mainpuri to set aside decrees fraudulently obtained in Calcutta—Decree obtained on the fraudulent and false allegation that notice served—Cause of action—Jurisdiction.*

A suit was brought in Mainpuri for setting aside, on the ground of fraud, a decree obtained

Civ. Pro. Code (1908)—(Continued).

in Calcutta and for an injunction against that decree being put into execution. It appeared that none of the defendants in the present suit resided or carried on business or personally worked for gain in Mainpuri but it was alleged that the decree in Calcutta was made against the present plaintiff on the false and fraudulent allegation that he had been served with a notice of the Calcutta suit. *Held* that the fraud complained of having been practised in Calcutta, the cause of action arose there and the Mainpuri Courts had no jurisdiction to entertain the present suits.

"A plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court." **Dau Dial v. Munna Lal**, 12 A.L.J. 955=39 A. 564=24 Ind. Cas. 978.

RICHARDS, C.J., and TUDBALL, J.

References :—22 Q.B.D. 128; 25 A. 48, *Diss.*; 29 A. 418, *R.*

(52) *S. 21—Scope and applicability—Suit tried in wrong place—Lower Court holding that it had jurisdiction to try it—Appellate Court holding the contrary—No failure of justice—Objection as to place of suing disallowed—Alterations in procedure—Construction of Statutes.*

The wording of S. 21, Civ. Pro. Code (1908), clearly shows that it lays down a rule for the guidance of only the appellate or revisional Court, and does not influence the Court of first instance in its decision on the question of territorial jurisdiction. When the original Court has given its finding on the matter of jurisdiction and it is re-agitated before a Court of appeal or revision, then the latter Court shall have to consider whether the defect of jurisdiction should or should not be cured by applying its provisions.

The object of the Legislature in enacting this salutary principle of law is that, when the Court of first instance, after giving an affirmative finding on jurisdiction, takes proceedings on the merits of the case, the latter should not be rendered abortive and all the time and labour spent thereon should not be wasted simply by reason of the fact that the higher Court comes to a contrary finding on the preliminary point of jurisdiction.

In this case the suit was instituted and tried at a wrong place, and the Court of first instance there found that it had jurisdiction to try the case. On appeal, however, it was found that the lower Court had no jurisdiction. The suit was instituted in 1906, i.e., before the new Code, but the decree was passed after the new Code came into operation, and S. 21 of the new Code was in existence when the appeal was instituted.

Held, that the Code applied to pending proceedings and that the appeal was not excluded from the operation of S. 21, Civ. Pro. Code.

Held also that, though the original Court had not the jurisdiction to hear the suit, the

Civ. Pro. Code (1908)—(Continued).

objection as to the place of suing cannot be allowed, because, under the circumstances of this case, there has been no consequent failure of justice.

It is a well-known rule of law that no person has a vested right in the course of procedure, and there is a general principle of the construction of statutes that alterations in the procedure are always retrospective unless there be some good reason against it. There can be no objection to their having effect immediately even though they should affect past transactions and the mode of enforcement of vested rights (a). **Ratti Ram v. Kundan Lal**, 87 P.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

Reference :—(a) 22 C. 767 (779), *R.*

(53) *S. 22—Jurisdiction denied—Application for determining jurisdiction—Not entertainable.*

In an application made to determine whether a suit was entertainable by the Civil Court at Benares or at Bhaagalpur within the jurisdiction of the Calcutta High Court, the applicant stated that he had taken objection that the Benares Court had no jurisdiction. *Held* that the objection having been taken to the jurisdiction of one Court, the application could not be entertained. • **Purna Chandra Mukerji v. Dhona Kristo Biawas**, 12 A.L.J. 896=24 Ind. Cas. 318.

BANERJI, J.

(54) *Ss. 22, 23—Defendant—His evidence available outside jurisdiction—Whether proper ground for transfer.*

The mere fact that the defendant who is a resident of Amritsar has evidence in Amritsar is not sufficient to justify transfer of the suit from Karachi to Amritsar. The Firm of **Shamsuddin Mahir Bux v. The Firm of All Mahomed Abdula**, 8 S.L.R. 43.

HAYWARD, J.C., and CROUCH, A.J.C.

(55) *Ss. 22, 23, 24, 151—Suit instituted in the original side of the High Court—Application to stay the suit when entertainable—Abuse of process of Court—Inherent powers of Court.*

Apart from the express provisions of the Civ. Pro. Code, there is an inherent jurisdiction in the High Court to stay any suit which is an abuse of the process of the High Court. The jurisdiction existed prior to the Code of 1908 and it is recognised in S. 151 of that Code.

A suit will be stayed if it proved to the satisfaction of the Court that either the expense or the difficulties of trial in the place where the suit is instituted are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in that place (a). A suit will also be stayed if it is brought in the tribunal in which it has been brought, not *bona fide* for the purpose of obtaining justice, but for the

Civ. Pro. Code (1908)—(Continued).

purpose of harassing and annoying the defendants, and of obtaining something to which the plaintiff may not in justice be entitled (b).

The suit in this case was instituted on the original side of the Madras High Court by a limited liability company for damages for defamation from the editor and publisher of a newspaper in Lahore.

Defendants applied for an order that all further proceedings in the High Court should be stayed and for a direction that plaintiffs should file their suit in a proper Court in the Punjab.

Held, that, as there was publication of the alleged libel in Madras, and a cause of action with reference to this libel arose within the jurisdiction of the High Court, the defendants have failed to make out that the institution of the suit in the High Court was an abuse of the process of that Court, and the application for stay should therefore be dismissed.

Held also that Ss. 22 and 23, Civ. Pro. Code are not applicable to the suits instituted on the original side of the High Court (c). *The Hindustan Assurance and Mutual Benefit Society, Ltd. v. Rai Mulraj*, 27 M.L.J. 645.

WHITE, C.J., and TYABJI, J.

References:—(a) (1908) 1 Ch. 471, R. (b) (1907) 2 Ch. 205, R. (c) 29 Ind. Cas. 758; 5 A. 60; 13 B. 178; (1906) 1 K B. 141, R.

(56) S. 23—*First hearing—Transfer of case—Convenient place of trial.*

Held, that, when a case is ready to proceed, it is the first hearing contemplated under S. 23, Civ. Pro. Code.

Held, also, that, where the materials on the record are insufficient to determine the place of residence, the case is triable at the place where the cause of action has arisen and at least some of the assets in suit are situate, particularly when at that place an administration suit is going on between defendants *inter se*, and other suits of large value are pending against the deceased's estate in dispute. *Amir Begam v. Sardar Muhammad Ismail Khan*, 65 P.W.R. 1914=150 P.L.R. 1914.

JONSTONE, J.

(56-a) S. 23. See Nos. 54 and 55, *supra*.

(57) S. 24—*Transfer of cases—Remand by High Court—Decree of District Judge—District Judge after remand sent down the case for re-trial by Subordinate Judge—Trial by Subordinate Judge with consent of parties—Jurisdiction, irregular assumption of—Lease—Dispossession—After-acquired title—Transfer of Property Act, S. 43—Burden of proof.*

An order by the District Judge after remand by the High Court for re-trial, for transfer of a suit under S. 24 of the Code of Civil Procedure, is legal, and it is immaterial that a suit is to be tried by a Subordinate Judge on the evidence recorded by the District Judge who heard the case in the first instance.

Civ. Pro. Code (1908)—(Continued).

When the High Court intended that the suit should be heard on the merits by the District Judge and that he was not at liberty to transfer the suit to a Subordinate Court under S. 24 of the Code, but the District Judge transferred the suit and the parties agreed before the Subordinate Judge that the suit should be tried by him.

Held, that the parties were not entitled to resile from the position they deliberately took up before the Subordinate Judge, as the case was one of assumption of jurisdiction by a competent Court in an irregular manner (a).

Where a lessor erroneously represents that he is authorized to lease a property and transfers it by a lease, and afterwards acquired that property, the lessee is entitled to have that property from the lessor under S. 43 of the Transfer of Property Act.

Merely because a defendant is found to be a tenant of some land under the plaintiff, the burden is not thereby cast upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant (b). *Protab Chandra Roy v. Judithir Das*, 19 C.L.J. 408 = 23 Ind. Cas. 69.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 36 C. 199=5 C L.J. 611, F. (b) 12 C.L.J. 376, R.

(58) S. 24—*Practice—Case remanded by High Court to District Judge—District Judge's power to transfer the case to Subordinate Judge.*

A case which had been decided by the District Judge of Jaunpur was remanded by the High Court to his file for disposal. On the receipt of the record from the High Court, the District Judge made an order transferring the case to the Court of Subordinate Judge of Jaunpur for disposal. Immediately after this order, the District Judge of Jaunpur ceased to exist and Jaunpur became part of the Benares district, and Mr. M was appointed Sessions and Subordinate Judge of Jaunpur and he decided the case.

Held, that the District Judge to whom the case was remanded for disposal had power to transfer the case to the Court of Subordinate Judge under S. 24 of the Code, and Mr. M was competent to dispose of the case. *Pandohi v. Sheo Bhargose*, 12 A.L.J. 1094.

SUNDAR LAL, J.

References:—21 A. 280; 10 C. W. N. 902; 13 B. 654; 24 A. 304; 24 A. 856; (1918) P.R. 392; 19 C.L.J. 408; (1914) M.W.N. 817; 39 C. 193, R.

(58-a) S. 24. See No. 55, *supra*, and 431, *infra*.

(58-b) S. 24 (4). See No. 44, *supra*.

(59) Ss. 24, 92—*Bengal Civil Courts Act (XII of 1887), S. 8—Suit relating to public charity—Additional District Judge, appointment of, by Local Government without specific authority to entertain suit under S. 92, Civ. Pro. Code—Transfer of suit by*

Civ. Pro. Code (1908)—(Continued).

District Judge without assignment of powers under S. 92, Civ. Pro. Code—Jurisdiction of Additional Judge to entertain suit under S. 92, Civ. Pro. Code, on transfer from District Judge.

Where a suit, under S. 92, Civ. Pro. Code, instituted before the District Judge, was transferred by the District Judge to the Additional District Judge under S. 24, Civ. Pro. Code, and it appeared that the Local Government, in appointing the Additional District Judge, had not empowered him to receive suits under S. 92, nor had the District Judge, in his order of transfer, assigned to the Additional District Judge the functions of a District Judge in respect of S. 92:

Held—That the Additional District Judge had no jurisdiction to try the suit and the order transferring the case made by the District Judge was of no effect. **Mahomed Musa v. Abdul Hassan Khan**, 18 C.W.N. 612=22 Ind. Cas. 951=41 C. 866.

STEPHEN and MULLIOK, JJ.

(60) Ss. 24, 99—*Remand to District Judge—Transfer by District Judge to Sub-Judge—Irregularity—Effect.*

Where the High Court remanded an appeal for hearing by the District Judge, and he sent it down to the Sub-Judge, for disposal, *held*, the trial by the Sub Judge was merely irregular and such an irregularity did not affect the merits (a).

Such a transfer may also be covered by the terms of S. 24 of the Civ. Pro. Code. **Singamusetti Venkathiah v. Bopalla Chairanna**, (1914) M.W.N. 317=15 M.L.T. 304=23 Ind. Cas. 425.

SADASIVA IYER and SPENCER, JJ.

Reference :—(a) 36 C. 193, F.

(61) S. 24 (3), O.I., r. 9, O. XLI, r. 20—Power of District Judge to transfer or make over case to Additional District Judge—Non-joinder of party—Suit when not to be defeated—What person can be made defendant—Power of Appellate Court to add respondent after time. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(62) S. 34—Delay in deciding case—Delay caused by plaintiff—Discretion not to award interest. See DEBTOR AND CREDITOR, No. 2, 98 P.W.R. 1914.

(62-a) S. 34. See No 407, *infra*.

(63) S. 35—“Costs would abide the result,” meaning of—Discretion.

The words “costs would abide the result” do not mean costs will follow the result.

The discretion ordinarily vested in a Subordinate Court, to decide how the costs shall be borne, is not curtailed by the mere use of the phrase “costs would abide the result” in an order of the Appellate Court (a).

Where a litigation is caused by the language of a Will, its costs should be borne by the estate

Civ. Pro. Code (1908)—(Continued).

of the testator and not by the trustees. **Godavarthi Perla v. Godavarthy Lakshmi Devamma**, 24 Ind. Cas. 96.

TYABJI, J.

Reference :—(a) 4 C.W.N. 343, Diss.

(64) S. 37—*Bombay Civil Courts Act (XIV of 1869), S. 32—Bombay Court of Wards Act (Bom. Act I of 1905)—Decree passed by Subordinate Judge—Addition of Court of Wards as party after decree—Execution proceedings can be entertained by the Subordinate Judge.*

A decree was passed by a Subordinate Judge. Thereafter the estate of the judgment-debtors having passed into the management of the Court of Wards, the Court of Wards was added as a party to the execution proceedings. The Subordinate Judge held that he had no jurisdiction to go on with the execution proceedings as the Court of Wards was a party:

Held, that the Subordinate Judge had jurisdiction to proceed with the execution, notwithstanding that after the decree the Court of Wards had become a party to the execution proceedings. **Bandoo Krishna Kulkarni v. Narsingrao Konherra Deshpande**, 16 Bom. L.R. 527=38 B. 662.

BEAMAN and HAYWARD, JJ.

(65) Ss. 37, 42, O. XLV, r. 16—*Order of Privy Council—High Court transmitting it to original Court for execution—Original Court's power to permit transferee decree-holder to execute it.*

Per Spencer, J.—The position of an original Court, which itself passed a decree against which appeals have been carried out to the Privy Council, when it receives the order of His Majesty in Council transmitted to it by the High Court, is not to be compared with the position of a Court to which the decree of another Court has been transferred for execution. They are totally different positions.

In this case a transferee decree-holder applied to the High Court for the transmission of an order of the Privy Council and prayed for a direction to bring him on record in that capacity. The High Court transmitted it for execution to the District Court which originally passed the decree. *Held* that there was nothing irregular or contrary to law in the action of the District Court in recognising the transfer and in permitting the transferee to execute the decree. **Lingam Kristna Bhoopati Deo Garu v. Basavi Reddi**, 13 M.L.T. 143=26 M.L.J. 185=23 Ind. Cas. 235.

SADASIVA IYER and SPENCER, JJ.

References :—28 M. 466; 6 C. 432; 22 C. 960, R.

(66) Ss. 37, 47, 150 and O. IX, r. 13—*Execution—Decree passed and attachment ordered by one Court—Jurisdiction transferred to another Court—No formal order of transfer to latter Court—Right of latter*

Civ. Pro. Code (1908)—(Continued).

Obtort to continue execution proceedings—Ex parte order after notice—Res judicata—Civ. Pro. Code, O. IX, r. 13—Applicability to orders in execution—Objection petition—When not to be treated as one under O. IX, r. 13—Limitation Act, Art. 164.

Where, pending an application for execution by attachment and sale of certain immoveable properties, the Court ceased to have territorial jurisdiction over the properties, and another Court acquired jurisdiction over the same, and where the decree-holder applied to the latter Court to continue the proceedings instituted in the former Court,

Held, that the latter Court has jurisdiction to continue the proceedings instituted in the former Court without a formal order of transfer from the former Court (*Vide* Ss. 37, 150, Civ. Pro. Code).

Unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings (affecting the property so transferred to another jurisdiction), such proceedings are *ipso facto* transferred by the change of venue to the new Court, the records relating to that action becoming part of the records of the new Court.

S. 150, Civ. Pro. Code (1908), is not confined only to transfers made under the special provisions of the Code, but seems to imply that the whole business of a Court might be transferred to another Court without any order of transfer being passed by a superior Court under S. 24 or any other section of the Code, either as regards a particular case or as regards all cases pending in a particular Court. The introduction of S. 150 indicates that the Calcutta view which held that, by the change of venue made by a local Government, the business of a Court, which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area, will be *ipso facto* transferred to the new Court has been adopted by the legislature (a).

An *ex parte* order passed after the issue of notice and after the Court held that the service of notice was duly effected is binding as *res judicata* on the defendant just as much as a contested decree or order (b).

Orders in execution which come under S. 47, Civ. Pro. Code, are decrees as defined in S. 2 of the Code, and hence *ex parte* orders passed in execution are *ex parte* decrees, and O. IX, r. 13, provides generally for the setting aside of *ex parte* decrees, and not only for the setting aside of those classes of *ex parte* decrees which are not also orders passed under S. 47 in execution proceedings (c).

Such orders are governed by Art. 164, Sch. II, Limitation Act. Where an objection to set aside an *ex parte* order was presented and the objection petition was not stamped and contained no prayer to set aside the *ex parte* order, and where from the petition it did not

Civ. Pro. Code (1908)—(Continued).

appear whether the petitioner had notice only within one month before filing the objection, the High Court refused to treat it as an application under O. IX, r. 13, to set aside an *ex parte* order (d). *Subbiah Naicker v. Ramanathan Chettiar*, 26 M.L.J. 189=(1914) M.W.N. 205=22 Ind. Cas. 899=87 M. 462.

AYLING and SADASIVA IYER, JJ.

References:—(a) 6 C. 513; 15 C. 667; 17 C. 699; 25 C. 315; 28 C. 236; 35 C. 974, *Appr.*; (1910) M.W.N. 477; 27 M. 118*; 30 M. 537; 32 M. 140, D. (b) 13 C.L.J. 38; 35 M. 84, F.; 15 A. 106; 8 C. 51, R. (c) 3 C.L.J. 276, F. (d) 15 C.L.J. 123, *Expl.*

(67) S. 39, Cl. (1)—*When decree sent to another Court on decree-holder's application—No question of competence of that Court arises.*

Where a Court sends its decree for execution to another Court on the application of the decree-holder under S. 39, Cl. (1) of the Civ. Pro. Code, the question of competence by jurisdictional value of the Court to which the decree is transferred does not arise. *Abdulla Sahib v. Ahmed Hussain Sahab*, (1914) M.W.N. 97=15 M.L.T. 148=22 Ind. Cas. 275.

SADASIVA IYER and SPENCER, JJ.

References:—7 M. 397; 17 M. 809; 7 M.L.J. 132, F.

(67-a) S. 42. See No. 65, *supra*.

(68) Ss. 42, 47, 104, Cl. (h), 145—*Appeal—Small Cause Court—Decree execution of—Surety—Order directing the arrest of a surety if appealable.*

An order directing the arrest of a surety passed by a Court exercising ordinary civil jurisdiction in execution of a Small Cause Court decree transferred to it is appealable. *Adhar Chandra Gope v. Pullin Behary Saha*, 20 C. L.J. 129.

WOODROFFE and D. CHATTERJEE, JJ.

(68-a) S. 44. See No. 48, *supra*.

(69) S. 47—*Suit for possession of house against trespasser—Decree on compromise in which defendant admitted plaintiff's right on condition of his allowing him to remain in possession as tenant—Effect of—Dispossession of tenant—Suit for.*

Plaintiff instituted a suit for possession of a house against the defendants whom he alleged to be trespassers. The suit was compromised, the defendants admitting the plaintiff's right on condition of their being allowed to remain in possession as tenants on payment of rent. The defendants were to vacate whenever asked to do so. *Held* that the relation of landlord and tenant between the parties commenced from the date of the decree, which so far as it was capable of execution was practically executed on the arising of that relation, and that a fresh suit was to be brought if it was desired

Civ. Pro. Code (1908)—(Continued).

to dispossess the defendants. **Mahammad Nasiruddin v. Bhagwana**, 12 A.L.J. 81=22 Ind. Cas. 668.

TUDBALL, J.

- (70) S. 47—No bar—Suit for damages—Fraudulent execution—Measure of damages.

A suit for damages for fraudulent execution is not barred by S. 47 of the Civ. Pro. Code.

The measure of damages is the amount recovered under such fraudulent execution. **Raghava Iyengar v. Athanambalam**, (1914) M.W.N. 174=23 Ind. Cas. 405.

SESHAGIRI IYER, J.

- (71) S. 47—Court executing decree—Questions to be determined.

Although a mortgage decree which ought to have followed the Form No. 4, Sch. D, of the Code, erroneously gave at once a personal remedy against the defendant, the executing Court has to execute the decree according to its terms. The decree-holder is entitled to the relief granted to him by the subsisting decree, even if it is erroneous. **Muthu Karuppan Chettiar v. Chinnasawmy Pillai**, (1914) M.W. N. 152=22 Ind. Cas. 299.

SADASIVA IYER and SPENCER, JJ.

Reference:—21 M.L.J. 1036, F.

- (72) S. 47—Limitation Act (1908), Ss. 5, 18—Suit to set aside revenue sale—Compromise that defendant should execute *kobala* within three months—After more than three years suit for declaration of title, whether maintainable.

Certain land belonging to the plaintiffs was sold for arrears of Government revenue and purchased by the defendant's father. The plaintiffs sued to have the revenue sale set aside on the ground of fraud, and during the pendency of that suit, which was decreed, a *solenamah* was entered into between the parties by which the defendant agreed to execute a *kobala* on receipt of Rs. 60 within three months, and in default the plaintiffs were to get the *kobala* executed in their favor by the Court. More than three years after this, the plaintiffs brought a suit for declaration of their title to the land which was the subject-matter of the previous suit, and for possession thereof, and also for getting a *kobala* executed by the defendant:

Held, that the suit was not maintainable; that the plaintiffs either must sue again to have the sale set aside on the ground of fraud, a suit which is clearly barred,—or they must execute the original decrees on the *solenamah* which is also barred.

Neither S. 5 nor S. 18 of the Limitation Act has any application to cases under S. 47 of the Code of Civil Procedure. **Shekambari v. Ram Kumar Das**, 23 Ind. Cas. 240.

HOLMWOOD and SHARFUDDIN, JJ.

- (73) S. 47—Limitation Act (1908), S. 18, Art. 166—Execution started against deceased

Civ. Pro. Code (1908)—(Continued).

judgment-debtor—Sale if may be set aside—Purchaser of occupancy-holding if may apply—Limitation—Fraud—Abuse of processes of Court—Onus—Bengal Tenancy Act, S. 153, if bars second appeal in application to set aside sale—Practice—Revision application treated as appeal.

Where proceedings to execute a decree for rent obtained against an occupancy raiyat having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served, and thereafter at the sale at which no bidders attended, the property was purchased by the decree-holder who on 8th April 1912 got delivery of possession through Court, and within one month thereof the petitioner who had previously purchased the holding from the tenant applied to have the sale set aside:

Held—that the execution proceedings were liable to be set aside on the ground of grave irregularity.

Quære.—Whether the irregularity was such as rendered the sale absolutely void or voidable only.

Held, that the application came within S. 47 of the Civ. Pro. Code and was not time-barred, S. 18 of the Limitation Act being applicable in the circumstances of the case (a).

That it was for the decree-holder to show that the petitioner had on any date earlier than 8th April 1912 knowledge of the sale.

That the petitioner from whom rent was received, though he might not have been formally registered as a tenant, had *locus standi* to apply under S. 47 to set aside the sale, although he had failed to prove that the holding was transferable by custom (b).

That a second appeal lay in the case although the claim in the suit for rent was under Rs. 100.

The explanation added to S. 153 of the Bengal Tenancy Act by the Amending Act of 1907 has not completely nullified the Full Bench decision in *Kali Mandal v. Ram Sarbwar* (c).

In this case no question of limitation or Court-fees arising, the petitioner's application for revision was treated as a memorandum of appeal. **Arjun Dass v. Gunendra Nath Basu-Mullick**, 18 C.W.N. 1266=20 C.L.J. 341.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 11 C.L.J. 489=14 C.W.N. 560, R.; 27 I.A. 216=25 B. 337; 6-A. 255. 12 A 440, D. (b) 13 C.W.N. 652, D. (c) 32 C. 957=9 C.W.N. 721, R.

(74) S. 47—Appeal—Order setting aside execution sale—Execution proceedings fraudulent and collusive—Decree-holder purchaser—Evidence Act, S. 44. **Ramdhani Sha v. Topi Bibi**, 18 C.L.J. 264=21 Ind. Cas. 938. See Final Part, 1913, Col. 322.

Civ. Pro. Code (1908)—(Continued).

(75) S. 47—*Appeal—Execution-sale—Application to set aside sale—Sale set aside—Appeal by auction-purchaser, whether competent—Bengal Tenancy Act (VIII of 1885), S. 173. Jadab Chandra Mukerjee v. Joy Gopal Bhattacharya, 20 Ind. Cas. 191=19 C.L.J. 81. See Final Part, 1913, Col. 323.*

(76) S. 47—*Execution of decree—Judgment-debtor claiming property as shebait for idol who was not party to suit—Appeal—Appeal when shebait party both in personal and representative capacity—Execution interrupted by suit for declaration—Declaration decree fatal to former and subsequent execution. Kali Prosanna Ghosh v. Golam Rahman, 20 Ind. Cas. 790=18 C.W.N. 910. See Final Part, 1913, Col. 323.*

(77) S. 47—*Promise by judgment-debtor to pay decretal amount in instalments or in default sale to be confirmed—Default by judgment-debtor—Confirmation of sale when to be considered to take place—Application for delivery of possession—Limitation. See EXECUTION OF DECREE, No. 7, 22 Ind. Cas. 497.*

(78) S. 47—*Validity of decree if can be questioned in execution proceedings—Refusal to stay execution whether an interlocutory order. See EXECUTION OF DECREE, No. 17, 20 C.L.J. 512.*

(79) S. 47—*Scope. See MEANE PROFITS, No. 3, 24 Ind. Cas. 484.*

(79-a) S. 47. See Nos. 4, 5, 6, 11, 12, 45, 66, 68 *supra* and 217, 335, 441, *infra*.

(80) Ss. 47, 96, O. XLVII, r. 2—*Delivery of possession—Review—Inherent power, when can be invoked—Sale certificate—Title—Appeal—Order cancelling order for delivery of possession—Decree-holder, auction-purchaser—Party—Question relating to execution of decree.*

A Court cannot, in the exercise of its inherent power, assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such application.

The inherent power of a Court can be invoked only for the attainment of the ends of substantial justice, for the administration of which alone Courts exist.

An order of the Munsif, by which he has cancelled the order of his predecessor for delivery of possession to the legal representative of the decree-holder, auction-purchaser, on the application of the judgment-debtor, is not open to appeal under S. 47 of the Code, as it does not decide any question between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decrees.

The question, whether an order in execution proceeding is within the scope of S. 47 of the Code depends for its solution upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between the parties to the suit or their representatives in interest, the order falls within the scope

Civ. Pro. Code (1908)—(Continued).

of S. 47 and is consequently a decree within the meaning of S. 2 and is open to appeal under S. 96 of the Code (a).

An order for delivery of possession to the auction-purchaser is not one relating to execution of decree.

An order for delivery of possession to the decree-holder, auction-purchaser, is not one between the parties to the suit or their representatives.

Cases on the point reviewed.

On any point specifically dealt with by the Code of Civil Procedure, a Court cannot disregard the letter of the enactment according to its true construction, though, as the Legislature cannot anticipate and make express provision to cover all possible contingencies, it is the duty of the Judge to apply the provisions of the law not only to what appears to be regulated expressly thereby but also to all cases to which just application of them may be made and which appears to be comprehended either within the express sense of the law or within the consequences that may be gathered from it (b).

A sale certificate is merely evidence of title; it does not create title which may be proved by other evidence (c) *Sasi Bhuan Mookerjee v. Radha Nath Bose, 20 C.L.J. 433.*

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 13 C.L.J. 257; 15 C.L.J. 89. R. (b) 9 W.R. 402; 3 C.L.J. 29. R. (c) 7 C.L.J. 384; 7 C.L.J. 387; 9 C.L.J. 346, R.

(81) S. 47, O. V, r. 17, O. XXI, rr 40 (1), 50 (1) (c), O. XXX, rr, 3, 5, 7, 8—*Decree, execution of—Decree against firm—Suit against firm—Names of partners not disclosed in plaint—Application for service of summons on certain person as partner—Service—Representation made at the time of service, legal effect of—Refusal to accept—Service on outer door of firm office—No written notice as to capacity in which summons was served—Service, individual—Person served, duty of—Appeal—Final order.*

Per Curiam.—A suit was instituted against a certain firm. The names of the partners were not disclosed in the plaint. An application was made by the plaintiff, in which it was prayed that the writ of summons in the suit might be served on B as partner of the firm; this application was allowed. The summons was handed to B at the place of the business of the firm and he was asked to receive in the name of his masters. When he refused to give a receipt, the summons was affixed to the outer door of the place of business. The plaintiff obtained a decree and the decree as drawn up was against the firm. An application for execution was then made against B as partner of the firm, and an order was passed for issue of warrant of arrest against him:

Held, that it was open to the decree-holder to proceed with execution against B under O. XXI, r. 50, sub-r. (1), cl. (c) of the Code.

Civ. Pro. Code (1908)—(Continued).

That the legal effect of the service of summons upon him without the prescribed notice under r. 5 of O. XXX of the Code was service upon him in his capacity as partner, and the only method by which he could contest his liability as partner was by appearance under protest in accordance with r. 8 of the said order. That, when he failed to appear, it was open to the decree-holder to proceed with execution against him.

The object of notice under r. 5 of O. XXX of the Code as to the capacity of the person served is to remove the possibility of dispute as to the character in which a particular person has been served. If there is a notice in writing, the person served is apprised of the character in which he is sought to be made liable. The notice may intimate to him that he is served as a partner or that he is served merely as the manager or that he is served in a two-fold capacity, namely, both as a partner and as a manager. The Legislature intended not merely to raise a rebuttable presumption as to the character in which he was served, but to lay down definitely the legal effect of the service.

That there was good service under O. V, r. 17 of the Code.

Held also, that an appeal lay under S. 47 of the Code. The order was essentially a decree as it determined a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree (a).

The fact that the judgment-debtor could avail himself of the provisions of sub-r. (1) of r. 40 of O. XXI of the Code did not alter the nature of the order passed by the Court.

Per Mookerjee, J.—Rule 3 of O. XXX of the Code defines the two alternative modes of service of summons in a suit instituted against a firm. The first mode is by service upon one or more of the partners. The second mode is by service upon the person who has the control or management of the business. If service is effected in either of these modes in accordance with law, there is a good service upon the firm as a corporate entity, and it is immaterial whether all or any of the partners are within or without British India. But there is a fundamental difference in the result of the two modes of service. In the case of service upon a partner, there is a good service not only on the firm but also upon the partner personally, which may render him liable in proceedings in execution to the extent stated in r. 50 of O. XXI of the Code; on the other hand, if there has been service upon a person who has the control or management of the business but is himself not a partner, although there is good service upon the firm, there is no individual service upon any of the partners. In this latter case, however, the decree-holder is entitled to proceed under sub-r. (2) of r. 50 of O. XXI of the Code.

Per Beachcroft, J.—Sub-r. (2) of r. 50 of O. XXI is only applicable in the absence of the conditions in sub-r. (1).

Civ. Pro. Code (1908)—(Continued).

Rule 7 of O. XXX of the Code is to be read subject to r. 5 and contemplates only a case where service is on a manager and not a case where the person served is deemed to be served as a partner.

Quære.—Whether a person who has refused to accept service of a summons can plead that he was in fact served in one capacity and not in another. *Balshab Charan Saha v. Bank of Bengal*, 19 C.L.J. 581.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 24 C. 725 (739); 34 A. 530, F.; 14 C.L.J. 35=16 C.W.N. 124; 16 C.W.N. 970, D.

(82) S. 47, O. XXI, r. 2—*Execution—Decree—Adjustment out of Court—Not certified—Failure of judgment-debtor to apply within time—Effect—Remedy by regular suit—Limitation Act, Art. 174.*

The Court executing a decree cannot recognise an adjustment of the decree out of Court which had not been recorded as certified (a) or to certify which the judgment-debtor did not apply within the time provided by Art. 174, Limitation Act.

When a decree has been fully executed, S. 47 ceases to apply, and there is nothing to prevent a judgment-debtor from instituting a regular suit on the ground of fraud or negligence, where, through the decree-holder's fraud or negligence to certify adjustment the judgment-debtor had to pay a second time (b). *Sayyid Muhammad Nur v. Ko Law Pan*—U.B.R. (1918), 4th Qr., p. 191=22 Ind. Cas. 963.

SHAW, J.C.

References:—(a) 21 C. 437; 31 C. 480; U.B. R. (1907—1909), Civil Procedure, 31, R. (b) U. B.R. (1904—1907), Civil Procedure, 36, R.

(83) S. 47 and O. XXI, r. 2—*Suit for declaration that a decree had been satisfied and should not be executed against plaintiff—Maintainability.* See DECLARATORY SUIT, No. 1. 42 P.R. 1914.

(84) S. 47, O. XXI r. 36—*Mortgage with possession—Mortgagee also co-sharer—Sale of equity of redemption—Suit for pre-emption—Money deposited by pre-emptor and removed by vendee—Pre-emptor full owner by operation of law—Execution of decree unnecessary.*

A property mortgaged with possession was sold off by the mortgagor. The mortgagee, who was in possession and was also a co-sharer, brought a suit for pre-emption without asking for possession, obtained a decree and deposited the money in Court which was removed by the vendee. The decree was never executed.

The plaintiff's title having been denied by the defendant, the present suit for declaration of right was brought. *Held* that the plaintiff being himself in possession *qua* mortgagee, it was not necessary for him to seek any further relief in execution of pre-emption decree under

Civ. Pro. Code (1908)—(Continued).

O. XXI, r. 36, Civ. Pro. Code, and the suit was not barred by S. 47 of the Code of Civil Procedure.

Held also, that when the plaintiff satisfied the condition laid down in the pre-emption decrees by depositing the amount of the sale price in Court and the defendant removed that amount, no title whatever remained in the defendant, and the plaintiff by operation of law became full owner of the property. **Sita Ram Pande v. Madho Pande**, 12 A. L. J. 521=23 Ind. Cas. 876.

TUDBALL, J.

(84-a) S. 47, O. XXI, r. 53 (3)—Questions relating to execution, what are—Objection to attachment of decree in execution—Order refusing application for execution—Appeal. See **EXECUTION OF DECREE**, No. 18-a, 17 O.C. 374.

(85) S. 47, O. XXI, r. 60—*Appeal, maintainability of—Decree, execution of—Endowed property, execution against—Decree against shebait, if binding against succeeding shebait—Judgment-debtor death of, pending execution—Succeeding shebait, objection of, as private property—Party.*

When a decree has been passed in a suit against a shebait as representing an idol, it is binding on the succeeding shebait, provided it has been passed without any fraud or collusion. But when a decree has been passed against a person in his capacity as shebait, execution can be taken out only against the properties of the endowment in his hands (2).

When X, in execution of a decree for money against Y as shebait of a deity, attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession not as shebait of the deity, but in his own right, the case does not fall within the scope of S. 47, but comes under O. XXI, r. 60 of the Code (b).

Per Beachcroft, J.—If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case falls under S. 47 of the Code, but if it is adverse to his interest as representative, it does not (c). **Upendra Nath Kalamuri v. Kusum Kumari Dasi**, 20 C.L.J. 485.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 14 B.L.R. 450=23 W.R. 253=21 A. 145; 6 C.W.N. 178; 29 M. 553; 14 M.L.J. 377, R. (b) 39 C. 298, F.; 17 C. 711, *Expl.*; 15 C.W.N. 725; 11 B.L.R. 149; 4 I.A. 66=2 C. 327, *Dist.* (c) 17 C. 711, *Dist.*

(86) S. 47, O. XXI, r. 60—Legal representative—Objection to attachment—Property if assets in the hands of legal representative—Question to be decided in execution. See **EXECUTION OF DECREE**, No. 14, 20 C.L.J. 481.

(87) S. 47, O. XXI, r. 66—*Proclamation of sale—Particulars of—Value and capacity of a mill are material facts for proclamation—Stay of sale.*

Civ. Pro. Code (1908)—(Continued).

Where the judgment-creditor had purchased property at an auction sale which was subsequently set aside, and the judgment-debtor in the next sale proclamation claimed a set-off from the judgment-creditor for the mesne profits of the property, *held*, that this matter should be dealt with in execution proceedings and not by a separate suit.

In the sale proclamation, as the parties did not agree as to the valuation and capacity of two rice mills, the Court inserted the respective figures of both parties. *Held* that, as far as valuation was concerned, this amounted to a material irregularity. The sale was stayed and the lower Court was directed to hold an enquiry as to valuation and insert the figure found on such enquiry. Each case must be dealt with on its merits. **Maung Maung v. Wightman & Co.**, 7 Bur. L.T. 64=24 Ind. Cas. 468.

HARTNOLL, C.J., and TWOMEY, J.*

Reference:—22 A. 412, R.

(88) S. 47, O. XXI, r. 65—*Appeal—Execution of decree—Sale proclamation—Valuation of mortgaged properties to be sold—Acceptance of decree-holder's valuation—Order, whether appealable.*

Every order passed in execution proceedings is not appealable; only such orders as conclusively determine the rights of the parties are appealable (a).

Therefore, an order accepting the valuation put upon a property by the decree-holder under r. 66 of O. XXI of the Civ. Pro. Code is not appealable. **Mahammad Eahsan Hosain v. Tara Prosanna Mukerjee**, 22 Ind. Cas. 548.

FLETCHER and CHATTERJEE, JJ.

References:—(a) 10 Ind. Cas. 371=14 U.L. J. 35=16 C.W.N. 124; 17 Ind. Cas. 88=16 C.W.N. 970, F.

(89) S. 47, O. XXI, rr. 100, 101—*Dispossession by auction-purchaser—Application by dispossessed mortgagee disallowed—Appeal.*

T obtained a decree for sale of a mortgaged property subject to a prior mortgage. The property was put to sale and was purchased by T himself. T obtained possession of the property through Court. The prior mortgagee then applied to the Court, praying that the possession might be restored to him. The Court disallowed the application:

Held, that no appeal lay from such order. **Tej Pal v. Tara Singh**, 24 Ind. Cas. 93.

RAFIQUE and PIGGOTT, JJ.

(90) S. 48—*Decree for possession on condition of paying an amount of money—Extension of time for payment—Objections of judgment-debtor disallowed—Appeal.*

A decree was passed for possession of certain property on condition of the decree-holder paying a certain amount up to a certain time. The money was paid beyond the time prescribed and the decree-holder prayed for possession of property. Judgment-debtors objected on the

Civ. Pro. Code (1908)—(Continued).

ground that the money was paid beyond time, but the Court below overruled their objection and allowed execution to proceed. *Held* that the order disallowing the objection was an order relating to the execution of the decree within the meaning of S. 48 of the Code, and an appeal lay against that order. **Kauri Upadhia v. Dwarka Singh**, 12 A.L.J. 12=22 Ind. Cas. 926.

BANERJI, J.

Reference :—11 A.L.J. 950, D.

- (91) S. 48—*Applications for execution after Code had come into operation—Bar of fresh application for execution after twelve years from date of decree—Application for execution after twelve years in continuation of previous execution within that time, whether barred under S. 48—Theory of continuation—Interruption of previous application by circumstances beyond decree-holder's control.*

S. 48 of the Civ. Pro. Code of 1908 applies to applications for execution of decrees made after that Code came into operation (a).

A mortgage decree was made absolute on February 1st, 1900. There were several applications for execution, one of which was made on July 9th, 1902. There was another application made on December 12th, 1910, which was in continuation of the application of July 9th, 1902. The present application, filed on August 9th, 1912, was made in continuation of the previous application of December 12th, 1910. The judgment-debtor objected on the ground that the present application was barred under S. 48 of the Civ. Pro. Code.

Held, that S. 48 provided that no order for execution should be made upon any fresh application after the expiry of twelve years from the date of the decree; that the present application was not a fresh application within the meaning of the section, it being an application in continuation of the previous application and that, consequently, the present application was not barred under S. 48.

The theory of continuation applies only where the previous application has been interrupted by reason of circumstances over which the decree-holder has no control (b). **Muhammad Nabi Reza v. William Alfred Thomas**, 21 Ind. Cas. 928.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 19 Ind. Cas. 391=17 C.W. N. 622=40 C. 704; 19 Ind. Cas. 899, F. (b) 16 Ind. Cas. 541, Rel.

- (92) S. 48—*Madras Court of Wards Act (I of 1902), S. 45—Limitation Act, 1908, S. 15—Mortgage decree against person of proprietor—Not in accordance with S. 89 of Transfer of Property Act—Irregular—Propriety cannot be questioned in execution—Estate under Court of Wards—Exclusion of time—Barred—Limitation.*

Civ. Pro. Code (1908)—(Continued).

A mortgage decree giving a personal remedy against the mortgagor before the sale of the mortgaged property, though irregular under S. 89 of the Transfer of Property Act, cannot be questioned in execution proceedings (a).

The provision in S. 45 of the Madras Court of Wards Act that the period during which the estate remains under the Court's management should be deducted when calculating the period of limitation prescribed by the Limitation Act, will apply only when decrees have been transferred to the Collector for execution. An amendment of it in execution petition ought not to be permitted to revive a barred claim (b).

Quere.—*Per Sadasiva Aiyar, J.*—The sections of the Limitation Act relating to exclusion of time and obtaining the benefit of time spent in necessary acts and other similar provisions govern also the 12 years' period of limitation provided in S. 48 of the Code of Civil Procedure (c). **Kumara Venkata Perumal Raja Bahadur Varu v. Velayuda Reddi**, 27 M.L.J. 25=24 Ind. Cas. 195.

WALLIS and SADASIVA AIYAR, JJ.

References :—(a) 12 Ind. Cas. 689; 21 M.L.J. 1036; 10 M.L.T. 429; (1911) 2 M.W.N. 458; F. (b) 13 Ind. Cas. 263; 10 M.L.T. 557; 36 M. 378; 22 M.L.J. 139; 21 Ind. Cas. 782; 14 M. L.T. 530; (1914) M.W.N. 157; 26 M.L.J. 83; 19 Q.B.D. 394; 56 L.J. Q.B. 621; 35 W.R. 820, F. (c) 1 C. 226 (242); 25 W.R. 283; 3 I. A. 7; 3 Sar. P.C.J. 573; 3 Suth. P.C.J. 236; 18 B. 734; 16 B. 536, F.; 18 Ind. Cas. 586; 13 M.L.T. 79; 24 M.L.J. 96; (1913) M.W.N. 114; 37 M. 186, Diss.

- (93) S. 48—*Meaning of "date of decree sought to be executed"—Application for execution to be treated as pending until validity disposed of—Res judicata in interpreting decrees—Court's power to construct records disappearing from its custody.*

A compromise decree dated 25-3-1895 directed that "the 1st defendant do execute a deed in favour of the second plaintiff empowering the second plaintiff to enjoy $\frac{1}{2}$ share in certain villages within a month from the date of demand by the second plaintiff, that the right to make the demand shall accrue to the second plaintiff as soon as a particular suit of 1894 is disposed of and as soon as a certain tank is provided with steps to be constructed by the first defendant within 3 years from the date of the decree."

An application to execute the decree was made on 10-12-1909 praying for execution of the deed, etc. A similar application for execution was made and granted in 1899, but there was nothing in the records to show why the decree was not executed or what became of the execution petition.

Held, that an application for execution must be deemed to be pending until it is validly disposed of, and that, so far as the execution petition of 1909 related to the carrying out of the order passed in the earlier petition of 1899

Civ. Pro. Code (1908)—(Continued).

- * directing the first defendant to execute the deed of transfer, it was not a fresh application, and the provisions of S. 48, Civ. Pro. Code, did not apply to it (a).

Where the question is as to the construction to be placed on a decree, any decision which has adjudicated the matter is *res judicata* in subsequent proceedings to enforce the decree (b).

A Court has inherent power to construct records which had disappeared from its custody (c).

The meaning of the expression "from the date of the decree sought to be executed" in S. 48, cl. (a), Civ. Pro. Code, discussed (d). **Yenkatamma v. Manikyam Nayani Varu**, 16 M.L.T. 399.

SADASIVA IYER and NAPIER, JJ.

References:—(a) 12 M.L.J. 24; 31 M. 71, R. (b) 36 M. 553, R. (c) 14 M.L.T. 317= (1913) M.W.N. 862, R. (d) 36 B. 368; 17 A. 39, Cons.

(94) S. 48, O. XX, r. 6—*Mortgage decree—Direction that unrealised balance of decree should be recovered from mortgagor personally—Application to execute, if may be made after 12 years.*

Where a mortgage decree directed that the property mortgaged should be sold and, if the proceeds of the sale be insufficient, the balance of the decree should be realized from the other properties and the person of the judgment-debtor, an application made more than 12 years after the date of the decree for attachment and sale of the mortgagor's other properties is barred by S. 48 of the Code. **Jnanendranath Bose v. Khulna Loan Company**, 18 C.W.N. 492=24 Ind. Cas. 35.

COXE and RAY, JJ.

(95) Ss. 50, 52—*Hindu law—Surety debt—Decree against father—Partition between father and son—Execution against property in the hands of son—Liability of son to pay it.* See CIV. PRO. CODE (1882), No. 23, 27 M.L.J. 112.

(96) Ss. 50, 52, 53—*Hindu Law—Liability—Property descending to son—Assets in the hands of the son made liable for father's debt—Son dying—Divided uncle succeeds—Property liable for father's debt.*

Where ancestral property in the hands of the son is made liable by S. 53 of the Civ. Pro. Code for the debts of the father, the fact that the son dies subsequently and execution is sought against his heir and legal representative does not affect the operation of S. 53 of the Code, as making the property in question any less, the father's property for the purposes of Ss. 50 and 52 of the Code. **A. Kaithuri Ranga Iyer v. Venkatrama Iyer**, (1914) M. W.N. 854=24 Ind. Cas. 280.

WALLIS and AYLING, JJ.

(97) S. 51 (d), O. XLI, r. 1—*Receiver, Grounds for appointment of—Discretion of Court—Convenience of decree-holder.* **Mirza**

Civ. Pro. Code (1908)—(Continued).

Mahammad Hussain Khan v. Amar Chand Paul, 16 O.C. 238=21 Ind. Cas. 283. See Final Part, 1913, Col. 328.

(98) S. 52—*Sequestration of property by attachment—Effect—Right of creditor—Personal liability of heirs-at-law—Right of heirs to profits.* See DEBTOR AND CREDITOR, No. 3, 17 O.C. 207.

(98-a) S. 52. See Nos. 95, 96, *supra*.

(98-b) S. 53. See No. 96, *supra*.

(99) S. 55 (4)—*Surety bond—Application by judgment-debtor to be declared insolvent and his appearance when called upon, both laid down as conditions thereof—Breach of one condition—Effect—Realisation of security—Order refusing to review order of arrest—Civil revision petition against—Death of petitioner—Abatement.*

A Civil revision petition against an order of the lower Court, refusing to review an order of arrest passed by it against the petitioner in execution proceedings, abates, on the death of the petitioner, and no right survives to his legal representatives.

A person stood as surety for a judgment-debtor and executed a surety-bond in terms of S. 55, cl. 4, Civ. Pro. Code. Under the bond, the surety agreed that the judgment-debtor will within one month apply to be declared an insolvent, and that he will appear when called upon in any proceedings upon the insolvency application or upon the decree in execution of which he was arrested, and that, if the judgment-debtor fails so to apply and appear the security may be realised. *Held* that the surety will not be discharged even if one of the two conditions stated above is broken. **Kallasa Aiyar v. Arunachala Chettiar by Ramasami Iyengar, Agent**, 15 M.L.T. 224=22 Ind. Cas. 953.

SADASIVA IYER, J.

(100) Ss. 55, 145 (c)—*Extent of surety's liability.* See EXECUTION OF DECREE, No. 3, 21 Ind. Cas. 612.

(101) S. 58, (b) (iv)—*Subsistence allowance sent by money order not reaching in time—"Omission to pay".*

The words "omission to pay" in S. 58, cl. (b) (iv) of the Code, include also a case where the subsistence allowance is sent by money order, which, though sent sufficiently early to reach the officer in charge of the prison on the first of the month, does not actually reach that officer in time.

A payment cannot be considered to have been made to the officer until the officer actually receives the money. **Thacharkal Tharkal Kannothe Arukasthanath Moldeen Kutti v. Parambath Kundi Mamu**, 22 Ind. Cas. 25.

MILLER, J.

(102) S. 60—*Attachment—Salary—Officer of Indian Army—Money attached and distributed among decree-holders, cannot be refunded.*

Civ. Pro. Code (1908)—(Continued).

The salary drawn by an officer in the Indian Army is not liable to be attached in execution of a decree, under S. 60 of the Civ. Pro. Code.

Where, however, the salary of such an Officer has been attached and the realisation distributed among the decree-holders, the latter cannot be ordered to refund the money so paid to them. *King King & Co. v. Francis D. Davidson*, 16 Bom. L.R. 233=23 Ind. Cas. 576=38 B. 667.

MACLEOD, J.

- (103) S. 60—*Army Act (44 and 45 Vic., Chapter 58), S. 136—Attachment of salary of Honorary Commissioned Officer in the Indian Subordinate Medical Department, liability of.*

Held, that the salary of Honorary Commissioned Officer employed in the Indian Subordinate Medical Department was liable to attachment to the extent of one-half under S. 60 of the Code of Civil Procedure read along with S. 136 of the Army Act (44 and 45 Vic., Chap. 58). *Prins. E. G. A. (Lieutenant) v. Messrs. Murray & Co. Limited*, 17 O.C. 99=23 Ind. Cas. 935.

LINDSAY and PANDIT KANHAIYA LAL, J. CS.

References:—33 A. 529; 37 B. 26 (30), *Not F.*; 24 C. 102; 25 M. 402, R.

(104) S. 60—Insolvent—Salary—Appropriation of income for the benefit of the creditor. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 18, 19 O.L.J. 33.

- (105) S. 60 (g)—*Political pension—Property granted by Government for political consideration—Sanad—Interpretation of—Opinion of the Revenue Officers as to the terms of the grant—Pensions Act (XXIII of 1871), S. 11—Evidence.*

A grant of land by Government for political considerations, to the grantee for life and as an absolute estate to his descendants, is not political pension within the meaning of S. 60 (g) of the Code of Civil Procedure, and the land so granted is not exempt from attachment and sale in execution of a decree.

The right of the parties to whom a grant of land has been made by the Government must be determined by references to the original *sanad* by which the grant was made, and the opinion expressed upon that *sanad* by Revenue Officers is irrelevant in construing that *sanad*. *Kaniz Fatima Begam v. Sakina Bibi*, 12 A.L. J. 437=36 A. 318.

RAFIQ and PIGGOTT, JJ.

References:—26 A. 617; 31 A. 382=6 A.L.J. 519, F.

- (106) S. 63—*Property attached by different Courts and money realised by the Court of the highest grade—Right of attaching creditors to share rateably though their decrees not transferred to the highest Court.*

Civ. Pro. Code (1908)—(Continued).

A section like S. 63, Civ. Pro. Code, which merely deals with procedure should not be construed as affecting the substantive rights *inter se* of the decree-holders in the different Courts.

Where property is attached by more Courts than one and money is realised in accordance with S. 63, Civ. Pro. Code, by the Court of the highest grade, all the holders of money decrees who have attached in execution in any Court before the actual receipt of the assets by the Court of the highest grade are entitled to share in the rateable distribution on application to such Court and without getting their decrees transferred to it. *Narasimhachariar v. Krishnamachariar*, 26 M.L.J. 406=23 Ind. Cas. 909.

WALLIS and BAKEWELL, JJ.

References:—30 M. 413; 35 M. 588=21 M. L.J. 605; 21 C. 200; 2 C.W.N. 126, R.; 6 M. 357, D.; 14 C.W.N. 393, Diss.

- (107) Ss. 63, 73, O. XXI, r. 52—*Illegality of attaching money lying in Court's hands in another district—Order XXI, r. 52—S. 63—Money detained under a temporary injunction liable to rateable distribution under S. 73—Proper course when money lying in another district is sought to be attached.*

It is illegal for a Court to attach money lying in the hands of a Court in another District. The proper procedure for a decree-holder in such a case is to have his decree transferred to the Court in that district for execution.

Money attached before judgment in a case is liable to rateable distribution in execution of decrees against the same defendant. *Ramchandra v. Latchman Pillay*, 7 Bur. L.T. 277.

SHAW, J. C.

- (108) S. 66—*Sale when Act of 1859 in force—Suit governed by later Code—Defence available to representatives of certified purchaser.*

Under an auction-sale held at a time when the Civ. Pro. Code of 1859 was in force, certain property was purchased by the plaintiff's ancestor in the name of the defendant's ancestor. A dispute arose between the parties as to ownership of the land when Act of 1908 had come into force. *Held* that the suit would be governed by the provisions of the later Code.

Held also that the defence provided by S. 66 of the Civ. Pro. Code, is open both to the certified purchaser and his representatives. *Gaya Prasad v. Lareti Kuar*, 12 A.L.J. 1145.

SUNDARLAL, J.

Reference:—31 Bom. 61, F.

- (109) S. 66—*Property purchased benami—Real purchaser obtaining and remaining in possession—Declaratory suit by real purchaser, whether barred—Specific Relief Act, S. 42.*

A real purchaser at an auction sale who purchases the property sold through a *benamidar*

Civ. Pro. Code (1908)—(Continued).

but remains in uninterrupted possession of the same, is not precluded by S. 66, Civ. Pro. Code, from suing for a declaration that he is the owner of the property. **Myat Gale v. San Tha**, 7 L.B.R. 260=25 Ind. Cas. 810.

ORMOND, J.

(109-a) S. 70. See No. 367, *infra*.

(110) S. 73—*Practice—Procedure—Rateable distribution—Meaning of "same judgment-debtor."*

Where certain property was attached and sold in execution of a decree obtained against X in his personal capacity, and where the holder of a decree passed against X as heir to his wife sought rateable distribution of the proceeds of the sale.

Held that the provisions of S. 73 of the Code cannot be invoked, unless the judgment-debtor occupies the same character in each decree. **Toola Ram v. Abdul Gaffoor**, 7 Bur. L.T. 67=24 Ind. Cas. 476.

ROBINSON, J.

Reference :—26 A. 1; 25 B. 494, F.

(111) S. 73—*Plaintiff's application for rateable distribution refused—Plaintiff's revision petition dismissed—Suit under S. 73, Civ. Pro. Code, to recover portion of assets—Limitation—S. 14 and Arts. 62, 120, Limitation Act (1908)—Deduction of time spent in prosecuting revision petition.*

Plaintiff brought a suit under S. 73, Civ. Pro. Code, his application for rateable distribution as against the defendant, in respect of certain assets in Court deposited by a third party against whom both plaintiff and defendant had obtained decree, having been refused on 18-10-1905. The defendant drew the money in question from Court on 19-10-1905. On 21-12-1905 plaintiff filed a revision petition in the High Court to set aside the refusal order dated 18-10-1905. That petition was dismissed on 12-12-1906. The present suit was filed on 11-12-1909. Held that Art. 62 of the Limitation Act applied to the case and the suit was barred as plaintiff was not entitled to deduct the time between the refusal order and the disposal of the revision proceedings.

Art. 62, Limitation Act, ought to apply wherever the defendant has received money which in justice and equity belongs to plaintiff in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff.

The intention of the defendant at the time of receipt of the money to receive it for himself and not for the plaintiff is not the test by which the question whether the money was in fact received for the plaintiff's use has to be decided.

If the plaintiff in a suit under S. 73, Civ. Pro. Code, is found to be entitled to a portion of the assets which have been paid to the defendant, the latter must be regarded as having received the portion so paid to him "for the use of the plaintiff" (a).

Civ. Pro. Code (1908)—(Continued).

The High Court will not exercise its revisional powers when there is any other remedy open. In the present case, the plaintiff had his remedy by suit, and hence cannot be said to have prosecuted the revision petition in good faith within the meaning of S. 14 of the Limitation Act. In this view the time which expired between the order refusing rateable distribution and the revision proceedings cannot be excluded in calculating the limitation for the present suit. **Balznath Lala v. Ramdoss**, 16 M.L.T. 509=27 M.L.J. 640.

AYLING and HANNAY, JJ.

References :—(a) 15 B. 438, F.; 23 A. 313; 32 C. 527; 6 W.R. 308; 10 C. 860; 30 M. 459; 11 M.L.T. 325=22 M.L.J. 485; 33 A. 708; 21 M. L.J. 705, R.

(111-a) S. 73. See No. 107, *supra*.

(112) S. 73—*Rateable distribution—When entitled—When decree of judgment-debtor is attached. K. Venkata Heggade v. Kuppanna Row*, (1913) M.W.N. 1021=14 M.L.T. 533=21 Ind. Cas. 611. See Final Part, 1913, Col. 332.

(113) S. 73—*Conditions entitling a party to rateable distribution—District Munsiff's Court in exercise of Small Cause jurisdiction not same as his Court in the original side. Chella Narasiah v. Sontan Obbayya*, 25 M.L.J. 601=21 Ind. Cas. 869. See Final Part, 1913, Col. 333.

(114) S. 73—*Priority of registered co-operative society to other creditors how enforceable—Rateable distribution. See ACT II OF 1912 (CO-OPERATIVE SOCIETIES), No. 1, 18 C.W. N. 1140.*

(115) S. 73—*Power of High Court to revise the order of the lower Court in a case of rateable distribution. See REVISION, No. 3, (1914) M.W.N. 738.*

(116) Ss. 73, 104—*Application for rateable distribution—Order, whether appealable—Appeal.*

No appeal lies from an order passed under S. 73 of the Civ. Pro. Code of 1908. **Pungalur Chennamma v. The Minor Raja of Karventigar** by Guardian W. A. Varadachariar, 23 Ind. Cas. 422.

SANKARAN NAIR and AYLING, JJ.

References :—12 Ind. Cas. 911=13 Bom.L.R. 1193=36 B. 156, Dist.

(117) Ss. 73, 115—*Execution of decree—Rateable distribution—Summary inquiry as to whether decree fraudulent—Jurisdiction—Acting with material irregularity—Examination of witness without notice to pleaders, if legal—Evidence not taken in accordance with law—Decision based on such evidence—Evidence Act, S. 165.*

A Court executing a decree has jurisdiction to hold a summary inquiry as to whether the decree obtained by one of the decree-holders asking for rateable distribution is fraudulent or not (a).

Civ. Pro. Code (1908)—(Continued)

A Court should not examine a witness without notice to the parties or their pleaders, and without affording them an opportunity to cross-examine him or to rebut his statements. S. 165 of the Evidence Act does not justify such procedure.

When a Court examines a witness without notice to the pleaders and bases its decision upon the evidence of the witness, it acts with material irregularity in the exercise of its jurisdiction within the meaning of S. 115 of the Civ. Pro. Code. **Pearl Lal Das v. Pearl Lal Dawn**, 22 Ind. Cas. 407.

• **MOOKERJEE and BEACHCROFT, JJ.**

References:—(a) 16 Ind. Cas. 795=17 C.W.N. 326=16 C.L.J. 582, *Rel.*

(118) S. 73, O. XXI, r. 52—*Fund in Court—Attachment by several creditors—Not entitled to rateable distribution—No assets held by Court—First attaching creditor in point of time—Right to payment in full—Attachment before money is paid into Court—Validity.*

The fact that a fund in Court is attached by a Court does not constitute the 'fund' assets held by that Court within the meaning of S. 73, Civ. Pro. Code. Therefore the first attaching creditor in point of time is entitled to be paid in full out of the fund and the other attaching creditors are not entitled to rateable distribution.

Where the fund in Court consisted of surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree, and where it was attached, before the money was paid in Court, at the instance of a creditor.

Held that the attachment was before there was any property in the custody of the Court within the meaning of O. XXI, r. 52 and was therefore bad (a). **K. Thiruvengadiah. R. Chinna-swamian v. K. Thiruvengadiah**, 26 M.L.J. 364=24 Ind. Cas. 617.

WALLIS, J.

Reference:—(a) 22 B. 39, R.

(119) S. 80—*Suit against public officer—Want of notice—Act by the officer in public capacity—Issue of notice of summary eviction—Talukdar Settlement Officer—Gujarat Talukdars Act (Bom. Act VI of 1888), S. 33 (2) (cc)—Land Revenue Code (Bom. Act V of 1879), Ss. 79-A, 202.*

A notice was served upon the plaintiff by the Talukdari Settlement Officer to evict him summarily from certain lands under S. 33 (2) (cc) of the Gujarat Talukdars Act read with S. 79 A of the Land Revenue Code. The plaintiff sued the officer to restrain him from doing so. No notice was given under S. 80 of the Civ. Pro. Code. The first Court held that no notice was necessary, as the suit was for an injunction in respect of an act to be done in the future. On appeal:

Held, that want of notice under S. 80 of the Civ. Pro. Code was fatal to the suit, inasmuch

Civ. Pro. Code (1908)—(Continued).

as the service of the notice which led to the suit was the first act in the process of eviction provided by S. 202 of the Land Revenue Code, and the suit having been brought to restrain the accomplishment of the act of eviction was a suit against a public officer in respect of an act purporting to be done by him in his official capacity. **Bhavanishankar Bhalsankar Vyasa v. The Talukdari Settlement Officer**, 16 Bom. L.R. 766.

SCOTT, C.J. and HAYWARD, J.

(120) S. 80, O. VII, r. 11 (d)—*Secretary of State for India in Council, suit against—Notice to "Collector" means notice to Collector of District in which suit instituted—Suit for damages for breach of contract, notice if necessary of—Defective notice, suit is to be dismissed or plaint only to be rejected—Appearance of defendant if precludes latter—Defendant taking exception to Court's jurisdiction if acquiesces in trial, if he does not apply for transfer.*

The notice contemplated in S. 80 of the Civ. Pro. Code must be served on the Collector or one of the Collectors of the District in which the suit is to be brought. A suit brought in the Court of Sealdah, after notice served on the Collector of Purneah, is not in compliance with S. 80, Civ. Pro. Code.

Such a notice is required even in a case arising out of a contract (a).

Where it was stated in the plaint that notice under S. 80, Civ. Pro. Code, had been duly served, but after defendant had entered appearance it was discovered that the notice had not been duly served:

Held—That it was too late to reject the plaint under O. VII, r. 11, and that there was also no statement in the plaint which suggested that the suit was barred.

A defendant who takes exception to the jurisdiction of the Court is not bound to apply for a transfer of the suit to the proper Court, and does not acquiesce in the trial of the suit by not so applying. **Ratan Chand Dharam Chand v. The Secretary of State for India in Council**, 18 C.W.N. 1340.

COXE and BEACHCROFT, JJ.

References:—(a) 5 C.L.J. 148, F.; 25 C. 289, R.

(121) S. 86—*Suit against Ruling Chief—Sanction of Governor-General in Council—Suit for declaration of title to land, sanctioned by Governor-General in Council—Amendment of plaint by addition of prayer for recovery of possession—Subsequent sanction of Governor-General in Council for suit for recovery of possession. Maharaja Sir Nripendra Narayan Bhup v. Maharaja Manindra Chandra Mundy*, 17 C.W.N. 1242=22 Ind. Cas. 889. See Final Part, 1913, Col. 335.

(122) S. 96—*When a prince or chief can be made a party. Kuthalidath Narayan v.*

Civ. Pro. Code (1908)—(Continued).

Cochin Sircar, (1913) M.W.N. 977=25 M.L.J. 621=14 M.L.T. 486=21 Ind. Cas. 980. See Final Part, 1913, Col. 335.

- (123) S. 92—*Public charitable endowment—Suit for removal of trespasser in possession of trust property.*

A suit for the removal of a trespasser in possession of trust property is not a suit of the kind contemplated by S. 92 of the Code. **Ayatannessa Bibi v. Kulper Khalifa**, 22 Ind. Cas. 677=41 C. 749=19 C.W.N. 234.

CARNDUFF and RICHARDSON, JJ.

References:—33 C. 789 (807, 808)=10 C.W.N. 581=2 C.L.J. 491 (499); 20 Ind. Cas. 37=11 A.L.J. 673=35 A. 459, F.; 26 M. 450, D.; 24 C. 418. Diss.

- (124) S. 92—*'Interest' meaning of—Suit by worshipper—Maintainability of—Temple—Erection by priest on site purchased out of funds raised by subscription—Public temple—Priest—His rights.*

Persons who are entitled to worship in a temple have an interest in the temple and other property sufficient to support a suit brought by them under S. 92, Civ. Pro. Code (1908) (a).

The terms of S. 92, Civ. Pro. Code (1908) no longer require parties to have a 'direct' interest. That word was struck out by the Amending Act of 1888 and all that is now required is an interest in the trust.

Where half the plot on which a temple stands was given to the priest for the purpose of building the temple and the other half was bought, and the temple was built by the priest out of the funds raised by public subscription and where the priest was shown in the Land Register as 'temple keeper' and the temple was then only 'under construction,' held that the temple was a public temple and that the priest was not the owner but only the priest and manager of that public temple (b). **Oseri v. Bawa Balmukandass**, 7 S.L.R. 129=24 Ind. Cas. 712.

HAYWARD, A.J.O.

References:—(a) 2 O. C. 810; 24 C. 418 (427); 23 B. 659 (663), R. (b) 23 C. 645 (653) & 23 B. 659 (664), R.

- (125) S. 92—*Suit to remove mutwali of mosque—Compromise by which plaintiff agrees to withdraw suit for consideration, whether lawful—Compromise if may be recorded before question whether endowment public or private decided.*

In a suit instituted under S. 92, Civ. Pro. Code, on the allegation that the defendant (the mutwali of two mosques) had misappropriated certain property dedicated for their up-keep, and praying *inter alia* that the defendant might be removed from the mutwaliship and a new mutwali appointed and a scheme for the proper discharge of the trust framed, the parties entered into a compromise, whereby the plaintiffs agreed to withdraw from the suit in consideration of certain advantages to be received

Civ. Pro. Code (1908)—(Continued).

by them, but the Court refused to record the compromise and pass a decree on its basis. On

Held—That the question whether the agreement of compromise was a lawful one depended on the further question whether the endowment in suit was a public endowment or not, and until that question was decided, it could not be said to be proved to the satisfaction of the Court that the suit had been adjusted by lawful agreement. **Abdul Karim Abu Ahmed Khan v. Abdus Sobhan Choudry**, 18 C.W.N. 1264.

COXE and RAY, JJ.

Reference:—8 C.W.N. 404, R.

- (126) S. 92—*Lessees of trust property—Whether proper and necessary parties.*

Wallis, C. J.—In a suit under S. 92, the lessees of the trust property are not proper parties. But if they choose they can come in as parties.

Seshagiri Iyer, J.—The decisions of all the High Courts are against giving possession to any but the lawful trustee and against ejecting persons in possession under S. 92, Civ. Pro. Code.

Where possession could not be given, there could not be a declaration embodied in the decree that the lease is not binding on the trust.

Where the alienation by a trustee is in question in a scheme suit, the proper course to adopt is to implead the alienees as parties. Even if they are not necessary parties, they are proper parties in the interests of justice and with a view to avoid a conflict of decisions. **Asain Raghavulu Setty v. Pellati Sittamma**, 16 M.L.T. 178=(1914) M.W.N. 692=27 M.L.J. 266.

WALLIS, C.J., and SESHAGIRI AIYAR, J.

(127) S. 92—*Suit for removal of trustee—Collector's sanction obtained—Leave under S. 14, Act XX of 1863—Not obtained—Maintainability of suit—Option to proceed under either section—Consent of Collector given prior to the new Civ. Pro. Code—Institution of suit after Civ. Pro. Code, 1908—Validity of consent.* **Yenkatarayachari v. Krishnama Charlu**, 24 M.L.J. 697=14 M.L.T. 44=20 Ind. Cas. 515=37 M. 184. See Final Part, 1913, Col. 336.

(127-a) S. 92. See No. 59, *supra*.

- (128) S. 92 (1) (b)—*Suit under S. 92 compromised and trustee discharged from liability to account—Compromise decree attacked as fraudulent and collusive—Declaration sought that discharge of trustee from liability to account is void—Advocate General's consent, whether necessary for such declaratory suit—Ejusdem generis, principle of—"Further or other relief," meaning of.*

A suit, under the provisions of S. 92, Civ. Pro. Code, praying for the removal of trustees' appointment of new trustees, accounts and inquiries, etc., was compromised, the old trustees were discharged from their trusteeship and new trustees were appointed in their stead.

Civ. Pro. Code (1908)—(Continued).

The beneficiaries under the trust being dissatisfied with the compromise decree attacked it in a regular suit on the ground of fraud and collusion and asked for the declaration that so much of the decree as related to the discharge of the old trustees from their liability to render accounts of the trust moneys was void and of no effect:

Held, that, although the direct object of the suit of the beneficiaries is to declare a portion of the challenged compromise decree void and of no effect, yet, as the grounds on which such a declaration is asked alleged a breach of trust and involved the taking of accounts and inquiries before a decision can be given on the prayer for relief, the relief asked for should be held to come within cl. (b), sub-S. (1) of S. 92, Civ. Pro. Code, and, therefore, the suit was not maintainable without obtaining the consent of the Advocate-General. **Mahomed Salay Naikwara v Mulla Goolam Mahomed**, 23 Ind. Cas. 111=7 Bur. L. T. 160.

HARTNOLL, OFFG C J. and TWOMEY, J.

References:—2 Ind. Cas. 701=11 Bom. L.R. 85=33 B. 509=5 M.L.T. 301, R.

(129) S. 92 and O. XXII, r. 11—*Suit for removing trustee and for declaration of invalidity of sale in favour of alienee from trustee—Voluntary transferee—Transferee for consideration but not in good faith—Transferee for consideration and in good faith—Distinction—Limitation Act, Ss. 10, 28 and Arts. 120, 124—Applicability—S. 64, Trust Act—Appeal by alienee—Death of trustee pending appeal—Whether appeal abates—Meaning of 'right to sue'—Test—Whether alienees or trespassers can be joined as parties to suit under S. 92, Civ. Pro. Code.*

This suit was instituted under Ss. 92 and 93, Civ. Pro. Code, for removing the trustee and manager of the plaint charities and for declaring the sale in favour of the alienee of the lands belonging on the charity to be invalid. Plaintiff succeeded in the lower Court and the alienee appealed. During the pendency of the appeal, the trustee died and his representatives were not brought on record. *Held*, that the alienee's appeal did not abate on that ground. The mere fact that one of the respondents is dead and that his representative is not brought on the record will not make the appeal abate if the right survives to the appellant (a).

A test for deciding whether the right survives seems to be whether the appellant can succeed and the decree can be reversed without bringing the legal representative of the deceased party on the record.

Trust property in the hands of a transferee in good faith for consideration without notice of the trust cannot be followed by the beneficiary at all. (See Trusts Act, S. 64). The right to follow arises only where the transferee has not acted in good faith. (1) If such a transferee has paid no consideration, he is not an assign for valuable consideration within the terms of

Civ. Pro. Code (1908)—(Continued).

the Limitation Act, S. 10, and in his case a suit for the purpose of following trust property is not barred by any length of time. But (2) where the transferee is an assign for valuable consideration, (a) if he has acted in good faith, without having notice of the trust, he acquires immediate title to the property under S. 64 of the Trusts Act; or (b) if he has not acted in good faith, but has paid valuable consideration, he acquires good title after the lapse of the period necessary for extinguishing (under S. 28 of the Limitation Act) the right of the beneficiary to follow the trust property in his hands. Where there is valuable consideration for the transfer, the original trust property is replaced by the consideration.

Where a person can sue under S. 92, Civ. Pro. Code for a declaration against an alleged transferee in breach of trust, the suit must be brought within 6 years of the transfer. The right to sue accrues at the completion of the document, and not when plaintiff obtains knowledge of the alienation.

Quere.—Whether alienees of, or trespassers on, trust property can be joined as parties to a suit under S. 92, Civ. Pro. Code (b). **Chettikulam Prasanna Venkatachala Reddier v. Sriranga Ammal**, 26 M.L.J. 537=(1914) M.W. N. 581=24 Ind. Cas. 369.

TYABJI and SPENCER, JJ.

References:—(a) 26 B. 597; 26 M. 499; 27 C. 493; 30 M. 67, R. (b) 14 M. 186; 20 A. 46; 21 A. 200; 24 C. 418; 12 M. 157; 17 M. 462; 3 C. 789; 2 O.L.J. 431; 28 A. 112; 15 M. 24; 16 M. 31; 24 B. 170; 23 M.L.J. 347; 33 M. 31, R.

(130) S. 95—*Suit for damages for wrongfully obtaining an injunction—Maintainability—Limitation. See DAMAGES, No. 3, 18 C.W.N. 1189.*

(131) Ss. 95, 104—*Appeal, second—Compensation.*

An order for compensation under S. 95 of the Civ. Pro. Code, is an order independent of the decree passed in the case, although the decree passed in the case sets of the amount of compensation against the amount of decree. The right of appeal from such an order is equally independent and is determined by S. 104 of the Code. The validity of the order cannot be questioned by a second appeal. **Kannappa Chettiar v. Sambasiva Thevan**, 21 Ind. Cas. 756.

SANKARAN NAIR and BAKWELL, JJ.

(131-a) S. 96. See Nos. 11, 13, 80, *supra*.

(132) S. 96 (1).—*Reference in case where award does not exceed Rs. 5,000—Decision by Assistant Judge—Appeal to District Court—Second appeal not allowed. See ACT I OF 1894 (LAND ACQUISITION), No. 28, 16 Bom. L.R. 72.*

(133) Ss. 96, 97, O. XLI, r. 23—*Plaintiff claiming alternative reliefs obtaining a decree—Right of appeal. See KHORPOSE GRANT, No. 1, 19 C.W.N. 102.*

Civ. Pro. Code (1908)—(Continued).

(134) Ss. 96 (3), 104 (2), O. XXIII, r. 3, O. XLIII (m)—Decree in terms of compromise—Appeal—Second appeal—Decree itself not passed by consent of parties, but Court passing decree holding that there was a consent—Appeal, whether lies. See COMPROMISE, No. 6, 16 M.L.T. 125.

(135) S. 96 (3), O. XLIII, r. 1 (m)—Compromise—Order to record compromise in decree—Appeal. See COMPROMISE, No. 7, 212 P.L.R. 1914.

(136) S. 97—Preliminary finding—Preliminary decree—Appeal—Decree—Duty to prepare—Court's duty to draw up decree—Practice.

In an account suit the Court ordered accounts to be settled between the parties in accordance with findings recorded. No preliminary decree was drawn up. The accounts were taken through a Commissioner. The Court accepted the Commissioner's report and dismissed the suit. The plaintiff appealed against the final decision and also against the findings which directed accounts to be taken. The lower appellate Court dismissed the appeal on the ground that the plaintiff not having appealed against the preliminary findings could not appeal against them in the appeal from the final decree. The plaintiff having appealed :

Held, that there was no right to appeal from the preliminary findings ; and it arose, under S. 97 of the Civ. Pro. Code, only when the preliminary decree was drawn up.

Under the Civ. Pro. Code, it is the duty of the Court to draw up a decree. The practice in the mofussil Court is in accordance with the provisions of the Code and the Civil Circulars issued by the High Court, viz., that the Court is to draw up the decree, and that the pleaders, if any, in the case are to see that it is in accordance with the judgment. *Kaluram Pirchand Marwadi v. Gangaram Sakharanahet Shimpi*, 16 Bom. L.R. 67 = 38 B. 331 = 23 Ind. Cas. 605.

HEATON and SHAH, JJ.

(136-a) S. 97. See Nos 7, 8, 13, 133, *supra*.

(137) Ss. 97, 2, Preliminary decree—Appeal—Decision that suit not barred as caste question.

A decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of the Civil Court does not amount to a preliminary decree within the meaning of S. 97 of the Civ. Pro. Code.

Similarly, decisions as to misjoinder, limitation and jurisdiction are not preliminary decrees. *Channalswami Rudraswami v. Gangadharappa Basalingappa*, 16 Bom. L.R. 954 (F.B.).

SCOTT, C.J., HEATON, MACLEOD, SHAH and HAYWARD, JJ.

References :—14 Bom. L.R. 916, *Overruled* ; 16 Bom. L.R. 206, *Expt.*

Civ. Pro. Code (1908)—(Continued).

(138) Ss. 97, 105 (2)—Remand—Incidental proceedings—Decisions on questions forming essential part of the order—Questionability of appeal—'Correctness,' meaning of the term—S. 97, Civ. Pro. Code, 1908—Finding as to plaintiff's right to redeem—Remand order—Appeal—Whether open to be questioned.

Where, in a suit, the decision that the plaintiff had a right to redeem was not only an essential part of the basis of the order of remand, but was the whole of it, *held* that it was not open to the appellant to question, in appeal, the correctness of that decision.

When an order of remand under S. 105 (2), Civ. Pro. Code, has become final and binding, a party can still question all those incidental findings and decisions which do not form an essential part of the basis of the order, but not those which do.

The use of the word 'correctness' precludes the questioning of all material decisions in the judgment equally with the questioning of the decree itself. (*Compare* S. 97, Civ. Pro. Code, 1908).

It is an ordinary canon of interpretation that a word keeps the same meaning at least throughout any one Act. *Kekra v. Sadhu*, 10 N.L.R. 28 = 23 Ind. Cas. 239.

HALIFAX, A.J.C.

(138-a) S. 99. See Nos. 50, 60, *supra* and No. 434, *infra*.

(139) Ss. 99, 102—Misjoinder—Decision in favour of plaintiff—Account, suit for—Second appeal. *Himat Khan v. Sher Khan*, 18 C.L.J. 260 = 21 Ind. Cas. 537. See Final Part, 1913, Col. 341.

(140) Ss. 99, 107 (1) (b), O. XLI, rr. 23, 25—Remand—Power of appellate Court—Inherent power of Court—Construction, canon of, of sections and rules of new Code. *Nabin Chandra Tripathi v. Pran Krishna Dey*, 20 Ind. Cas. 39 = 18 C.L.J. 613 = 41 C. 108. See Final Part, 1913, Col. 341.

(141) S. 100—Second appeal—Gauchar land (pasturage)—Grant by Government whether inconsistent with the general wishes and well-being of the village community—Question of fact.

Where the main question in a case was whether or not the grant of certain gauchar land (pasturage) in a village in Kumaon by the Government was inconsistent with the general wishes and well-being of the village community and the Deputy Commissioner (on appeal from a decree of the Assistant Collector) was of opinion that the grant was inconsistent with the general wishes and well-being of the community, *held*, that the question decided on appeal by the 1st appellate Court was one of fact and the Commissioner could not upset that finding in second appeal. *Gita Ram v. Kirpa Ram*, 12 A.L.J. 378 = 36 A. 256 = 24 Ind. Cas. 111.

CHAMBERLAIN and PIGGOTT, JJ.

Civ. Pro. Code (1908)—(Continued).

(142) S. 100—*Second appeal—First Appeal Court not giving as much weight to certain circumstances as High Court might have done if it were first Appeal Court—Finding of first Appeal Court based also on other facts—Legality.*

The finding of a District Judge cannot be called illegal simply because he does not indicate sufficiently that he gave as much weight in defendant's favour and against plaintiff to the circumstance of plaintiff's non-production of a deed as the High Court might have given to that circumstance, if it had been the Court of First Appeal, especially when the Judge has relied on other circumstances which in his opinion strongly justified his finding. **Chokkalinga Pillai v. Mahalingam Pillai**, 24 Ind. Cas. 383.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

(143) S. 100—Findings of fact—Erroneous view of law—Interference in second appeal. See FRAUDULENT TRANSFERS, No. 2, 23 Ind. Cas. 796.

(144) Ss. 100, 4—*Vinchur Court—Decision—Appeal—Special appeal—Second appeal—Reg. IV of 1827, cl. 99—Reg. XIII of 1830, cl. 5.*

A special appeal, from the decision of the Civil Judge at Vinchur, lies to the High Court on the grounds mentioned in S. 100 of the Civ. Pro. Code, 1908. **Ramchandra Anandrao Kulkarni v. Pandu Dagdu Teli**, 16 Bom. L.R. 75=38 B. 340=23 Ind. Cas. 617.

HEATON and SHAH, JJ.

(145) Ss. 100, 101, —*Lower Burma Courts Act (VI of 1900), S. 30—Second appeal—Mixed question of law and fact—Contest between verbal sale and registered deed of sale—Sale and agreement to sell.*

Questions of fact which can be gone into in second appeals under S. 30, Lower Burma Courts Act, cannot be opened up in second appeals under S. 100, Civ. Pro. Code, unless the lower appellate Court made a new case for the parties, which was not warranted by the pleadings and the evidence.

The question of contest between a verbal sale and a registered sale-deed is a mixed question of fact and law and cannot be allowed to be raised in second appeal under Ss. 100 and 101, Civ. Pro. Code, for the first time.

Per Robinson, J.—It is a common experience that witnesses do loosely speak of agreements to sell, subsequently carried out as if they were sales. **Abdul Sattar v. Maung Lu Maung**, 22 Ind. Cas. 802.

ROBINSON, J.

References:—29 B. 1=8 C. W. N. 865=1 A.L.J. 367=6 Bom. L.R. 770=31 I.A. 154, *Considered.*

(146) S. 100—O. LXI, r. 10 (2)—*High Court's power to order a party to furnish*

Civ. Pro. Code (1908)—(Continued).

security for costs—Dismissal of appeal, effect of—Appeal to His Majesty in Council—Substantial question of law.

Where the High Court can order an applicant for leave to appeal to Privy Council to furnish security for costs, it has no option but to reject the appeal when the order for security is not complied with, and the order of the High Court dismissing the appeal is not a fit one for appeal to His Majesty in Council as the matter does not involve a substantial question of law. **Mohammad Abdul Ghafur Khan v. Secretary of State for India**, 12 A.L.J. 451=36 A. 325=23 Ind. Cas. 532.

RICHARDS, C.J. and BANERJI, J.

(146-a) S. 101. See No. 145, *supra*.

(147) S. 102—*Suit to recover share in Kulkarni Vatan—Suit of Small Cause Court, nature—Second appeal—High Court. Bhikaji Hari Chabul v. Radhapal Sitaram Kulkarni*, 15 Bom. L.R. 803=21 Ind. Cas. 181=97 B. 700. See Final Part, 1913, Col. 343.

(148) S. 102—*Suit for rent other than house rent if a suit of Small Cause nature—Second appeal if lies. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 12, 20 C.L.J. 494.*

(149) S. 102. See CONTRIBUTION, No. 4, 20 C.L.J. 200.

(150) S. 102—*Second appeal—High Court—Competency to treat the appeal as revision petition. See LIMITATION ACT (1908), No. 101, 7 L.B.R. 138.*

(151) S. 102—*Lower appellate Court misapprehending evidence—Whether ground for second appeal. See WATER, No. 2, 21 Ind. Cas. 393.*

(151-a) S. 102. See No. 139, *supra* and 192, 275, *infra*.

(152) S. 102, O. XLI, r. 23, O. XLIII, r. 1 (u)—*Suit to recover share of a crop or its value—Small Cause Court nature—No second appeal—No appeal from order of remand. Bindraban v. Sahodra*, 11 A.L.J. 599=21 Ind. Cas. 688. See Final Part, 1913, Col. 343.

(153) S. 103. See ACT VIII OF 1885 (BENGAL TENANCY), No. 2, 19 C.L.J. 614.

(153-a) S. 104. See Nos. 9, 116, 181, *supra*.

(153-b) S. 104 (2). See No. 134, *supra*.

(153-c) S. 104 (h). See No. 68, *supra*.

(154) Ss. 104, 115, sub-s. (1), cl. (f); Sch. II, paras. 20, 21, cl. (2)—*Arbitration without intervention of Court during pending litigation—Award—Filing of award—Appeal—Jurisdiction of appellate Court—Decision right or wrong—Revision by High Court—Conflict between Code and Schedule—Construction of Statute.*

While an appeal from a decree of the first Court was pending in the High Court, the question in dispute was referred to arbitration independently and without the intervention of any Court. The award which clearly sets forth this circumstance was made, and the successful

Civ. Pro. Code (1908)—(Continued).

party applied for and obtained from the Munsif an order that it should be filed and made the basis of a decree. On appeal the District Judge set aside the Munsif's order holding that there could be no independent reference to arbitration regarding a matter which was at the time actually the subject of a pending litigation and that, therefore, there was no valid award that could be filed and converted into a decree :

Held, that the appeal to the District Judge was competent though limited to the questions of the regularity of the arbitration and the validity of the award ; that there was no further appeal to the High Court ; and that, as the District Judge had jurisdiction to decide rightly or wrongly that a dispute cannot be lawfully referred to arbitration and made the subject of an award while it is the subject of pending litigation and as this objection was apparent on the face of the award, the High Court could not interfere in revision. •

In the case of a conflict between the Civ. Pro. Code and its schedule, the Code must prevail. *Rahim Manjhi v. Sheikh Ekbar*, 22 Ind. Cas. 690.

CARNDUFF and RICHARDSON, JJ.

(155) *S. 104, Sch. I, O. I, r. 13, Sch. II, para. 14—Arbitration—Reference by only some of parties—Non-joinder, objection as to—waiver—Refusal by Court to remit award—Appeal.*

Where the plaintiff and some of the defendants joined in a petition for reference to arbitration without making the other defendants parties, and at no stage before the Court any objection was taken upon the ground of non-joinder.

Held, that the reference to arbitration was not bad by reason of non-joinder, for, applying the principle set forth in r. 13 of O. I of the Civ. Pro. Code, the right to object upon that ground was waived.

Under para. 14 of Sch. II of the Civ. Pro. Code, a Court may remit an award to an arbitrator upon the ground that the award has left undetermined one of the matters referred, but if the Court, after considering the objection made upon this ground, refuses to remit the award to re-consideration, no appeal lies from such refusal. *Annada Prosad Dutta v. Jogesh Chandra Sen Gupta*, 23 Ind. Cas. 862.

IMAM and CHAPMAN, JJ.

(156) *S. 104 (1), Sch. II, para. 20—Arbitration—Award—Conditional purchase of partnership outstandings by one partner—Remission of private award.*

The partners in a money-lending firm referred their disputes and differences regarding certain items to arbitrators agreeing in writing to abide by their award if made by a certain date. The arbitrators made the award by the specified date and directed that, as the plaintiff purchased

Civ. Pro. Code (1908)—(Continued).

outstandings at a certain valuation, the defendant should be responsible for any error or omission in the accounts regarding those outstandings. •

Held, that the award did not finally determine the questions referred for arbitration, as it exposed the defendant to a suit by the plaintiff for any error or omission subsequently discovered in the accounts, however unintentional it might be.

There is no provision for remitting to the arbitrators an award made in arbitration without the intervention of a Court. *P. L. M. Subramonian Chetty v. K. R. V. Nellian Chetty*, 24 Ind. Cas. 132.

PARLETT, J.

(157) *S. 104 (2), cl. (i), O. XLIII, r. 1, cl. (w); O. XLVII, rr. 4, 7—Appeal—Review—Grounds of appeal.*

There is no appeal from an order granting a review except on any of the grounds mentioned in r. 7, of O. XLVII of the Code. *Tripura Charan Kul v. Shoroshi Bala*, 22 Ind. Cas. 773.

RICHARDSON and MULLICK, JJ.

Reference :—14 Ind. Cas. 39, *F*.

(158) *S. 104 (2) and Sch. II, r. 20—Appellate Court allowing party to file an award and a decree passed thereon—No appeal—Revision.*

Held, that an order passed by an appellate Court under r. 20 of the second schedule to the Code of 1908, allowing a party to file an award and directing the first Court to pass a decree in accordance therewith is not open to appeal as is laid down in S. 104 (2) of the said Code.

Held, also that it is exceedingly doubtful whether revision of the order under consideration is permissible. *Sunder Das v. Manak Chand*, 143 P.W.R. 1914=280 P.L.R. 1914.

RATTIGAN and SCOTT-SMITH, JJ.

(159) *S. 104 (f), Sch. II, S. 21—Arbitration without intervention of Court—Award—Order filing award—Appeal.* See *AWARD*, No. 1, 18 C.W.N. 381.

(159-a) *S. 105.* See No. 263, *infra*.

(159-b) *S. 105 (2).* See No. 138, *supra*.

(160) *Ss. 105, 109—Remand order—Preliminary point—Privy Council appeal—Leave—"Final," meaning of.* *Mayari Venkatarama Row Garu v. Raja Keesara Venkatarama Narasimha Rao Garu*, 14 M.L.T. 560=21 Ind. Cas. 842=(1914) M.W.N. 64=26 M.L.J. 96. See *Final Part*, 1913, Col. 846.

(161) *Ss. 105 (1), 115, Revision—Order refusing to allow amendment of plaint.* *Penumarll Yasantarayudu v. Reddi Subbamma*, 14 M.L.T. 588=23 Ind. Cas. 39=(1914) M.W.N. 98. See *Final Part*, 1913, Col. 846.

(162) *S. 105, O. XXXIV, r. 3, O. XLIII, r. 1 (c)—Foreclosure—Redemption—Time for*

Civ. Pro. Code (1908)—(Continued).

payment of money when may be extended—Order granting or refusing extension of time—Appeal—Final decree to be drawn up as a necessary sequence to every preliminary decree. See MORTGAGE (GENERAL), No. 40, 10 N.L.R. 150.

- (163) Ss. 106 and 107, O. XLIII, r. 10 (a)—Order of appellate Court returning plaint for presentation to proper Court, appealable—Suits Valuation Act (VII of 1887), S. 11—Error in valuation of suit—Disposal of suit on the merits not prejudicially affected—Duty of appellate Court.

*An appeal will lie from an order of the appellate Court returning a plaint for presentation to the proper Court. Where an appellate Court finds that the suit, by reason of its being under-valued, was not triable by the Court of first instance in which it was filed, it ought at once to consider if the under-valuation has prejudicially affected the disposal of the suit; if it has not so affected and the materials necessary for the disposal of the case are on the record, the duty of that Court is to decide the appeal as if there was no defect of jurisdiction in the Court of first instance. *Dalip Singh v. Kundan Singh*, 12 A.L.J. 21=36 A. 58=22 Ind. Cas. 614.

RICHARDS, C.J. and TUDBALL, J.

Reference:—25 A. 174, *Appr. & F.*

(168-a) S. 107. See No. 163, *supra* and 380, *infra*.

(163-b) S. 107 (1) (b). See No. 140, *supra*.

(164) Ss. 107, 149, O. VII, r. 11 (c)—Memorandum of appeal—Insufficient stamp—Presentation of appeal on the last day—Rejection of appeal—Court must give time to pay up deficiency. *Achut v. Nagappa*, 15 Bom. L.R. 902=21 Ind. Cas. 337=35 B. 41. See Final Part, 1913, Col. 346.

(165) Ss. 107 (2), 151; O. 39, r. 1—Execution of decree, stay of, pending decision of appeal—Restitution of profits of property decreed—Security for the benefit of respondent.

On the application of the appellants execution of the decree for possession of property was ordered to be stayed. The respondents had been ordered to pay a certain sum of money as Court-fee and they applied for the order staying execution to be set aside on the ground that the order totally prevented them from raising money for the Court-fee stamps, and the order was set aside. The appellants subsequently applied for an injunction restraining the respondents from alienating the property decreed pending decision of the appeal. The appellants offered to advance sufficient sum of money to cover the Court-fee at a certain rate of interest on the security of the property in dispute and the offer was accepted.

On the application of the respondents the appellants were ordered to give security for restitution of the profits of the property which

Civ. Pro. Code (1908)—(Continued).

may ultimately be declared to be due to respondents from the date the execution was originally stayed by order of Court. *Muhammed Din v. Nur Din*, 59 P.L.R. 1914=33 P. W.R. 1914.

JOHNSTONE, J.

(165-a) S. 109. See No. 160, *supra*.

(166) S. 109 (c)—Appeal to the Privy Council—Certificate granting leave—Fit cases where the certificate can be granted—Case involving question of law—Not necessarily a proper one.

Cases in which the decision is of general importance or affects any large body of persons or threatens the religious or civil rights of any class of the community might fairly be ranged within the category in which a certificate might properly be granted under S. 109 (cl.) of the Code of 1908.

Any decision which might form part of the case-law for subsequent cases of a similar kind is not necessarily a fit one for a certificate. *Tahilram Maniram v. J. A. Blackwell*, 7 S. L.R. 92=23 Ind. Cas. 793.

PRATT, J.C., and KEMP, A.J.C.

(167) Ss. 109, 110—Leave to appeal to the Privy Council—Value of the subject-matter—Suit for accounts—Jurisdiction—Bom. Civil Courts Act (XIV of 1874), S. 24—Court Fees Act, S. VII (iv) (f)—Suits Valuation Act, S. 8—Questions of public importance. *Hirjibhai v. Jamshedji*, 15 Bom. L.R. 1021=21 Ind. Cas. 783. See Final Part, 1913, Col. 348.

(168) Ss. 109, 110—Rejection of application by legal representatives to be made parties—Appeal to Privy Council. See LETTERS PATENT (BOMBAY), No. 1, 16 Bom. L.R. 195.

(169) S. 110—Special leave—Privy Council—Appeal to—Value of property sued for.

Special leave to appeal to the Privy Council may be granted, if consolidated suits, following a single judgment, do involve directly, in part, and indirectly to a greater extent, claims to and respecting property of the value of ten thousand rupees and upwards. *Rajajagaveera Rama Venkateswara Ettappa v. Suppanasari*, (1914) M.W.N. 162=22 Ind. Cas. 390.

AYLING and SADASIVA AIYAR, JJ.

Reference:—8 M.I.A. 265, *F.*

(170) S. 110—Leave to appeal to the Privy Council—Question directly or indirectly involved—Subject-matter of the suit exceeded Rs. 10,000 but that of appeal less than Rs. 10,000—Amount, indirectly involved more than Rs. 10,000. *Sr. Kishen Lal v. Kashmiri*, 11 A.L.J. 654=35 A. 445=21 Ind. Cas. 617. See Final Part, 1913, Col. 348.

(171) S. 110—‘Question directly or indirectly involved,’ meaning of the expression—Leave to appeal to the Privy Council when to be refused. *Abdul Karim v. Allah Bakhsh*, 90 P.R. 1913=340 P.L.R. 1913=229 P.W.R. 1913=21 Ind. Cas. 624. See Final Part, 1913, Col. 349.

Civ. Pro. Code (1908)—(Continued).

(172) S. 110—Concurrent findings of fact by Indian Courts—Ordinary presumption therefrom—Question relating thereto—Does not involve 'some substantial question of law'. See APPEAL TO PRIVY COUNCIL, No. 2, 7 L.B.R. 103.

(172-a) S. 110. See Nos. 167, 168, *supra*.

(178) S. 114, O. 47, r. 1—High Court—Disciplinary jurisdiction—High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of the Letters Patent—Order granting leave to appeal whether may be reviewed at instance of Public Prosecutor. See LETTERS PATENT (CALCUTTA), No. 3, 41 C. 734.

(174) S. 115—Specific Relief Act, S. 9, suit under—Suit decided on wrong issue—High Court's power to interfere.

Where a suit under S. 9 of the Specific Relief Act was decided on a wrong issue relating to title, held that the High Court ought not to interfere under S. 115, Civ. Pro. Code, as the aggrieved party has got another remedy by suit. *Devata Sri Ramamurti v. Venkata Sitaramachandra Row*, (1914) M.W.N. 95=22 Ind. Cas. 279.

SADASIYA AIYAR and SPENCER, JJ.

References :—29 B. 213, *Doubtful*; 33 A. 647; 30 A. 331, *F*.

(175) S. 115—Revision—Material irregularity—Application to set aside *ex parte* decree—Transfer of case, application for—Rule issued—Case decided by first Court pending hearing of Rule—Effect of.

The plaintiff brought a suit on a mortgage bond against the mortgagor and defendant No. 2, and obtained a decree. Defendant No. 2 applied to Subordinate Judge to set aside the decree on the ground that it had been passed *ex parte*. The plaintiff thereupon applied to the District Judge for transfer of the case and a rule was issued on the defendant No. 2 to show cause why the proceedings should not be transferred from the file of the Subordinate Judge before whom the matter was then pending to the file of some other Judge. The Subordinate Judge, though acquainted with the fact that the defendant No. 2 had been served with the Rule, set aside the decree on the ground that it was *ex parte*. Subsequently the District Judge dismissed the application for transfer, on the ground that he had no jurisdiction to deal with the matter, as the Subordinate Judge had already set aside the decree as being *ex parte*:

Held, that, as the Subordinate Judge acted in a materially irregular manner, the High Court could and should interfere. The orders of the Subordinate Judge and the District Judge were set aside. *Narayan Prosad Mondal v. Jotindra Nath Bhattacharjee*, 19 C.L.J. 258.

FLETCHER and CHATTERJEE, JJ.

(176) S. 115—Interference when its effect will be to perpetuate wrong order—Crim. Pro. Code, S. 195—Dismissal in default—Restoration—Revision.

Civ. Pro. Code (1908)—(Continued).

A Court has no power to dismiss for default and non-payment of process fees, an application made under S. 195 of the Code of Criminal Procedure(a).

Where a Court restores to its file an application so dismissed the High Court will not interfere, for the order of restoration is the order required to set right what was done without jurisdiction. *Marudappa Gounden v. Bommanna Gounden*, 15 Cr.L.J. 71=22 Ind. Cas. 423.

MILLER, J.

References :—(a) 32 B. 203 (204)=10 Bom.L. R. 95=3 M.L.T. 170=7 Cr.L.J. 120, *F*.

(177) S. 115, Presidency Small Cause Courts—Proceeding under S. 41 of the Presidency Small Cause Courts Act, 1882—Power of High Court to revise—Small Cause Court's power under S. 41 of Act XV of 1882—Conditions of exercise of such power—Failure to comply with—Absence of jurisdiction—Interference under S. 115—No question of discretion—Lease—Term fixed—Provision for notice to quit after expiry of the term—Notice given before expiry—Effect.

The Presidency Small Cause Court being subordinate to the High Court, the High Court has under S. 115, Civ. Pro. Code (1908), power to revise a proceeding taken under S. 41 of the Presidency Small Cause Courts Act, 1882 (a).

The power to pass orders under S. 41 of the Presidency Small Cause Courts Act is an exceptional authority conferred on the Presidency Small Cause Courts, and the conditions under which this power can be exercised must therefore be strictly complied with. If the conditions fail, the jurisdiction does not exist.

Where a want of jurisdiction has been established, no question of discretion arises and the High Court cannot condone absolute want of jurisdiction (b).

Where a rental agreement executed on the 14th June 1897, by which the defendant agreed to occupy a site for 15 years by building a house on it, contained a provision in the following terms, *viz.*, 'In case you require the aforesaid land, if you give me 6 months' previous notice after the aforesaid 15 years, I shall accordingly vacate the land, remove the superstructure I had built thereon and put you in possession of it,' and where the plaintiff gave two notices, one in October, 1911, and another on 13th December, 1913, claiming possession on the 31st December 1913. Held that the notice of October 1911 given prior to the expiry of the period of 15 years did not terminate the tenancy (c) and that the second notice was not sufficient. *P. Ramasami Naidu v. Venkataramanjulu Naidu*, 26 M.L.J. 467= (1914) M.W.N. 368=23 Ind. Cas. 572.

SESHAGIRI AIYAR, J.

References :—(a) 30 C. 588, *Rel.*; 37 C. 714; 30 C. 986, *R.* (b) 11 B. 488; 31 B. 259, *R.* (c) 2 Campb. 573; 8 C.B.N.S. 208=29 L.J. C.P. 251; 77 L.T. 643 (C.A.), *R.*

Civ. Pro. Code (1908)—(Continued).

(178) *S. 115—Revision—Order of adjournment on payment of costs—Interlocutory order—Revision.*

An order to adjourn a case conditional on payment of costs thereof is merely an interlocutory order and is not one of those the revision of which is contemplated under S. 115 of the Code. **Mu Chand v. Juggi Lal**, 12 A.L.J. 460.

TUDBALL, J.

(179) *S. 115—Occurrence of mere errors of fact or law whether justifies interference in revision—Decision must be perverse—Test of perversity—S. 15, Charter Act.*

The occurrence of mere errors of fact or law in an order cannot justify interference with it in revision (a), but there must be a perverse decision on law or procedure (b).

A decision is perverse where it is a conscious deviation from some rule of law or procedure. The test of perversity will be applicable also, when the error is of fact and the decision has been reached in defiance of facts, which have been recognized by the lower Court as established or must be presumed to have been so or when the decision is based on or involves material assumptions or inferences which there is nothing in fact or probability to support. **Yenkatachalam Pattar v. Parasu Pattar**, 16 M.L.T. 156 = (1914) M.W.N. 614.

OLDFIELD, J.

References:—(a) 11 C. 6; 30 C. 397; 21 M.L.J. 484, R. (b) 17 M. 410, R.

(180) *S. 115—Interlocutory order—Appeal allowed—Revision—Partnership suit—Amendment.*

Where the legality of an interlocutory order can be questioned by way of appeal, it is not a fit case for interference by the High Court under S. 115 of the Code of Civil Procedure, unless there has been an improper exercise of jurisdiction by the lower Court or an improper refusal to exercise the jurisdiction vested in it (a).

In a partnership suit a Court should take into account all the transaction between the partners to avoid multiplication of proceedings, and all such amendments should be allowed as may be necessary to determine the real questions in controversy (b). **Sambasiva Aiyar v. Ganapathy Aiyar**, 23 Ind. Cas. 564.

SPENCER, J.

*References:—*31 M. 62 = 3 M.L.T. 246; 12 Ind. Cas. 719 = 22 M.L.J. 60 = (1912) M.W.N. 546 = 10 M.L.T. 451; 4 Ind. Cas. 509 = 32 M. 334 = 5 M.L.T. 125; 17 Ind. Cas. 65 = 23 M.L.J. 499 = 12 M.L.T. 439 = 13 Or. L.J. 753 = 36 M. 275 = (1912) M.W.N. 1154; 22 Ind. Cas. 39 = 14 M.L.T. 588 = (1914) M.W.N. 98, F. (b) 13 Ind. Cas. 268 = 36 M. 378 = 10 M.L.T. 557 = 22 M.L.J. 139, F.

(181) *S. 115—Order amending decree—Revision petition against such order presented more than eight months from date of order*

Civ. Pro. Code (1908)—(Continued).

—Delay not excusable—Decree amended eight years after, whether ground for revision.

Where an order was sought to be revised, under S. 115 of the Code of Civil Procedure, by a petition presented more than eight months from the date of the order and after five months of inexcusable delay, there is no sufficient reason to excuse the delay in prosecuting the petition. **Yazhakuttia Kutti Uduman Haji v. A. Mammi Kutti**, 24 Ind. Cas. 56.

TYABJI, J.

*Reference:—*24 M. 646, D.

(182) *S. 115—High Court's power to revise judgment of the Full Bench of the Presidency Small Cause Court on question of limitation.*

The High Court has no power under S. 115, Civ. Pro. Code, to revise the decision of the Full Bench of the Presidency Small Cause Court on the question of limitation merely because it is alleged to be erroneous. **N. C. Kuppasamy Iyengar v. N. C. Narayana Iyengar**, 16 M.L.T. 438.

HANNAY, J.

*References:—*20 A. 78; 11 C. 6; 39 C. 473, F.; 17 M. 410; 10 M.L.T. 281 = 21 M.L.J. 1020, D.; 3 C.L.J. 188; 28 M. 364; 24 M. 25, R.

(183) *S. 115—Applicability. See ACT XXXVII OF 1855 (SONTHAL PARGANAS), No. 2, 18 C.W.N. 662.*

(184) *S. 115—Court having revisional jurisdiction exercising appellate jurisdiction—Material irregularity—Revision. See ACT VIII OF 1885 (BENGAL TENANCY), No. 83, 23 Ind. Cas. 844.*

(185) *S. 115—Order refusing to issue commission to examine witnesses—Not open to revision. See COMMISSION, No. 1, 15 M.L.T. 339.*

(186) *S. 115—Return of plaint—Refusal to exercise jurisdiction—Revision. See COURT-FEES, No. 1, 19 C.L.J. 15.*

(187) *S. 115—Order setting aside ex parte decree—Revision whether lies. See EX PARTE DECREE, No. 2, 16 M.L.T. 101.*

(188) *S. 115—Meaning of 'jurisdiction'—Dismissal of application under Ch. VII of Presidency Small Cause Courts Act—Interference in revision when justifiable—Appeal from order of single Judge of High Court interfering in revision whether lies—Jurisdiction of High Court over Small Cause Courts. See LETTERS PATENT (CALCUTTA), No. 4, 41 C. 323.*

(189) *S. 115—Suit valued at more than Rs. 1,000—Mortgage decree—Execution—Adjournments of sale by Sub-Judge—Order if revisable by High Court. See REGULATION V OF 1893 (SONTHAL PARGANAS), No. 2, 22 Ind. Cas. 848.*

(190) *S. 115—Order for prosecution under S. 476, Crim. Pro. Code—Failure to make preliminary enquiry—Material irregularity—Revision. See SANCTION TO PROSECUTE No. 3, 7 S.L.R. 187.*

Civ. Pro. Code (1908)—(Continued).

(191) S. 115—Order allowing withdrawal of suit with liberty to file fresh suit—No 'case'—No revision. See **WITHDRAWAL OF SUIT**, No. 3, 41 C. 632.

(191-a) S. 115. See Nos. 117, 161, *supra* and Nos. 218, 219, 257, 350, 382, 468, 472, *infra*.

(191-b) S. 115—Sub-S. (1), cl. (f). See No. 154, *supra*.

(192) Ss. 115, 102—Erroneous decision not affecting the jurisdiction of the Court—Revision. See **CONTRIBUTION**, No. 3, 20 C.L.J. 196.

(193) Ss. 115, 151—Revision—High Court's power to interfere—Shahnas delivering attached property without permission—Remedy.

A High Court's power to interfere either under S. 115 or S. 151 of the Civ. Pro. Code, with an order of a Munsif making a *shahna*, who was put in charge of attached property but had given it away without permission to the judgment-debtor or decree-holder, pay a certain amount to the judgment-debtor.

The order though irregular cannot be said to be without jurisdiction.

The *shahna*, if a servant of the Court, has a right, by way of appeal, to the District Judge. **Tural Ram v. Parma**, 23 Ind. Cas. 907.

KNOX, J.

(194) Ss. 115, 151—Reference to arbitrator—Claim against military officer—Award—Decree in terms of award—Interference by High Court. See **HIGH COURT RULES (BOMBAY)**, No. 2, 16 Bom. L.R. 517.

(195) Ss. 115, 151, 152—Inherent power of Court—Amendment of decree to bring into conformity with judgment—Necessary for ends of justice—High Court's power of interference—Revision.

The Courts in this country have an inherent power to amend or vary decrees so as to bring them into conformity with the judgments after they are signed by the Judges under S. 151 of the Code, even if they do not fall under S. 152 (a).

An order under S. 151, however, can only be made where it is necessary for the ends of justice.

Where the Court acts under S. 151 in a case where it should not have done, it is competent to the High Court to interfere and set matters right. **Bibhuti Bhusan Pal Chowdhury v. Lalit Mohun Pal Chowdhury**, 23 Ind. Cas. 906.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 7 Ind. Cas. 876=37 C. 649, F.

(196) Ss. 115, 152—Order admittedly illegal but good on merits—Refusal to interfere in revision—Amendment under S. 152—Practical reversal of finding on formal issue—Illegality—When not open to revision.

Civ. Pro. Code (1908)—(Continued).

Where a Court allowed interest to a party when the merits of the case did not entitle him to interest, and the Court, on an application under S. 152, Civ. Pro. Code (1908), modified its judgment by disallowing such interest.

Held, on revision, that the order in the case had the effect of giving a finding entirely inconsistent with that in the judgment on a specific issue, and that S. 152 did not contemplate the practical reversal of a Court's finding on a formal issue.

Held, however, that the order ought not to be interfered with, because it was admittedly good on the merits and the power under S. 115 was purely discretionary. **Iyandas Pokerdas v. Thakurdas Gidumal**, 7 S.L.R. 186.

CROUCH and BOYD, A.J.CS.

(197) S. 115 and O. XIV, r. 2, O. XV, r. 3 (1)—Issues, trial of—Issues of law, when to be tried—Application for trial of issues without evidence long after the settlement of issues—Revision—Interlocutory order—Trial of case piecemeal—Validity of custom when to be tried.

Neither O. XIV, r. 2 of the Code which has reference to the stage of settlement of issues, nor O. XV, r. 3 (1), which contains a similar provision for the disposal of the suit at the first hearing, has any application to the case where the plaintiff made his application for trial of certain issues without evidence, long after the date fixed for first hearing.

The trial of a case piecemeal may lead to protracted litigation and serious inconvenience and involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal (a).

A Court should not consider the question of validity of custom till the custom itself has been established with precision.

In very exceptional cases, the High Court can interfere and set matters right by the reversal of interlocutory orders. The fact of each individual case is the determining factor. **Rai Yatindra Nath Chaudhury v. Hari Charan Chaudhuri**, 20 C.L.J. 426.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 17 C.W.N. 166 (168); 10 M. L.A. 476 (488), R.

(198) S. 115, O. XXI, rr. 59, 60, 61—Claim—Scope of inquiry—Possession of judgment-debtor—"Some interest" in r. 59, meaning of—Question of possession to be gone into—Court not determining question of possession—Revision by High Court.

Rule 59 of O. XXI of the Code does not mean that, if the claimant establishes that he has some interest in the property, he is entitled to succeed irrespective of the question of possession; nor does it imply that, if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question of possession of the judgment-debtor.

The words "some interest" in the rule mean such an interest as would render the possession

Civ. Pro. Code (1908)—(Continued).

of the judgment-debtor possession not on his own account but on account of or in trust for some other person (a).

In each of the cases mentioned in rr. 60 and 61 of O. XXI of the Code, the Court must determine the question of possession of the judgment debtor. The Court cannot found its decision on the question of the validity of the claim or the determination of the title to the property attached (b).

Where the Court below in a claim case refuses to determine the one question it was competent to decide, namely, the question of possession, and, on the other hand, determines the question it was not competent to investigate, namely, to question of title, the order made by it under r. 61 of O. XXI of the Code cannot be supported. **Satkari Mandal v. Tirtha Narain Bhattacharjee**, 24 Ind. Cas. 62.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 1 C.W.N. 617 (622); 25 M. 555=11 M.L.J. 346, *Rel.* (b) 14 C. 617; 18 C. 290; 29 C. 548, R.

(199) S. 115, O. XXI, r. 100—*Revision—Remedy by regular suit open to parties—Ordinary practice of the High Court—Special circumstances when revision allowed.*

Ordinarily it is contrary to the practice of the High Court to entertain an application for revision when a remedy by way of a regular suit is open to the applicant, but each case must be judged upon its peculiar circumstances.

An application by an auction-purchaser for possession of the property purchased was disallowed by the Court on objection being taken. For the second time, but without mentioning the first application, the purchaser again applied for possession and the Court put him into formal possession. The person dispossessed applied under O. XXI, r. 100, of the Code of Civil Procedure, but without going into the merits of the case the Court rejected his application summarily. *Held* that, the matter having been once considered on the merits and decided in favour of the applicant, the Court was not justified in disposing of it summarily, and it was, therefore, a fit and proper case for interference in revision. **Ram Narain v. Muhammad Shah**, 12 A.L.J. 899=24 Ind. Cas. 807.

RICHARDS, C.J., and TUDBALL, J.

(200) S. 115, O. XXIII, r. 1—*Withdrawal of suit with permission to bring a fresh one—Omission to include all inconsistent causes of action—Revision—Power of High Court.*

The plaintiff sued the defendant for certain property on the allegation that he was the adopted son of the last owner. The defendant denied the adoption. The plaintiff applied for withdrawal of the suit with permission to bring a fresh one, on the ground that the denial of adoption by the defendant made it necessary for him to allege all the grounds (a will executed in favour of the plaintiff being one of them)

Civ. Pro. Code (1908)—(Continued).

upon which he was entitled to sue. The lower Court granted his application. *Held*, that the order could be revised by the High Court.

Held, further that the omission by the plaintiff to include in his plaint all his causes of action, which are inconsistent with each other, cannot be said to constitute a formal defect in the plaint and is not a sufficient ground to allow him to withdraw his suit with permission to bring a fresh one.

Held, also that the dismissal of a suit for recovery of property on the basis of an adoption is no bar to a second suit brought for the same property on the basis of a will made in the plaintiff's favour. **Manbhari v. Sumer Chand**, 12 A.L.J. 441.

RAFIQ, J.

Reference:—7 M.L.J. 288, R.

(201) S. 115, O. XXIII, r. 1—*Suit—Withdrawal—Closing of evidence—Plaintiff given time after close of evidence to produce documents to counteract defendant's documents—Non-production of documents—Suit cannot be allowed to be withdrawn with permission to file a fresh suit.* **Bai Kashibai v. Shidappa Anappa Pujari**, 15 Bom. L.R. 823=21 Ind. Cas. 28=37 B. 682. See Binal Part, 1913, Col. 355

(202) S. 115, Sch. II, para. 15—*Inherent jurisdiction wrongly exercised—Interference in revision—Arbitration proceedings—Setting aside of reference during pendency of proceedings.*

The intention of the second Schedule to the Code of Civil Procedure is that, when once a reference to arbitration has been made under the orders of the Court, that reference should only be superseded for one of the reasons given in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under para 15, after the award has been received.

It is unsound on general principles to invoke the inherent jurisdiction of a Civil Court in a matter for which provision is made in the Code itself. A Court has no inherent jurisdiction under S. 151 of the Code to supersede an arbitration proceeding during its pendency, and the High Court can interfere in revision when the inherent jurisdiction of a Court is exercised wrongly and with material irregularity. **Chatter Bhuj v. Raghubar Dayal**, 12 A.L.J. 529=36 A. 354=23 Ind. Cas. 758.

RAFIQ and PIGOT, JJ.

Reference:—34 B. 1, *Not Fol.*

(203) Ss. 129, 131—*Service of summons through post—Refusal by defendant—Effect—Defendant disputing delivery or tender of delivery—Onus.* See **HIGH COURT RULES (BOMBAY)**, No. 1, 16 Bom. L.R. 204.

(203-a) S. 131. See No. 203, *supra*.

Civ. Pro. Code (1908)—(Continued).

(204) S. 141—Meaning of 'suit'—Construction of consolidating statute—Execution proceedings—Rights of decree-holder. **A. Balasubramania Chetti v. Swarnammal**, (1913) M.W.N. 685=14 M.L.T. 196=25 M.L.J. 367=21 Ind. Cas. 32. See Final Part, 1913, Col. 356.

(204-a) S. 141. See Nos. 360, 401, *infra*.

(205) S. 141, O. IX, r. 13, O. XXI, rr. 100, 101—Execution of decree—Claim—Claim allowed decree-holder not appearing—Subsequent setting aside of order—Jurisdiction—O. IX, r. 13, whether applicable to execution proceeding. **Harl Charan Ghosh v. Manmatha Nath Sen**, 19 Ind. Cas. 683=18 C.W.N. 948=41 C. 1. See Final Part, 1913, Col. 356.

(206) S. 144—Execution of decree—Restitution—Possession taken by plaintiff after decree but not by execution—Decree set aside on appeal—Whether decree-holder entitled to restitution.

Restitution under S. 144 of the Code may be made even when the possession of the property was taken otherwise than by execution.

Therefore, where A obtained a decree for possession of a certain property against B, in the first Court and took possession, though not by execution, and the decree of the first Court was reversed on appeal.

Held, that B was entitled to restitution of the property under S. 144 of the Code. **Hara Chandra Samanta v. Chintamani Datta**, 21 Ind. Cas. 84.

COXE and RAY, JJ.

References:—29 A. 348=4 A.L.J. 188=A. W.N. (1907) 90, F.

(206-a) S. 144. See Nos. 4, 12, *supra* and 220, *infra*.

(207) Ss. 144, 151—Restitution—Appeal—Inherent power—Discretion—Appellate Court—Revision. **Pandit Sham Parshad v. Ram Chand**, 273 P.L.R. 1913=20 Ind. Cas. 203=217 P.W.R. 1913=10 P.R. 1914=25 P.W.R. 1914. See Final Part, 1913, Col. 358.

(208) S. 145—Security bond—Appeal—Discharge of surety.

An order refusing to enforce a security bond against the sureties is appealable. S. 145 does not bar such appeals against sureties. The contention that that section justifies only an appeal by a surety cannot be recognised. S. 145 deals with procedure, not the extent of the surety's liability.

Where, in order to get a release of property attached before judgment, a security bond was given in general terms to the Court of first instance (the guarantee being for the payment of any amount which may be decreed against defendant in that litigation) and the suit was dismissed by the Court of first instance, *held* that the bond became thereby discharged. **Gallamudi Venkatasubba Row v. Chaparala Rajayya**, (1914) M. W. N. 714.

OLDFIELD and NAPIER, JJ.

Civ. Pro. Code (1908)—(Continued).

(209) S. 145. See RECEIVER, No. 6, 20 C. L.J. 123.

(209-a) S. 145. See No. 68, *supra*.

(209-b) S. 145 (c). See No. 100, *supra*.

(210) S. 145, O. XXXIV, r. 14—Surety for costs of Privy Council appeal—Execution of decree for costs against surety and his properties. See CIV. PRO. CODE (1882), No. 64, 19 C.W.N. 178.

(210-d) S. 148—Pre-emption decree—Jurisdiction to extend period fixed for payment. See PRE-EMPTION, No. 28-a, 17 O.C. 377.

(211) S. 148—Power of High Court to extend time for instituting complaint on sanction. See SANCTION TO PROSECUTE, No. 2, (1914) M.W.N. 347.

(211-a) S. 148. See No. 9, *supra*.

(212) Ss. 148, 149, O. VII, r. 11—Appeal out of time when proper Court-fee is paid—Delay if could be excused—Discretion of Court.

In the case of complaints insufficiently stamped, under O. VII, r. 11, Civ. Pro. Code, the Court is bound to give a few days to pay the correct fee. Delay could be excused if the insufficiency was caused by a mistake as to the amount of the requisite stamps. But under S. 149, Civ. Pro. Code, it is now left to the discretion of the Court.

O. VII, r. 11, is not rendered applicable to memoranda of appeals by S. 148, so as to make it incumbent upon the Court to admit memoranda out of time where the conditions of the rule are complied with (a). **Akkaraju Narayana Rao v. Akkaraju Seshamma**, 27 M.L.J. 677.

WALLIS, C.J. and SESHAGIRI Aiyar, J.

References:—(a) 38 B. 41, Diss.; 12 A. 129 (151), R.

(213) Ss. 148, 151, 2 (16)—Decree in second appeal for delivery of property on paying a certain sum within a certain time—Failure to pay within the time—High Court's power to extend the time—Application for review—'Inherent powers' of Court, meaning of.

The decree in this case was passed by the High Court in second appeal and was for delivery to plaintiff of certain property on his paying Rs. 50 within three months from its date. The payment was not made and plaintiff applied for extension of time to the High Court.

Held that the specific direction as to time given in the decree was an essential part of it, and the High Court has no power to extend the time or modify the decree in respect of it to the prejudice of the opposite side.

S. 148, Civ. Pro. Code, is inapplicable, since it applies only to cases in which time has been fixed for the doing of acts 'prescribed or allowed' by the Code [see S. 2 (16) Civ. Pro. Code.]

"Inherent power" may ordinarily be taken to be something which inheres in a Court by the very fact of its being empowered to exercise any jurisdiction at all, so that it comes either

Civ. Pro. Code (1908)—(Continued).

within the express sense of the law or within the consequences that may be gathered from it (a).

Quære :—Whether a review application would lie for extending the time. **Moldeen Kuppall v. Ponnusami Pillai**, 16 M.L.T. 430.

OLDFIELD and TYABJI, JJ.

References :—(a) 24 M. 1 (10); 33 C. 927 (931); (1895) 1 Ch. 141, R.

(214) S. 148, Sch. II, cls. 8, 15, and O. XXIII, r. 3—*Arbitration—Award filed out of time—Agreement of parties not to dispute award—Effect*.

Where the Court granted time till the 28th of February 1914 for "filing" the award, and the arbitrators made an award in the Hindi language on that date and also signed the same, but instead of filing it on that day had the same rendered into English and filed the same on the 2nd of March following :

Held, that the word "filing" in the Court's order was a clerical error and since the Hindi award was "made" within the time fixed by the Court, it did not matter that the award rendered into English was prepared and filed two days later : the requirements of the law had been satisfied and the award was a good one.

Quære :—Whether **Shib Krishna v. Satish Chandra** (a) had been rightly decided, having regard to the change in the law made by the wordings of S. 148 and Sch. II, cls. 8 and 15 of the Code of Civil Procedure (1908), which would seem to give the Court discretion to extend the time even after the original time for making the award has expired.

Whether, having regard to the above changes in the law, the decision of the Privy Council in **Rajah Har Narain v. Bhagwant** (b) is of the same binding authority as before.

Semble :—As in this case while the award was being rendered into English, the parties entered into a written agreement not to dispute the award, the plaintiff was precluded from questioning the award. The agreement might be regarded as amounting to a fresh submission and acceptance of the English award as an award binding on all the parties to the agreement or it might be regarded as a lawful adjustment of the suit which might be enforced as a decree under O. XXIII, r. 3. **Sri Lal v. Arjun Das**, 18 C.W.N. 1325.

CHITTY, J.

References :—(a) 38 C. 522, R. (b) 13 A. 300, R.

(215) S. 149—*Appeal—Payment of deficit Court fee within extended time—Limitation*. See **APPEAL (GENERAL)**, No. 3, 21 Ind. Cas. 866.

(215-a) S. 149. See Nos. 164, 212, *supra*.

(215-b) S. 150. See No. 66, *supra*.

(216) S. 151—*Power to correct a mere clerical error*. See **AWARD**, No. 3, 13 P.W.R. 1914.

(216-a) S. 151. See Nos. 4, 55, 165, 193, 194, 195, 207, 213, *supra*.

Civ. Pro. Code (1908)—(Continued).

(217) Ss. 151, 47, and O. XXI, rr. 89, 90—*Sale contrary to the terms of the decree—Application to set aside—Limitation—Applicability of Art. 166, Limitation Act (1908)—"Inherent powers" of Court, nature of—Such powers when may be exercised—Effect of other remedy being available to applicant—Effect of laches*.

The decree in this case directed the sale of certain items in a particular order and the sale proclamation followed it. They were, however, sold in a different order, and the sale was confirmed. On an application to set aside the sale on that ground, held, *per Oldfield, J.*, that the application fell under S. 47, Civ. Pro. Code, and was governed by Art. 166 of the Limitation Act (a).

Per Tyabji, J.—O. XXI, rr. 89 and 90, Civ. Pro. Code or Art. 166, Limitation Act, did not directly apply to the case, but by analogy the Courts would be right in guiding themselves by the provisions of Art. 166 of the Limitation Act and O. XXI, rr. 89 and 90 of the Civ. Pro. Code (b).

Per Oldfield and Tyabji, JJ.—The inherent powers of the Court are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure, much less than for one, who having his remedy has lost it by his own delay (c).

The Court may reasonably take as a guide for the standard of the diligence to be exercised by the parties concerned the provisions of the Limitation Act, and for its guidance as to the circumstances which would justify interferences, the provisions of law contained in regard to matters most nearly analogous to those brought in question by reason of the Court's inherent powers.

The inherent jurisdiction of the Court is not to be used so as to lead to arbitrary disposals actuated by individual sentiment or the mere disinclination for the exertion involved in the investigation of the law. **Muthia Chettiar v. Bava Sahib**, 27 M.L.J. 605.

OLDFIELD and TYABJI, JJ.

References :—(a) 14 M. 227; 20 I.A. 176; 8 B. 377; 22 C. 425, R. (b) 29 C. 707 (715), R. (c) 14 M.I.A. 40; 5 C.L.J. 611 (620); 19 B. 113; 19 B. 116; 20 B. 281; 3 I.A. 221; 11 I.A. 37; 17 C.L.J. 416; 21 M. 42, R.

(218) Ss. 151, 115—*Order recording satisfaction of decree—Order obtained by fraud on Court—Power to vacate order—Revision*.

Where an order recording satisfaction of a decree was obtained by a fraud practised on the Court, the Court has inherent power under S. 151, Civ. Pro. Code, to vacate the order, and the High Court will not interfere in revision with the order vacating it. **Vilakathala Ramani v. Vayalil Nachu**, 27 M.L.J. 172.

OLDFIELD and NAPIER, JJ.

References :—6 B. 149; 2 M. 264, R.

(219) Ss. 151, 115—*Minor attaining majority before application for appointing guardian—*

Civ. Pro. Code (1908)—(Continued).

Court's inherent power to recall the previous order appointing guardian—Appeal—Revision—Court's power in revision to investigate facts. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 83, 20 C.L.J. 213.

(220) Ss. 151, 144—*Court sale—Execution of rent decree—Application to set aside sale dismissed by first Court—Sums deposited by auction-purchaser withdrawn by decree-holder and judgment-debtor—Sale set aside on appeal—Restitution—Duty of appellate Court—Inherent power of Court.*

An application to set aside a sale held in execution of a rent decree was dismissed by the first Court, and the decree holder and judgment-debtors withdrew from Court the sum deposited by the auction-purchaser. On appeal the sale was set aside :

Held, that the appellate Court should have not merely set aside the sale but also directed the decree-holder and the judgment-debtors to bring back into Court the sums which they had respectively withdrawn, in order that the auction-purchaser might recover back what he had paid into Court; and that it was clearly incumbent on the Court to make such an order for restitution in the exercise of its inherent power, as otherwise a grave injustice might be done to the auction-purchaser. **Nepal Chandra Bhattacharjee v. Ramendra Nath Chakravarty**, 24 Ind. Cas. 384.

MOOKERJEE and BEACHCROFT, JJ.

(221) Ss. 151, 152—*Decree in apparent conformity with judgment—True intention of Court as to costs awarded to successful party whether against one or more defendants, as gathered from whole judgment if may be given effect to, by way of amendment—Review application, if only remedy.*

Where one only of several defendants contested the suit which was decreed in favour of the plaintiffs, and from the judgment as a whole, it appeared that the Court intended to make defendant No. 1 alone liable for the costs and not the other defendants, but in concluding its judgment it said : "the suit be decreed with costs."

Held—that this portion of the judgment was elliptical and ambiguous, and the true intention of the Court was to be gathered from the judgment as a whole, and the decree of the Court which, following the concluding portion of the judgment, awarded costs against all the defendants was not really in accord with the true intention of the Court.

That the defect in the decree could be amended under either S. 151 or S. 152 of the Code, and an application for review of judgment was not the only remedy of the other defendants (a).

Such an amendment could be made even after an appeal had been lodged from the decree (b). **Barhamdeo Singh v. Harmanoge Singh**, 18 C.W.N. 772—28 Ind. Cas. 419.

CARNDUFF and RICHARDSON, JJ.

References :—(a) 37 C. 649 (659) ; (1885) 30 Ch. D. 239, R. (b) L.R. (1908) p. 88, F.

Civ. Pro. Code (1908)—(Continued).

(222) Ss. 151, 152—*Decree not inconsistent with the order in the judgment—Power of Court to vary or alter the order and decree—Inherent power of Court to give effect to its intention—Decree for costs—Decree amended in favour of persons other than applicants by Court acting ex proprio motu—Power to amend when appeal is pending against the decree. See AMENDMENT, No. 5, 20 C.L.J. 18.*

(223) S. 151 and O. VI, r. 17—*Amendment—Mistake as to correct survey numbers—Application to amend plaint made after preliminary decree—Whether can be allowed—Scope of O. VI, r. 17—Partition suit—Court's duty—Controversy regarding constitution of estate to be divided—Power to include order for inquiry in preliminary decree.*

Where, some time after the mistake came to light, the plaintiff in a partition suit asked the Court, after the preliminary decree was drawn up, to amend the plaint by putting correct survey numbers :

Held that the mere fact that the plaintiff has been negligent and dilatory will not be sufficient cause for refusing amendment.

Amendments may be divided into two classes (1) cases in which the plaintiff wishes to correct a clerical mistake or *bona fide* wrong description due to some ignorance or carelessness; and (2) cases in which he tries to add, by proving some new cause of action, to the dispute which already exists. Cases of the latter class would not fall within O. VI, r. 17, Civ. Pro. Code, for the determination of the new questions so raised would not be necessary to the settlement of the controversy which existed when the suit was brought.

The only limitation to the Court's duty of making such amendments in the pleadings as are necessary for the purpose of determining, i.e., finally deciding and settling the real questions in controversy between the parties, appears to be that suggested by S. 151; the legal rights of no party must be violated and the process of Court must not be abused (a).

In a suit for partition, a Court of Equity does not act ministerially and in obedience to the call of those parties who have a right to partition, but adjusts the equities of all parties interested (b). An order for enquiry as to the constitution of the estate to be divided is ordinarily included in a properly drawn up preliminary decree. **Syud Thrababchah v. Bibi Nagu**, 8 S.L.R. 28.

CROUCH and BOYD, A.J. CS.

References :—(a) 10 C.D. 393 (396, 397) ; L. R. 19 Q.B.D. 374 (396) ; L.R. 26 Ch. D. 700 (710) ; L.R. 16 Q.B.D. 556, R. (b) 2 Y. & C. (Ex.) 586, R.

(224) S. 152—*Decree—Amendment—Court's power.*

Errors creeping into a decree could and ought to be corrected by an application, under S. 152 of the Code (a).

Civ. Pro. Code (1908)—(Continued).

It is not a preliminary requisite for the amendment of the decree that the pleadings in which the errors had formerly crept in should first be amended. *Somasundaram Ghet-tiar v. Veluawamy Naicker*, (1914) M.W.N. 107=15 M.L.T. 102=2 Ind. Cas. 774.

SADASIVA IYER and TYABJI, JJ.

Reference:—(a) 16 M. 424, F.

(225) S. 152—*Inherent jurisdiction of Court—Judgment, according to compromise—Some terms of compromise not embodied in decree—Negligence of Court's officers—Un-intentional and accidental error—Amendment of decree, by correcting error, if within S. 152.*

S. 152 of the Civ. Pro. Code authorizes a Court to remedy, as far as it can, errors in the formal expression of its orders occasioned by its own indolence.

A suit was decreed in terms of a compromise, but certain terms of it were not embodied in the decree owing to negligence of the Court's officers. The plaintiff made an application praying that the decree may be amended and brought into conformity with the compromise:

Held, that the decree was capable of correction under S. 152 of the Code. *Muttair Rahman v. Harendra Nath Mukerjee*, 21 Ind. Cas. 115.

COX and RAY, JJ.

(226) S. 152—*Error, in the relief claimed, due to an accidental slip—Record to be amended.*

Where a reversioner sued for possession of a two-anna share, described the property in the plaint as a two-anna share, paid Court-fee thereon, and both the parties during the trial of the suit knew that the dispute between them was with regard to a two-annas share, but by a clerical mistake in the end of the plaint relief was claimed with respect to a two-pie share and the decree consequently awarded to the plaintiff only a two-pie share; *held*, on an application by the plaintiff, decree-holder, that there was a clerical error in the plaint which was due to an accidental slip, and the Court had power to amend the whole record beginning with the plaint down to the decree. *Sheo Balak Pathak v. Sukhdei*, 12 A.L.J. 185=23 Ind. Cas. 344.

TUDBALL, J.

(227) S. 152—*Arithmetical error repeated in High Court to be corrected—Civil Rules of Practice—Pleader's fee in appeal from order under Ss. 244, 212, Civ. Pro. Code (1882).*

Arithmetical errors made in the Lower Court and repeated in the High Court office in drawing up the order of the High Court must and will be corrected.

In an appeal against an order under the old S. 244, read with the old S. 212, a pleader's fee will be allowed, under S. 62 of the Civil

Civ. Pro. Code (1908)—(Continued).

Rules of Practice, only at the rate of $1\frac{1}{2}$ per cent. *Adusumalli Yenkataratnam v. Senkarayanna*, 24 Ind. Cas. 283.

SADASIVA AIYAR and SPENCER, JJ.

(228) S. 152—*Clerical error in decree—Application to correct error—Limitation—Court's duty to correct—Appellate Court confirming decree—Eff. Ct. Bikhomal Lalchand v. Rajal-mal Manomal*, 7 S.L.R. 53=21 Ind. Cas. 540. See Final Part, 1913, Col. 362.

(228-a) S. 152. See Nos. 195, 196, 221, 222, *supra*.

(229) S. 153 and O. XXXIV, r. 6—*Mortgage decree—Construction of—Personal relief already provided—No application for personal decree under O. XXXIV, r. 6, lies—Amendment of prayer—Powers of Court. See MORTGAGE (GENERAL), No. 9, 15 M.L.T. 232.*

(230) O. I, rr. 2, 9 and O. II, r. 6—*Second appeal—Suit, dismissal of—Misjoinder of parties and causes of action.*

No second appeal lies from the decision of the lower appellate Court dismissing the plaintiff's suit both for misjoinder of parties and of causes of action.

A Court has no power to direct a suit to be dismissed by reason of the misjoinder or non-joinder of parties, but can take action under O. I, r. 2 and O. II, r. 6 of the Code. *Gur Prasad Singh v. Gur Prasad Lal*, 19 C.L.J. 816.

COXE and CHATTERJEE, JJ.

(231) O. I, r. 3—*Multifariousness—Suit by reversioner for possession—Parties—Persons in possession and transferees from widow.*

A suit for possession by one of the reversioners, after the death of a Hindu widow, brought against the person in possession of the property and the other reversioners, also in possession, as well as against transferee from the widow, is not bad for multifariousness, and the plaintiff is entitled to join all the above persons as parties to the suit so as to recover his share in the whole of the estate. *Bal Krishna Das v. Hira Lal Bagla*, 12 A.L.J. 509=36 A. 406=24 Ind. Cas. 95.

TUDBALL and CHAMIER, JJ.

References:—29 A. 267; 30 A. 560; 16 A. 279, R.

(231-a) O. I, r. 3. See No. 50, *supra*.

(232) O. I, rr. 3 and 9—*Pleadings—Plea of non-joinder of co-plaintiff—Dismissal of suit on plea not raised.*

Where the defendant in a case has raised no objection as to the non-joinder of a co-plaintiff, the Court should not dismiss the plaintiff's claim on that ground, without framing an express issue and allowing the plaintiff to meet it. *Kedar Nath v. Tulshi*, 21 Ind. Cas. 182.

KANHAIYA LAL, A.J.C.

(233) O. I, r. 3, O. II, rr. 3 and 5—*Misjoinder of causes of action—Claim for stridhan can be joined with a claim for maintenance—Practice—*

Civ. Pro. Code (1908)—(Continued).

Jankibal v. Srinivas Ganesh Valsankar, 15 Bom. L.R. 684=20 Ind. Cas. 533=39 B. 120. See Final Part, 1913, Col. 362.

(234) O. I, r. 6—Hundi—Dishonour—Suit based thereon—Parties. See ACT XXVI OF 1881 (NEG. INSTRUMENTS), No. 12, 140 P.W.R. 1914.

(235) O. I, r. 8. See DECLARATORY SUIT, No. 5, 17 O.C. 354.

(236) O. I, r. 9—*Applicability where the rights of parties actually before the Court, cannot be determined.*

O. I, r. 9, Civ. Pro. Code (1908), does not apply where the rights and interests of the parties actually before the Court cannot be determined.

The change made in the new Code does not affect the rule regarding the indivisibility of a mortgage nor the rule under the Mitakshara that no co-parcener has a definite share till a partition is made. **Nagorao v. Nago**, 10 N.L.R. 72=24 Ind. Cas. 831.

MITRA, OFFG. A.J.C.

(237) O. I, r. 9—Misjoinder of parties—Dismissal of suit. See CIV. PRO. CODE (1882), No. 9, 19 C.L.J. 455.

(237-a) O. I, r. 9. See Nos. 61, 230, 232, *supra*.

(238) O. I, r. 10—Party *not* before lower appellate Court—*Whether can be joined in second appeal.*

A Court cannot in second appeal add a person as a party unless he was a party to the appeal before lower appellate Court. **Pachkauri Raut v. Ram Khilawan Chaubay**, 12 A.L.J. 1277.

CHAMIER and PIGGOTT, JJ.

Reference :—16 A. 5, F.

(238-a) O. I, r. 10—Landlord and tenant—Joint tenants—Joint and several liability of tenants—Suit against one tenant to pay the whole rent—Power to order other tenant to be added as a co-defendant—Whereabouts of other co-defendant not known—Discretion of Court. See CONTRACT ACT, No. 40, 107 P.R. 1914.

(238-b) O. I, r. 10. See No. 378, *infra*.

(238-c) O. I, r. 13. See No. 155, *supra*.

(239) O. II, r. 2—*First suit for specific performance—Subsequent suit for possession—Subsequent suit not barred.*

Where a person, who had obtained a decree in his favour for the execution of a deed of sale in accordance with an agreement to sell property to him, obtained the sale-deed in execution of that decree, and subsequently sued for possession on the strength of the sale-deed, *held* the second suit is not barred under O. II, r. 2, Civ. Pro. Code. **Krishnammal v. Manondiar Soundararaja Iyer**, 15 M.L.T. 103=(1914) M.W.N. 200=22 Ind. Cas. 912.

SANKARAN NAIR and TYABJI, JJ.

Reference :—22 M. 24, D.

(240) O. II, r. 2—*Suit for dissolution of partnership and rendition of accounts—*

Civ. Pro. Code (1908)—(Continued).

Subsequent suit for recovery of property, held not as partners but as co-owners—Previous suit—No bar.

A partner suing for dissolution of partnership and rendition of accounts of his share of the partnership property is not bound, in that suit, to claim, from his partners, property which he and they hold, not in their right as partners, but as co-owners and independently of the partnership. **Har Dayal v. Dya Ram**, 83 P.L.R. 1914=43 P.W.R. 1914=22 Ind. Cas. 664.

RATTIGAN and SCOTT-SMITH, JJ.

References :—25 B. 189=2 Bom. L.R. 869; 31 M. 385 (396); 1 Ind. Cas. 808; 4 P.R. 1903, Cited.

(241) O. II, r. 2—*Promissory note given in discharge of certain debt—Suit on promissory note—Subsequent suit on debt due—Causes of action.*

Where a promissory note is given in discharge of a debt, a suit based upon the note is not on the same "cause of action" as one brought on the original debt.

An arrangement was come to between the parties for the payment of a certain debt by instalments. Some of the instalments were paid up but in lieu of certain others a *hundi* was drawn by the plaintiff upon the defendants and accepted by the latter. The defendants having failed to pay up the *hundi*, a suit was brought on it but was dismissed for want of proof of the acceptance. The plaintiff then brought a suit on the original debt. *Held* that the causes of action in the two suits were totally different and O. II, r. 2 of the Code of Civil Procedure did not bar the second suit. **Beni Ram v. Ram Chandar**, 12 A.L.J. 959=36 A. 560.

RICHARDS, C.J. and TUDBALL, J.

References :—29 A. 256, *Doubted*; 18 O.W.N. 617 (P.C.) R.

(242) O. II, r. 2—*Scope—Contract providing for supply of goods by two shipments—Construction of contract—Purchaser's failure to take delivery or pay for goods in respect of the two shipments—Vendor bringing two separate suits for resale damages one in respect of each shipment—Maintainability.*

A contract provided for the supply of goods by two shipments. One of the clauses of the contract ran as follows :—"Except as above stated this indent is to be deemed and construed as a separate indent in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent had been made out and signed in respect of each instalment."

The purchaser did not obtain delivery or pay for the goods in respect of the two shipments. The vendor therefore brought two separate suits for resale damages one in respect of each shipment. *Held*, on a construction of the clause in question, that there were separate contracts

Civ. Pro. Code (1908)—(Continued).

in respect of the two shipments, and plaintiff was not, under the circumstances, debarred from bringing two suits.

The scope of O. II, r. 2, Civ. Pro. Code,³ explained.

Under O. II, r. 2, that which is required to be included in the suit is the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; that is one and the same cause of action. The rule is framed to avoid the splitting of claims and remedies and does not apply where there are several causes of action. The object of the rule is to protect the defendant from being twice vexed for one and the same cause. But the parties themselves by the form of their convention determine whether the rule is applicable to them. The rule may operate to defeat a plaintiff with whom, as in the present case, the merits have been held to rest. *Mandal & Co. v. Fazul Ellahie*, 41 C. 825.

JENKINS, C.J. and WOODROFFE, J.

References:—19 M. 304, F.; 24 M. 96; 12 C. 60; 12 C. 339; 19 C. 372; 7 B. 134; 21 B. 267; (1882) L.R. 7 A.C. 259, R.

(243) O. II, r. 2—Purchase of shares of two co-parceners—Different sale deeds—Suit on first sale-deed for determination and possession of one of the shares—Subsequent suit for similar reliefs on second deed—Bar of later suit—Abandonment of right. *Manonmani Ammal v. Vythilinga Naicker*, 14 M.L.T. 341=25 M.L.J. 481= (1913) M.W.N. 881=21 Ind. Cas. 402. See Final Part, 1913, Col. 365.

(244) O. II, r. 2—Auction-purchaser—Mortgage decree—Suit for possession dismissed—Reliefs open to him. *Elkur Ramachandralah v. Chayya Pappannah*, (1913) M.W.N. 646=21 Ind. Cas. 42. See Final Part, 1913, Col. 365.

(245) O. 2, r. II—Scope. See CEYLON CIVIL PROCEDURE ACT, No. 1, 18 O.W.N. 617.

(246) O. II, r. 2—Applicability. See SPECIFIC RELIEF ACT, No. 26, 16 M.L.T. 310.

(247) O. II, r. 2 (1)—Cause of action—Vendee in consideration of sale undertaking by deed to deliver certain things at once and to pay balance by instalments—Default in respect of both promises—Single contract—One cause of action—Separate contract after deed in respect of delivery of things—Different causes of action—Plaintiff not bound to sue for specific things

Defendant bought a certain thing from plaintiff for a sum named, and undertook by a written deed to liquidate that sum in a specified way, that is to say, (i) by making over at once certain things as worth one-half of the price fixed and (ii) by paying the other half on a specified day. Apparently at the time of the writing of the deed, such a thing as breach in respect of (i) was not contemplated, while a penalty was provided for breach in respect of:

Held, that this was a single contract, and in the absence of a new contract thereafter

Civ. Pro. Code (1908)—(Continued).

entered into with respect to (i), default having taken place both as to (i), and (ii) before the institution of a suit on the basis of the deed, there was only one cause of action within the meaning of O. II, r. 2 (1), Civ. Pro. Code; but if, subsequent to the deed, there was a new separate contract as to (i), namely, that it was to be an obligation to which a new liability was attached, that is, liability to pay interest, causes of action as to (i) and (ii) would be different.

Held, further, that the plaintiff was not barred in case of default as to (i) from suing for the specific things. The original arrangement was, no doubt, made for the defendant's convenience, but it would be unreasonable to hold that plaintiff, after waiting for years, should be debarred from recovering their price in cash. *Narain Das v. Mangha Ram*, 183 P.L.R. 1914=129 P.W.R. 1914=23 Ind. Cas. 845.

JOHNSTONE and SHADI LAL, JJ.

(248) O. II, rr. 2, 4—Cause of action—Splitting up—Landlord suing to recover possession under forfeiture clause—Second suit to recover rent—Same cause of action—Second suit barred.

The defendant rented certain lands from the plaintiff under a lease which provided that on the defendant's failure to pay rent the plaintiff was entitled to take possession of the land. The defendant having failed to pay rent for two years, the plaintiff sued to recover possession of the land and obtained possession in execution of the decree in his favour. The plaintiff next sued to recover the rent for the two years from the defendant. The lower Courts held that the second suit was barred under the Civ. Pro. Code, O. II, r. 2. The plaintiff having appealed:

Held, that the suit was barred under the Civ. Pro. Code, O. II, r. 2, inasmuch as the claim in the present suit for rent up to the date of the forfeiture arose upon the same contract of tenancy as did the landlord's right of forfeiture for non-payment of rent.

The 'cause of action' upon which the plaintiff may base various claims in one suit under O. II, r. 2, does not depend upon the character of the relief for which he prays. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour, to every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. If the evidence required to support two claims is different in any material respect the cause of action are different.

The words of r. 4 do not imply that in all cases a suit for the recovery of immoveable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land. There may be cases in which a suit for recovery of land will involve the production of different evidence to that necessary to support a suit for rent in respect of

Civ. Pro. Code (1908)—(Continued).

the same land. *Kashinath Ramachandra v. Nathoo Keshav*, 16 Bom. L.R. 454=38 B. 444.

SCOTT, C.J. and BATCHELOR, J.

(219) O. II, rr. 2, 4 (c)—*Mortgage without possession—Share of produce to be paid as interest—On default to pay interest possession to be taken—Default—Suit for produce without asking for possession—Subsequent suit for possession barred—R. 4 (c) object of insertion—Novation of contract—Burden of proof—Mere promise by creditor not to sue, effect of—Jurisdiction of Civil or Revenue Court. Chhabil Das v. Masu, 243 P.L.R. 1913=19 Ind. Cas. 991=145 P.W.R. 1913=207 P.W.R. 1913=4 P.R. 1914. See Final Part, 1913, Col. 367.*

(250) O. II, r. 2 and O. XXXIV, r. 14—*Suit for simple money decree based on a mortgage—Subsequent suit for sale on that mortgage—Averment in the former suit that right under the mortgage given up—Extinguishment of mortgage—Limitation Act, 1908, S. 19—Admission of liability on a mortgage contained in previous written statement—Acknowledgment—Interest—Liability of mortgagor.*

Held, that O. II, r. 2, is no bar to a subsequent suit for sale on a mortgage, where in a previous suit on the same mortgage a simple money decree had been asked for and obtained.

Held also that a mere averment in the former suit for simple money decree that the plaintiffs gave up their right under the mortgage for the purpose of that suit is not in the nature of an agreement, and even if so it is without consideration and cannot be regarded as an extinguishment of the mortgage rights.

Held further that an admission, contained in a written statement filed in Court by the mortgagor in a previous suit, of a mortgage, is an acknowledgment of liability under that mortgage within the meaning of S. 19 of the Limitation Act and gives a fresh start for the computation of limitation if made before the expiry of the prescribed period.

Held also that, when the plaintiffs are entitled to sue upon their mortgage, they can claim interest at the stipulated rate up to the date of payment, notwithstanding any directions to the contrary contained in the decree passed in the former suit for simple money decree. *Indarpal Singh v. Mewalal*, 12 A.L.J. 374=36 A. 264=25 Ind. Cas. 429.

RICHARDS, C.J. and BANERJI, J.

(250-a) O. 2, r. 3. See Nos. 50 and 233, *supra*.

(250-b) O. 2, r. 4. See No. 248, *supra*.

(250-c) O. 2, r. 4 (c). See No. 249, *supra*.

(250-d) O. 2, r. 5. See No. 233, *supra*.

(250-e) O. 2, r. 6. See No. 230, *supra*.

(251) O. 3, r. 1—*Recognized agent, if has right of audience.*

A recognized agent as such has no right of audience. *Hurchand Ray Goboorhdon Das v. The Bengal-Nagpur Railway Co.*, 19 C.W.N. 64.

JENKINS, C.J., and N.R. CHATTERJEE, J.

Civ. Pro. Code (1908)—(Continued).

(252) O. III, r. 2—*Use of special powers of attorney to evade the provisions of the law relating to the appointment of pleaders and advocates. See REGULATION I OF 1896 (UPPER BURMA CIVIL COURTS), No. 1, 7 Bur. L.T. 206.*

(253) O. V, r. 5—*Summons for final disposal—Mortgage suit—Practice—Procedure.*

In a mortgage suit filed in 1910, the plaintiff having died, his son had his name substituted in place of his father's name in April 1912. The Court then issued for the first time a summons to the defendant as for final disposal; and the hearing was fixed for the 1st June. The Court raised issues on the day of hearing, and as the plaintiff was not ready with his witnesses, the Court dismissed the suit as not proved.

Held, (1) that there was a miscarriage of justice, for the Civil Procedure Code required, in cases of such a nature, that the parties should have the opportunity to produce evidence relevant to issues.

(2) That the Court should have issued summons only for settlement of issues. *Tuljaram Harichand Gujar v. Sitaram Narayan Katar*, 16 Bom. L.R. 39=38 B. 377=24 Ind. Cas. 665.

HEATON and SHAH, JJ.

(254) O. V, r. 12—*Personal service—Defendant absent in the neighbouring village—Suit to set aside ex parte decree.*

Where, on enquiry, the serving officer is told that the defendant has left for a particular place, it is not the duty of the plaintiff to take out summons to the place mentioned to him on enquiry, and if it is found he has left that place also it is not his duty again to take out fresh summons to the places where he is told the defendant is gone.

If the defendant had any other place of residence or business, plaintiff should take out summons to that place. *Madurathachi v. Chokalinga Pillai*, (1914) M.W.N. 314=23 Ind. Cas. 324.

SESHAGIRI IYER, J.

References:—29 M. 324; (1914) M.W.N. 79, R.

(255) O. V, rr. 13 and 19—*Declaration of due service, when not justified—Setting aside ex parte decree.*

Where a summons to the defendant was served by affixture only, the return of the serving officer being that "he left the house 3 or 4 days ago for Madura and other places," *held*, the Court was not legally justified in declaring under O. V, r. 19, that the defendant was duly served and, further, he is entitled to have the decree passed *ex parte* against him in such circumstances set aside (a). *Yellayappa Chetti v. Yeerappa Chetti*, (1914) M.W.N. 74=22 Ind. Cas. 498.

SADASIVA IYER and TYABJI, JJ.

References:—21 M. 419; 29 M. 324, F.

(256) O. V, r. 15—*Service of summons on paternal uncle, not sufficient unless the defendant*

Civ. Pro. Code (1908)—(Continued).

proved not to be found. *Makhan Das v. Manu Lal*, 11 A.L.J. 875=35 A. 556=21 Ind. Cas. 614. See Final Part, 1913, Col. 369.

(256-a) O. V, r. 17. See No. 81, *supra*.

(257) O. V, r. 17—O. IX, r. 13—S. 115—*Service by affixture—Defendant temporarily absent.*

Where the process server did not add in the return that the date of the defendant's return was indefinite, or was not known, *held* that the Court might find the indefiniteness of the return from the surrounding circumstances.

If the absence of the defendant from his house is for an indefinite period, service by affixture in the house is sufficient (a).

Even if the lower Courts were wrong on the question of law relating to service of summons, the High Court cannot interfere under S. 115 (b).

In a case of patent and extreme hardship, the powers under S. 15 of the Charter Act can be invoked. *Gontia Venkata Pitchayya v. Sowdagor Mahomed Abdul Kareem Beg Sahab*, 15 M.L.T. 217=(1914) M.W.N. 253=26 M.L.J. 368=23 Ind. Cas. 14.

SADASIVA IYER, J.

References:—(a) 29 M. 324, *Doubted*; 21 M. L.J. 978, *Appr.*; 21 M. 324, *F.* (b) 6 A.L.J. 45, *Doubted*.

(257-a) O. V, r. 19. See No. 255, *supra*.

(258) O. V, r. 19 and O. XXI, r. 22—*Service of summons—Declaration of Court—Irregularity.*

Service of notice otherwise than by personal delivery cannot be said to have been effected duly, unless the Court declares, under O. V, r. 19, that the notice has been duly served though personal service has not been effected.

There is a presumption in favour of the proceedings of Court of Justice that everything has been duly performed.

When a District Munsif passes orders for attachment when the process of service of notice under S. 248 was returned by the peon with the note that it was affixed to the outer door of the judgment-debtor owing to his evading service, this is a sufficient declaration that the service has been duly effected.

Whether omission to have a notice served under O. XXI, r. 22, is a serious irregularity under the new Code, having regard to para. 4 of the Rule. *Mahomed Meerza Rowther v. Kadir Meerza Rowther*, (1914) M.W.N. 63=22 Ind. Cas. 302.

SADASIVA IYER and SPENCER, JJ.

(259) O. VI, r. 14—Agent appointed to carry on business of partnership—Right of agent to sue for dissolution of the partnership—Amendment of plaint—Formal defect. See *POWER OF ATTORNEY*, No. 2, 7 Bur. L. T. 202.

Civ. Pro. Code (1908)—(Continued).

(260) O. VI, r. 17—*Amendment of plaint—Introduction of fresh cause of action which has become barred by limitation—Whether allowed.*

Held, on the facts that an application for leave to amend a plaint made after the case had been reserved for judgment was rightly refused.

Semble—Courts as a rule will not allow a plaintiff to amend his plaint by introducing a cause of action which since the institution of the suit has become barred by limitation. *Bisheshar Prasad v. Gobind Ram*, 12 A.L.J. 833.

TUDBALL and CHAMIER, JJ.

(261) O. VI, r. 17—*Amendment—Pleading—Includes any part thereof—Omission not intentional but due to inadvertence—Amendment to be allowed—Date of amendment—Date of presentation of plaint—Institution of plaint deemed to be on the latter date.*

On the 7th April 1908, a property was sold consisting of 41 kanals, 18 marlas of land, the second storey of a house, share in a well and share in a *shamiyat*. Suit for pre-emption was instituted on 30th March 1909, but in the plaint the property asked for was described only as 41 kanals and 18 marals of land. On 12th May 1909 the plaintiff applied for leave to amend, saying that he intended not to renounce any part of the claim, but by a '*kilabi ghalti*' omitted the house. On obtaining the leave, he amended the plaint by adding the house, but still the share of well and of *shamiyat* was left out. The defect was discovered on 4th February 1910 and the plaint was fully and finally amended on 16th February, 1910.

Held that O. VI, r. 17, Civ. Pro. Code (1908), allows amendment of any part of a plaint, provided that the amendment does not alter the character of the suit or introduce a different cause of action.

Held, that in the present case the omission was merely inadvertent and not intentional (a).

Where a plaint has been rightly amended, the date of institution of the claim is the date of presentation of the original and not of the amended plaint (b). *Jalal Din v. Qaim Din and Mussammam Umar Bibi*, 62 P.R. 1914=255 P.L.R. 1914=161 P.W.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

References:—(a) 39 B. 641; 17 A. 288; 33 A. 616; 36 M. 378; 7 P.R. 1896; 10 P.R. 1909, R. (b) 9 B. 373; 19 B. 320, R.

(262) O. VI, r. 17—*Powers of amendment under the new and the old Codes. See LIMITATION ACT (1908), No. 25, 16 M.L.T. 241.*

(262-a) O. VI, r. 17. See No. 223, *supra*.

(263) O. VI, r. 17 and S. 105—*Amendment of plaint—Introduction of fresh cause of action barred at the time of amendment—Limitation—Computation from date of plaint—Civ. Pro. Code, S. 105—Objection against amendment in appeal against decree—*

Civ. Pro. Code (1908)—(Continued).

Allowable—Fraud—Ground for extending period of limitation—Not alleged in plaint—Amendment not to be allowed at late stage—Contract Act, S. 253 (7)—Sale by some partners of business—Dissolution—Effect—Suit for dissolution and account against partners and for recovery against purchasers—Multifariousness.

Generally speaking, no amendment should be allowed which includes a claim which could not, under the law of limitation, be made the subject of a fresh suit. Secondly, the fresh questions which can be introduced into a suit, by amendment must be questions which come reasonably and fairly within the scope of the plaint as originally presented. Generally speaking, therefore, no amendment should be allowed which completely introduces a new cause of action (*vide* O. VI, r. 17, Civ. Pro. Code (1908) (a)).

An order permitting an amendment under the provisions of S. 105 (1), Civ. Pro. Code, can be dealt with in the appeal against the decree (b).

The plaintiff cannot be allowed to plead fraud for the purpose of extending the period of limitation for bringing the suit, unless he has specifically pleaded fraud in his pleadings, and he cannot be allowed to amend the plaint at a late stage by inserting allegations of fraud therein.

A suit for declaration that the sale of the business by some partners is fraudulent and for the recovery of the assets of the firm from the purchasers, and for an account against the partners who sold the business, is bad for misjoinder of parties and causes of action.

Where an application was made to amend the plaint in such a suit by substituting a prayer for declaration that the assets of the firm were still the property of the firm :

Held, that it ought not to be granted, because it would introduce a new cause of action and a suit based on such a cause of action would be time-barred if instituted on the date of amendment.

Where certain partners sell the business of the firm, the partnership is by such act dissolved under the provisions of S. 253 (7), Contract Act. *Galrajmal v. Pamanmal*, 8 S.L.R. 69.

HAYWARD, J.C., and CROUCH, A.J.C.

References:—(a) 9 B. 373 (402), *Doubled*. (b) 19 B. 320, R.

(264) O. VI, r. 18—Amendment—Powers of Court. See ACT I OF 1879 (CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE), No. 2, 22 Ind. Cas. 778.

(265) O. VII, r. 2 (2)—Claim for mesne profits already accrued due—Valuation—Jurisdiction—Court-fee. See MESNE PROFITS, No. 4, 24 Ind. Cas. 232.

(266) O. VII, rr. 2, 11—Court Fees Act, S. 7 (iv). (f)—Suits Valuation Act, S. 8—Suit for dissolution of partnership and for accounts—Valuation of claim for Court fees and jurisdiction

Civ. Pro. Code (1908)—(Continued).

—Amendment of claim—Dismissal of suit. Bai Hirsagavri v. Gulabdas Jamnadas, 15 Bom. L.R. 1123 = 22 Ind. Cas. 71. See Final Part, 1913, Col. 372.

(267) O. VII, rr. 5, 11—Necessary facts not mentioned in the plaint—Replication filed—Cause of action. See ACT IX OF 1890 (RAILWAYS), No. 10, 12 A.L.J. 339.

(268) O. VII, r. 6—Plaintiff bound to show in the plaint the ground upon which he claims exemption from the law of limitation. See LIMITATION ACT (1908), No. 35, 83 P.R. 1914.

(269) O. VII—Rule 11—Valuation of suit—Jurisdiction—Court-fee—Suit of possession of colony land—Custom—Alienation by father—Market—Value of land determines valuation of suit—Suit improperly valued—Procedure.

The plaintiff sued for possession of some colony land, the plaint alleging that a sale by the plaintiff's father was without necessity. The suit was instituted in the Court of a First Class *Munsif* and was stamped at Rs. 1-2-0, calculated at 5 times revenue of Rs. 1-2-6. It was not clear what this revenue represented.

The *Munsif* held that the jurisdictional value of the suit was Rs. 2,598 under the Suits Valuation Act calculated at 15 times the net profits and returned the plaint of presentation to a competent Court.

On appeal the Divisional Judge held that the valuation of colony lands should be based on the market-value and dismissed the appeal. The plaintiff applied for revision of the order of the Divisional Judge. Subsequently the plaint was rejected by the District Judge.

Held, that the Divisional Judge was right in holding that the valuation of the suit for purposes of both jurisdiction and Court-fees would be the market-value. But the Divisional Judge ought not to have dismissed the appeal. He should have determined the market-value of the land and allowed the plaintiff time to pay up deficiency in the Court-fee and instructed the plaintiff as to the Court before which he should present his plaint after it is properly stamped. *Wasawa Ram v. Bahadur Chand*, 194 P.L.R. 1914.

KENSINGTON, C.J., and CHEVIS, J.

(270) O. VII, r. 11—Plaint presented on insufficient Court-fee stamp—Court requiring payment in certain time—Non-payment—Dismissal of suit—Appellate Court cannot give option to plaintiff to limit his claim to the extent of Court-fees paid. See COURT FEES, No. 3, 16 Bom. L.R. 763.

(270-a) O. VII, r. 11. See Nos. 212, 266 and 267, *supra*.

(271) O. VII, r. 11 (b)—Order rejecting plaint—Appeal lies against—No revision—Court Fees Act, S. 12, no bar to appeal—Punjab Courts Act (XVIII of 1884), S. 70 (1) (a).

An order rejecting a plaint under O. VII, r. 11 (b), Civ. Pro. Code (1908), is a decree within

Civ. Pro. Code (1908)—(Continued).

the meaning of S. 2 of the Code and an appeal lies against such an order (a). Therefore, no revision lies to the Chief Court against such an order.

S. 12, Court Fees Act, does not bar an appeal against such an order rejecting a plaint (b). *Mussammat Sada Kaur v. Buta Singh*, 80 P.R. 1914=265 P.L.R. 1914=167 P.W.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

References:—(a) and (b) 6 C. 249; 14 C.W.N. 343; 11 A. 91; 12 C.L.R. 148; 28 C. 334, R.; 12 A. 129; 14 M. 169; 10 B. 610; 7 B. 341, D.

(272) O. VII, r. 11 (b)—Deficient Court-fee not supplied as required by the Court—Duty of Court to reject plaint. See COURT FEES ACT, No. 23, 35 P.R. 1914.

(272-a) O. VII, r. 11 (c). See No. 164, *supra*.

(272-b) O. VII, r. 11 (d). See No. 120, *supra*.

(273) O. VIII, rr. 2 to 5—Pleadings—Construction. See PLEADINGS, No. 3, (1914) M. W.N. 883.

(273-a) O. VIII, r. 3. See No. 273, *supra*.

(273-b) O. VIII, r. 4. See No. 273, *supra*.

(274) O. VIII, r. 5—Failure to deny allegations in plaint—Effect. See PLEADINGS, No. 2, 19 C.L.J. 518.

(274-a) O. VIII, r. 5. See No. 273, *supra*.

(275) O. VIII, r. 6 and S. 102—Set-off when may be allowed. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 15, 16 Bom. L.R. 746.

(276) O. IX, rr. 3, 7 and 9—Dismissal of suit in default—Plaintiff and some defendants absent—Fresh suit against absent defendants—Not barred—Nature of the order of dismissal for default—Rule in *King v. Hoare*—Applicability to case of dismissal for default.

On the date fixed for the hearing of a suit, both the plaintiff and the defendants except the guardian *ad litem* of a minor defendant were absent. The Court passed an order dismissing the suit 'in default.' Plaintiff again brought a suit claiming the same reliefs against all the defendants except the one who was present.

Held, that the subsequent suit against the defendants who were absent at the hearing of the prior suit was not barred.

The order dismissing the suit in default should be taken as passed partly under O. IX, r. 3, and partly under O. IX, r. 7, and when O. IX, r. 9, imposes a disability on the plaintiff, it means a disability only as against the defendant who was actually present (a). The rule that a judgment recovered against one of several joint contractors, though unsatisfied, is a bar to any action against the others does not apply

Civ. Pro. Code (1908)—(Continued).

to the case of a dismissal in default (b). *Bukharam v. Ramji*, 10 N.L.R. 89=23 Ind. Cas. 878.

MITTRA, A.J.C.

References:—(a) 16 C. 98 (101); 10 C.W.N. 40 (41), R. (b) 13 M. & W. 494=67 R.R. 694; 4 App. Cas. 504=48 L.J.C.P. 705, R.

(277) O. IX, r. 3, O. XVII, r. 3—Time granted to produce evidence—Adjournment of suit—Failure to appear on adjourned date—Proper order is to proceed with suit and not to dismiss it.

Where the parties to a suit agreed that the decision in that suit should follow the decision or the appellate Court in another suit, and after producing a copy of that decision, both parties absented themselves on the adjourned date.

Held, that the proper course for the Court was to proceed to decide the suit under O. XVII, r. 3, and not to dismiss it under O. IX, r. 3, of the Code of Civil Procedure. *Penamucha Anandaraju v. Nadimpalli Venkataraju*, 23 Ind. Cas. 519.

TYABJI and SPENCER, JJ.

(278) O. IX, r. 5, O. XXIII, r. 1—Suit against both principal and surety—Non-service of summons on principal—Striking out his name—Surety's liability whether affected. See CONTRACT ACT, No. 89, 16 Bom. L.R. 696.

(279) O. IX, r. 5, O. 41, r. 14—Appeal—Summons returned unserved—Failure to take out fresh summons—Dismissal of appeal before expiry of one year from date of return—Illegality. *Gopiseti Narayanasami Naidu Garu v. Namburi Bahadri Raza*, 25 M.L.J. 451=21 Ind. Cas. 420. See Final Part, 1913, Col. 374.

(280) O. IX, rr. 6, 13—O. XVII, rr. 2, 3, distinction between—Sch. I, Appendix B, Form No. 1—Case, adjournment of—Defendants, non-appearance of, on the date fixed—Procedure to be followed—Decree, ex parte—Application to set aside decree, if can be entertained.

The provisions of O. IX of the Code by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the Procedure is laid down in O. XVII which deals with adjournments.

The distinction between r. 2 and r. 3 of O. XVII of the Code is, that the former rule applies to hearing adjourned at the instance of the Court, while the latter applies to hearing adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted; and that where there are no materials on the record the proper procedure to follow would be that laid down in r. 2; but if there are materials on the record the Court ought to proceed under r. 3 (a).

Civ. Pro. Code (1908) — (Continued).

Where, therefore, on the day the hearing of the suit commenced both the parties appeared, and the case proceeded from day to day, and the examination and cross-examination of plaintiff's witnesses were finished, and the defence pleader began his case and examined one of the defendants whose cross-examination not having been finished the case stood adjourned to the next day, when neither he, the witness, nor the pleader for the defence appeared, and the Court noted the case for the defence as closed and proceeded to hear the arguments of the pleader for the plaintiff, and delivered judgment decreeing the suit in plaintiff's favour and the defendants subsequently made an application for setting aside the decree alleging that it has been passed *ex parte*, and the Court refused the application on the ground that it had no power to set aside the decree under O. IX, r. 13.

Held, that, on the default of the defendants, the Court below must, have proceeded under O. XVII, r. 2, to dispose of the suit in one of the modes directed in that behalf by O. IX, and that being so the defendants' application under O. IX, r. 13 should have been entertained (b). *Roatulla Basunia v. Jabon Mohan Roy*, 19 C.L.J. 535 = 23 Ind. Cas. 769 = 41 C. 956.

IMAM and CHAPMAN, JJ.

References:—(a) 5 C.L.J. 260 = 34 C. 235, F. (b) 23 C. 73, F.

(281) O. IX, rr. 6, 13, O. XVII, rr. 2 and 3 — Failure of defendant to appear in the course of the hearing after plaintiff has closed—Court if may proceed to pass judgment on the materials before it—Application to set aside judgment as made *ex parte* —“Appearance”—“Default.”

Where, in the course of the hearing of a suit, the plaintiffs having closed their case, the defence began and the cross-examination of one of its witnesses not having been finished at the end of a day, it stood adjourned to the next day when neither the defendant nor his witnesses nor his pleader appeared, and the Court treating the defence case as closed, heard plaintiff's arguments and delivered judgment.

Held:—That the mere fact that the Court had materials before it upon which it could pronounce judgment was not enough to bring the case under r. 3 of O. XVII as the other condition, *viz.*, that the adjournment must have been at the instance of a party, was not fulfilled.

That the case fell under r. 2 of O. XVII, and the Court must be taken to have proceeded to dispose of the suit in one of the modes directed by O. IX, so that an application to set aside the order under O. IX, r. 13 should have been entertained.

The provisions of O. IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. In such a case, O. XVII applied,

Civ. Pro. Code (1908) — (Continued).

r. 2 applying to a hearing adjourned by the Court, r. 3 to a hearing adjourned at the instance of a party, in which last case, if the party fails to appear on the adjourned date and there are sufficient materials on the record to enable the Court to proceed to judgment, the Court may dispose of the case under that Rule. Even in such a case if there are not sufficient materials on the record the proper procedure to follow would be that laid down in r. 2 (a).

The test of a defendant's appearance in obedience to a summons for the purpose of r. 6, O. IX, is, as indicated in the form of the summons in App. B to Sch. I of the Code, whether the defendant has appeared in person or by pleader duly instructed and able to answer all material questions relating to the suit or who is accompanied by some person able to answer all such questions.

In the present case, as the pleader's being furnished with due instruction could not be doubted, there was no non-appearance within r. 6, O. IX. *Reajuddin Basunia v. Jiban Mohan Roy*, 18 C.W.N. 775.

IMAM and CHAPMAN, JJ.

Reference:—(a) 34 C. 235, R.

(281-a) O. 9, r. 7. See No. 276, *supra*.

(282) O. IX, r. 8—Dismissal on plaintiff's default—Application for restoration put in within one month—No affidavit or copy of decree and judgment filed as ordered—Petition dismissed—Second application after two months of order dismissing suit, barred—Limitation Act (1908), Sch. I, Art. 163.

Where, in a suit dismissed for default of plaintiff, an application for the restoration of the suit was dismissed also, because the applicant had failed to produce the judgment and decree as directed by Court, and a second application for the same purpose was made 2 months after the original order:

Held, that second application was time-barred. *Nalu Subba Row v. Gauti Venkataratnam*, 22 Ind. Cas. 669.

TYABJI, J.

(283) O. IX, r. 8—Appeal, if lies—Suit, dismissal of—Formal decree drawn up—Law, changes of—Bengal Tenancy Act (VIII of 18-5), S. 107—Decision. *Parbati v. Tulsi Koori*, 18 C.L.J. 128 = 20 Ind. Cas. 1 = 18 C.W.N. 604. See Final Part, 1914, Col. 374.

(284) O. IX, r. 8—O. XVII, r. 3—Order—Judgment—Restoration.

Where a plaintiff is absent and the pleader has instructions only to apply for an adjournment, and the Munsif refusing the adjournment dismisses the suit, the order of the Munsif comes within O. IX, r. 8, and not O. XVII, r. 3, though there is a judgment followed by a decree (a).

The term in which the order is touched will be no indication that it was not passed under O. IX, r. 8, and the passing of a decree will

Civ. Pro. Code (1908)—(Continued).

not take the matter any further (b). **Mittadar Yenkoba Royer v. Mittadar Kadiappa Gounder**, (1914) M.W.N. 344=23 Ind. Cas. 614.

• **SESHAGIRI AIYAR, J.**

References;—(a) 34 A. 123, R. (b) 30 M. 274, F.

(285) O. IX, r. 9—*Order conditionally setting aside an order dismissing a suit for default—Appeal—Jurisdiction of High Court to interfere on question of damages.*

Where a Court passed an order setting aside an order dismissing a suit for default, on condition of the plaintiff paying a certain amount of damages to defendants, and provided in the same order that, in the event of such payment not being made, the application should stand dismissed, *held* that the Court intended to and did completely dispose of the application for restoration of the suit and the order was therefore appealable.

Held also that in second appeal the High Court could consider whether the damages awarded were adequate or grossly excessive, though it would not have interfered if the application for restoration had been dismissed for not disclosing sufficient cause. **Nand Lal v. Kishori**, 12 A.L.J. 1270.

CHAMBER and PIGGOTT, JJ.

(285-a) O. IX, r. 7, 9. See No. 276, *supra*.

(286) O. IX, r. 9 (1)—*Minority whether 'sufficient cause'—Gross negligence of next friend—Ground for setting aside dismissal for default.*

Minority is not in itself covered by the description 'sufficient cause.' But where a minor's suit is dismissed for default, the gross negligence of his next friend is a ground for setting aside the order of dismissal. **Adyapadi Ramanna Udpa v. Krishna Udpa**, 27 M.L.J. 167.

OLDFIELD, J.

References:—26 M. 599; 30 M. 274, F.; 24 M.L.J. 239, Not F.; 6 C.L.R. 69, R.

(287) O. IX, r. 13—*Conditional order setting aside decree—Condition not fulfilled—Extension of time—Appeal from order—Effect of conditional order.*

An *ex parte* decree was set aside on condition that a sum of money was paid before a certain date. The money was tendered one day too late and the plaintiff refused to accept it. The Court rejected an application to extend time, holding that it had no jurisdiction to make any such order, and thereupon it formally dismissed the application for setting aside the *ex parte* decree.

Held that the provisions of O. IX, r. 13, do not contemplate the passing of a conditional order such as to have an effect analogous to that of a preliminary decree in a pre-emption case. The proper order for the Court to pass was to direct the applicants to deposit the

Civ. Pro. Code (1908)—(Continued).

amount on a certain day, and, after the money was deposited, to have passed the order setting aside the decree, and the conditional order passed in the case can be dealt with as an order so passed.

Held further that an appeal lay in this case inasmuch as the order was an order setting aside the *ex parte* decree. **Jagarnath Sahl v. Kamta Prasad Upadhyaya**, 12 A.L.J. 38=36 A. 77=23 Ind. Cas. 138.

RYVES and PIGGOTT, JJ.

(288) O. IX, r. 13—*Ex parte decree against several defendants—Application to set it aside made by some—Power of Court to set aside decree against non-applying defendants—Principal and surety—Liability of surety.*

The plaintiff sued M as principal and N as surety. A decree was passed against both, *ex parte* against M only. On the application of M. alone the Court set aside the *ex parte* decree against both M and N, and eventually released N. from liability, holding that he was not liable as a surety and that he signed the contract, basis of the suit, as a witness only. On application for revision by plaintiff.

Held, that, in the absence of an application by N the Court was wrong in setting aside the decree passed against him.

(2) That the contract clearly showed that N was liable as surety, and the Court was not justified in finding that N signed the contract as a witness only. **The Singer Manufacturing Co. of Lahore v. Mohammad Din and Nathu**, 246 P.L.R. 1914=166 P.W.R. 1914.

KENSINGTON, J.

(289) O. IX, r. 13—*Ex parte decree against debtor and his surety—Surety alone applying for setting aside of decree—Decree set aside against both.*

An *ex parte* decree against a debtor and his surety can, in view of the proviso to O. IX, r. 13, Civ. Pro. Code, be set aside against both of them on the application of the surety alone. **Muhammad Raza v. Musammat Barka**, 24 Ind. Cas. 115.

LINDSAY, J. C.

(290) O. IX, r. 13—*Compromise petition purporting to be by all the defendants filed by those actually present in Court—Decree passed or such compromise petition—Subsequent repudiation by defendants not present at filing of petition—Jurisdiction of Court to set aside, decree as ex parte decree under O. IX, r. 13.*

The petitioners instituted a suit for declaration of their title to, and for possession of, certain lands. Two of the defendants (Nos. 4 and 5) filed a petition of compromise and asked for a decree, so far as they were concerned, on that compromise, and an *ex parte* decree against the other defendants. The Court, however, ordered fresh service on the other defendants, and

Civ. Pro. Code (1908)—(Continued).

subsequent thereto defendants Nos. 4 and 5 appeared in Court with a petition of compromise purporting to be executed by defendants Nos. 1 to 3 as well as by themselves. On this petition the decree was made in terms of the compromise. Afterwards defendants Nos. 1 to 3 put in a petition to the Court stating that defendants Nos. 4 and 5 had no authority to present the petition of compromise on their behalf, that no summons had been served on them, and that the petition was fraudulently represented as being made by them. The Court acting under O. IX, r. 13, Civ. Pro. Code, set aside the decree and ordered a retrial of the case.

Held—that the Judge when he made his order was under the impression that all the parties in the case were before him and that the petition was the petition of all the parties: consequently in granting the petition he did not intend to make it *ex parte* and the decree could not be treated as an *ex parte* one and consequently O. IX, r. 13, Civ. Pro. Code, did not apply. **Damodar Misra v. Hrishik Naik**, 19 C.W.N. 118.

STEPHEN and MULLICK, JJ.

(291) O. IX, r. 13—*Ex parte decree—Setting aside*. **Nithiananda Muthuswamy Monigaran v. Vivanatha Manigaran** (1913) M.W.N. 857=21 Ind. Cas. 457. See Final Part, 1913, Col. 376.

(292) O. IX, r. 13—*Serving of summons on gumastah—Onus to prove that service was proper*. **Nagary Rasappa Setty v. Namburi Venkataratnam**, (1913) M.W.N. 1028=14 M.L.T. 535=21 Ind. Cas. 922. See Final Part, 1913, Col. 376.

(293) O. IX, r. 13—Decree obtained by fraud or perjury—Whether can be set aside. See DECREE, No. 1, 8 S.L.R. 81.

(293-a) O. 9, r. 13. See Nos. 66, 205, 257, 280, 281, *supra*.

(294) O. XI—*Interrogatories—Discovery—Law under the Code of 1882—Practice*.

Plaintiff sued to recover Rs. 5,000 and interest alleged to be due to him from the defendant on a *hundi* that was drawn and accepted by the defendant. Defendant denied the claim and applied for leave to administer interrogatories for the examination of plaintiff.

Held that a party to a suit is entitled to a discovery relating to the facts directly in issue on the pleadings, and that defendant is entitled to ask the plaintiff to state on oath in what from the consideration of the *hundi* was paid, the particulars of the place where the defendant drew, and accepted the *hundi*, and also to state on oath where and by whom the *hundi* was presented for payment.

The Code of 1882 is not the same as O. XXXI of the Rules of the Supreme Court, whereas O. XI of the present Civ. Pro. Code relating to discovery and inspection is the same as O. XXXI, of the Rules of the Supreme Court.

Civ. Pro. Code (1908)—(Continued).

Baljnath Kedia v. Rakhunath Prasad, 41 C.C.=24 Ind. Cas. 765.

FLETCHER, J.

Reference :—17 C. 840, D.

(294-a) O. XIV, r. 2. See No. 197, *supra*.

(295) O. XIV, XV—*Summons for settlement of issue*.

Where summons was issued only for settlement of issues, the proviso to O. XV, r. 3 (1) or O. XIV, r. 3 (6) does not apply. **Varadachariar v. Parthasarty Iyengar**, (1914) M.W.N. 501=27 M.L.J. 58.

WHITE, C.J. and SESHAGIRI IYER, J.

(295-a) O. XV, See No. 295, *supra*.

(295-b) O. XV r. 3 (1). See No. 197, *supra*.

(296) O. 17, r. 1—*Execution—Execution Court cannot go behind decree—Adjournment—Discretion of Court—Interference in second appeal*.

The Court executing a decree cannot go behind the terms of the decree.

The question of granting or refusing an adjournment on the ground that a party is not ready with evidence which he desires to produce, is one essentially for the discretion of the Court concerned, a discretion to be exercised judicially upon a fair consideration of the opportunities the party in question has had of getting his evidence ready in time and the reasons given by him for having failed to do so. It is impossible for a Court of second appeal to interfere with the exercise of such discretion. **Parasottam Das v. Kesho Saran**, 24 Ind. Cas. 206.

PIGGOTT, J.

(297) O. 17, r. 1—*Suit part-heard by Sub-Judge—Court bound to go on with suit from day to day unless adjourned—Sub-Judge is the proper officer to adjourn—District Judge has no voice in the matter*.

Where a suit is once begun, the Court is, under O. 17, r. 1, Civ. Pro. Code, bound to go on from day to day unless for special reasons it is necessary to adjourn the case to some future day.

Where a suit was part-heard by a Sub-Judge, he was the proper officer to decide when the case was to be adjourned and the District Judge had no voice in the matter. The Sub-Judge must exercise his own discretion in adjourning the case.

Where the Sub-Judge adjourned a part-heard case in obedience to the orders of the District Judge to whom he applied for directions, *held*, the order of the Sub-Judge must be set aside. **Sivagami Ammal v. Louis Gnana Prakasa Mudaliar**, 16 M.L.T. 504.

KUMARASWAMI SASTRI, J.

(297-a) O. 17, r. 2. See Nos. 280, 281, *supra*.

(298) O. 17, rr. 2, 3—*Suit adjourned to produce succession certificate—Default—Suit not to be dismissed but to be decided on merits*.

Civ. Pro. Code (1908)—(Continued).

After a plaintiff has adduced all the evidence on which he intends to rely but has failed to produce a succession certificate as to a part of his claim on the adjourning hearing, his suit ought not to be dismissed under O. XVII, r. 2 of the Code but decided on merits under O. XVII, r. 3. **Droupadi Ammal v. South Indian Railway Company, Limited**, 21 Ind. Cas. 353.

SANKARAN NAIR and AYLING, JJ.

(298-a) O. XVII, r. 3. See Nos. 277, 280, 281, 284 and 298, *supra*.

(299) O. XVIII, r. 1—Suit for restitution of conjugal rights—Marriage ceremony admitted—Coercion and non-consent pleaded—Right to begin. See ACT IV OF 1869. (DIVORCE), No. 3, 23 Ind. Cas. 242.

(300) O. 18, r. 4. See EVIDENCE ACT, No. 1, (1914) M.W.N. 931.

(301) O. XVIII, r. 18—*Inspection by District Munsif—Sanction of District Judge.*

O. XVIII, r. 18, Civ. Pro. Code, vests an absolute discretion in the District Munsif to make an inspection, and the sanction of the District Judge is not necessary if the District Munsif in his discretion wishes to make an inspection without charges. **Nallabolu Bodi Naidu alias Yenkatappa v. Chengama Naidu**, (1914) M.W.N. 79=26 M.L.J. 9=23 Ind. Cas. 297.

MILLER, J.

(302) O. XIX, r. 3—*Affidavit, meaning of.*

A statement which merely recites facts to the "best of the information and belief" of the deponent, but does not state the source of his information is not an "affidavit" within the meaning of O. XIX, r. 3 of the Code, and cannot be used as evidence in any judicial proceeding. **Doraiswami Chetty v. Govindu Chetty**, 15 M. L.T. 377=23 Ind. Cas. 377.

SANKARAN NAIR and AYLING, JJ.

References:—(1900) 2 Ch. D. 753; 69 L.J. Ch. 868; 83 L. T. 418; 43 W.N. 115, F.

(302-a) O. XX, r. 6. See No. 94, *supra*.

(302-b) O. XX, r. 12. See Nos. 7 and 14, *supra*.

(303) O. XX, r. 13—Applicability where Administrator-General appointed to administer estate of insolvent. See ACT II OF 1874 (ADMINISTRATOR-GENERAL), No. 3, 22 Ind. Cas. 566.

(304) O. XX, r. 13—Suit asking Court to administer the estate of a deceased person and give plaintiff his share therein—Nature of suit—Whether suit 'for accounts'—Valuation for purposes of jurisdiction—S. 8, Suits Valuation Act. See COURT FEES ACT, No. 7, 100 P.R. 1914.

(304-a) O. XX, r. 13. See No. 14, *supra*.

(304-b) O. XX, r. 14. See Nos. 5 and 14, *supra*.

(305) O. XX, r. 15—Agreement for partnership in respect of a lease for the farm and sale of

Civ. Pro. Code (1908)—(Continued).

drugs—Agreement by lessee to transfer a portion of the profits or losses resulting from the lease—Discretion of Court in passing preliminary decree. See AGREEMENT, No. 2, 17 O.C. 193.

(305-a) O. XX, r. 15. See No. 14, *supra*.

(305-b) O. XX, r. 16. See No. 14, *supra*.

(305-c) O. XX, r. 17. See No. 14, *supra*.

(306) O. XX, r. 18. See HINDU LAW (PARTITION), No. 3, 12 A.L.J. 696.

(306-a) O. XX, r. 18. See No. 14, *supra*.

(307) O. XX, r. 18 (2)—*Limitation Act (1908), S. 5—Properties assessed to land revenue, partition of—Form of decrees—Lower Court not to add to terms of decrees as passed by appellate Court—Decree defective and not capable of being enforced—Decree-holder's remedy in case of decree not being in proper and correct form—Review—Saving of limitation.*

The provisions of O. XX, r. 18 (2), Civ. Pro. Code, relate to properties other than those assessed to the payment of land revenue to the Government.

In cases of partition of properties assessed to land revenue, the Code of Civil Procedure does not contemplate the passing of a final decree by the Civil Court. It simply authorizes the Civil Court to declare the shares of the parties concerned and to give a direction to the Revenue Courts to give effect to its decree and no further.

The lower Court cannot add to the decree of the appellate Court a direction which has been omitted, though wrongly, by the latter.

Where a decree-holder cannot obtain from the lower Court any relief owing to the decree passed by the appellate Court being in form legally incorrect, the proper course for him is to apply for review of the judgment of the appellate Court upon which the decree is based and not to apply for revision of the lower Court's order refusing to grant the relief claimed.

The time thus spent by the decree-holder in seeking for the relief under the said decree is allowable to him under S. 5 of the Limitation Act when he applies for a review. **Som Nath v. Ram Bailas**, 24 Ind. Cas. 113.

LINDSAY, J. C.

(308) O. XXI, r. 2—*Certificate of payment—How to be made.*

O. XXI, r. 2, of the Code, contemplates a definite proceeding with a petition on the part of the decree-holder and a formal Act by the Court. It requires a decree-holder, who wishes to have a payment certified, to do so in some well-defined speech or writing.

Where a decree-holder made an application for execution of a decree stating in the petition that the judgment-debtor had paid some money to him as interest, but the statement was made not in the place where he was required to state if any adjustment of the decree was made but in an unusual place, *held*, that the action of the decree-holder was not such a certificate of

Civ. Pro. Code (1908)—(Continued).

payment as was required by the Code. **Gokul Chand v. Bhika**, 12 A.L.J. 387=23 Ind. Cas. 758.

KNOX, J.

(309) O. XXI, r. 2—*Limitation—Decree, execution of—Part-payments, certificate of—Separate petition other than application for execution, if necessary—Limitation within which decree-holder must certify, if any.*

A decree-holder made an application for execution of his decree more than 3 years after the date of the decree, and in the application for execution he certified certain payments made by the judgment-debtor, these payments being endorsed on the back of an office copy of the decree. Upon an objection being taken as to the execution of the decree on the ground of limitation :

Held, that the application was not barred, inasmuch as the part-payments were within time to prevent the decree from being barred, and, there being no period of limitation fixed within which the decree-holder must certify, the decree-holder could certify the part payments at any time, and it was not necessary that a separate petition should be filed merely certifying the part-satisfaction of the decree. **Lakhi Narain Ganguli v. Felamani Dasi**, 20 C.L.J. 131.

FLETCHER and RICHARDSON, JJ.

(310) O. XXI, r. 2—*Execution of decree—Uncertified payment, whether can save limitation—Mere mention of payment, whether amounts to certificate.*

An uncertified payment or adjustment can not operate to prolong the period of limitation for applying for execution under the Limitation Act, nor can a decree-holder certify payments after his decree has become barred.

Therefore, where a payment, alleged to have been made out of Court, was not formally certified under O. XXI, r. 2, but was mentioned in the next application for execution :

Held, that this did not amount to certificate as required by the Code. **Bhajan Lal v. Cheda Lal**, 24 Ind. Cas. 215.

PIGGOTT, J.

References :—26 A. 36=A.W.N. (1903) 179; 23 Ind. Cas. 753=12 A.L.J. 387, R.; 21 B. 122, Distd.

(310-a) O. XXI, r. 2. See Nos. 82, 83, *supra*.

(311) O. XXI, r. 2. cl. (2)—*Part-payment—Execution of decree—Uncertified payment or adjustment—Not to be recognised—Limitation.*

An uncertified payment on account of a decree or its adjustment out of Court cannot be recognized by any Court executing the decree, and cannot operate to prolong the period of limitation applying for execution under the Limitation Act (a).

Civ. Pro. Code (1908)—(Continued).

A decree-holder cannot certify a payment made to him out of Court after the decree has become barred by limitation (b). **Bhajan Lal v. Cheda Lal**, 12 A.L.J. 825.

PIGGOTT, J.

References :—(a) 26 A. 3, R. (b) 12 A.L.J. 387, F.; 21 B. 122, D.

(312) O. XXI, r. 2 (2), (3)—*Execution proceeding—Decree, adjustment of—Application should recite the terms of adjustment—Acknowledgment—Limitation Act (1908), S. 19—Estoppel—Express statutory provision.*

An application made to the executing Court recited that the judgment-debtor had paid to the decree-holder a certain sum in different instalments and that the decree-holder had out of kindness to the judgment-debtor agreed to have execution struck off and consented to receive the balance by giving some further time. The petition further stated that the execution might be struck off with permission to the decree-holder to make a fresh application for execution.

Held, that, as the application did not recite the terms of the adjustment, it could not be deemed to be an application contemplated by sub-r. (2) of r. 2 of O. XXI of the Code.

That, as the application did not, by implication or otherwise, acknowledge the right of the judgment-debtor to apply to the Court to have the adjustment recorded as certified, it could not save that right from the bar of limitation under S. 19, Limitation Act.

That, if the doctrine of estoppel were applicable as between the decree-holder and the judgment-debtor, the Court could not still recognize an adjustment not duly certified in contravention of sub-r. (3) of r. 2 of O. XXI of the Code.

The doctrine of estoppel cannot be invoked to nullify an express statutory provision. **Jogendra Nath Sarkar v. Provath Nath Chatterjee**, 19 C.L.J. 126=21 Ind. Cas. 926.

MOOKERJEE and BEACHCROFT, JJ.

References :—(1880) 14 Ch. D. 432; 12 Bom. L.R. 686=34 B. 575, R.

(313) O. XXI, r. 2, cl. (3)—*Decree for the delivery of possession and for payment of the money—Payment to the decree-holder not certified, cannot be recognised.*

When a decree is for the delivery of possession and for the payment of money, any uncertified payment to the decree-holder cannot be recognized by the executing Court.

Change in the new Code in O. XXI, r. 2, cl. (3)—“Under a decree of any kind” explained. **Abdul Latiff Sahab v. Bathula Bibi Ammal**, (1914) M.W.N. 346=15 M.L.T. 388=23 Ind. Cas. 530.

WALLIS and AYLING, JJ.

References :—22 M. 182, Expl.; 6 C. 786, R.

Civ. Pro. Code (1908)—(Continued).

- (314) O. XXI, r. 3, O. XLI, r. 4—*Decree against defendants on ground common to all—Appeal by all the defendants—Death of one of the appellants—Failure to bring his representative on record within six months—Partial abatement—Effect on surviving appellants.*

In this case, the Court of first instance dismissed the suit, but it was declared by the Lower Appellate Court. The defendants preferred a further appeal to the Chief Court. One of these defendants died and his representative was not brought on record until after six months from the date of his death. *Held* that the appeal abated so far as the deceased appellant was concerned. But as the decree in this case proceeded upon a ground common to all the defendants and it was open to any one of them to appeal against it and the Chief Court would have been empowered to reverse or modify the decree in favour of all the defendants, the partial abatement would not produce any prejudicial effect and the further appeal could proceed as if the deceased had not been an appellant from the very beginning. **Med Singh v. Musammat Kabir-un-nissa**, 88 P.R. 1914.

SCOTT-SMITH and SHADI LAL, JJ.

References :—22 B. 718 ; 27 B. 284 ; 25 A. 27, F.

- (315) O. XXI, r. 5—*Execution of decree—Transfer of decree for execution to another district—Sending decree direct to Sub-Judge—Dismissal of petition by Sub-Judge, whether legal.*

The District Judge of Gaya, on an application, issued process for execution to the Sub-Judge of Palaman direct, instead of sending it to the Judicial Commissioner of Chota Nagpur so that he might send it on to the Sub-Judge. The Sub-Judge dismissed the application :

Held, that he should have returned the papers to the District Judge of Gaya in order that he might adopt the correct procedure, and should not have dismissed the application. **Prakash Chandra Sarkar v. Pandey Baldeo Ram**, 22 Ind. Cas. 682.

STEPHEN and MULLICK, JJ.

- (316) O. XXI, r. 7—*Executing Court—Jurisdiction of Court passing the decree cannot be questioned in execution—Bombay Court of Wards Act (Bom. Act I of 1905), S. 32—Retrospective effect—Construction of Statute.*

The executing Court has no power, under O. XXI, r. 7 of the Code, to question the jurisdiction of the Court which passed the decree under execution.

S. 32 of the Bombay Court of Wards Act (Bom. Act I of 1905) has no retrospective effect and is not intended to apply to pending suits. **Harl Govind Kulkarni v. Narsing Rao Noherrao**, 16 Bom. L.R. 80=28 B. 194.=28 Ind. Cas. 128.

SCOTT, C.J. and BATCHELOR, J.

(316-a) O. 21, r. 7. See No. 48, *supra*.

Civ. Pro. Code (1908)—(Continued).

- (317) O. XXI, r. 11—*Res judicata—Execution of decree.*

Where a person applied for execution of a decree as an assignee of the decree by operation of law and a notice was issued to the judgment-debtor under O. XXI, r. 11, and the judgment-debtor took no objection and execution was ordered, *held* that, in a subsequent application by the same person to execute the decree, the judgment-debtor was debarred from disputing the title of that person to execute the decree. **Omen Prasad v. Durlab Shankar**. 12 A.L.J. 206=23 Ind. Cas. 286.

KNOX, J.

References :—24 A. 138 ; 24 A. 282 ; 15 A. 84, R.

- (318) O. XXI, rr. 16, 17—*Absence of defendant—Affixure to door of house, when good service—Due and reasonable diligence.*

The amount of "due and reasonable diligence" which a serving officer must exercise, before affixing a notice to the door of the house in which the person to be served resides, is a question to be decided on the facts of each case.

If the person to be served with has gone to another village, it is not the duty of the serving officer to wait till he returns or to pursue him to that village. In such cases, service by affixure would be "good service" **Yalluri Basavayya v. Perruri Kistna Brahman**, 23 Ind. Cas. 219.

AYLING, J.

References :—21 M. 324=8 M.L.J. 58 ; 21 M. 419, F. ; 29 M. 324 ; 22 Ind. Cas. 498=(1914) M.W.N. 79=1 L.W. 1 ; 24 A. 202=A.W.N. (1902) 68, R.

(319) O. XXI, r. 17—*Limitation—Decree, execution of—Application to file a list of immovable properties—Permission to file—No time fixed by Court—Petition for execution, not amended within the period of limitation—Execution proceedings whether barred.* **Nawab Sri Salimullah Bahadur v. Sainaddi Sarkar**, 18 C.L.J. 538=22 Ind. Cas. 337. See Final Part, 1913. Col. 380.

(319-a) O. XXI, r. 17. See No. 318, *supra*.

(320) O. XXI, r. 18—*Cross decrees what are.*

R brought a suit in 1894 against the husband of the appellant, S, for maintenance due out of the estate in his hands and obtained a decree. The judgment-debtor died before R applied for execution, leaving a widow S who inherited the estate. In 1909 R brought a suit for the same relief against S as the legal representative of the judgment-debtor in the first suit, and the suit was dismissed, R being directed to pay the costs of S. Subsequently R put in an application for liberty to execute the decree of 1894 and it was granted, execution being however stayed till 11th October 1912 so as to enable S to apply for execution of the decree for costs in the suit of 1909. S subsequently applied for leave to execute her decree for costs and an

Civ. Pro. Code (1908)—(Continued).

order was made ordering that satisfaction of the decree of 1894 should be entered to the extent of this sum.

Held, Per White, C.J.—That the Judge had jurisdiction to make such an order and that this was a case in which "applications were made to the Court for the execution of cross-decrees in separate suits" within the meaning of O. XXI, r. 18. It will quite do if each party filled the same character in execution proceedings.

Oldfield, J.—The decrees are cross decrees and the parties fill the same character.

To apply O. XXI, r. 18, both the decrees in question should be before the Court for execution, and the Court had no jurisdiction in the facts of this case to allow the adjustment. *Rukmani Ammal v. Seethammal*, (1914) M. W.N. 85=22 Ind. Cas. 73.

WHITE, C.J., and OLDFIELD, J.

(321) O. 21, r. 18—*Cross-decrees of different Courts—Application for execution of decrees not in the same Court—Set-off not allowed.* *Afzalunnissa v. Nurul Huda*, 11 A.L.J. 763=21 Ind. Cas. 32. See Final Part, 1913, Col. 381.

(322) O. XXI, rr. 19, 20—*Decree for sale of mortgaged property—Costs awarded to judgment-debtor—Set-off—Cross-claims under same decree in mortgage suit.*

Under r. 19, read with r. 20, of O. XXI, Civ. Pro. Code, the costs awarded to the judgment-debtor in a decree for sale of the mortgaged property can be set-off against the mortgage money recoverable by the decree holder from that property. Rule 19 is not in terms limited in application to cases in which the remedy of each party against the others is of precisely the same nature or whether the parties fill the same character. *Mirza Sadik Hussain Khan v. Nawab Hashim Ali Khan*, 24 Ind. Cas. 376.

LINDSAY, J.C. and KANHIA LAL, A.J.C.

References:—16 A. 395=A.W.N. (1894) 133; 23 M. 121; 8 Ind. Cas. 885=7 A.L.J. 1179, R.

(322-a) O. XXI, r. 20. See No. 322, *supra*.

(323) O. XXI, r. 22—*Date of notice—Running of time.* See EXECUTION OF DECREE, No. 8, 20 C.L.J. 15.

(323-a) O. XXI, r. 22. See No. 258, *supra*.

(324) O. XXI, rr. 31, 33 (1)—*Suit for restitution of conjugal rights—Proof of marriage—Presumption—Minor wife—Execution against parents.*

In a suit for restitution of conjugal rights, very strict proof of marriage is essential; but in the absence of proof to the contrary, only the general evidence of marriage is sufficient to justify the presumption that all the necessary marriage ceremonies were performed (a).

The new Civ. Pro. Code, has abolished imprisonment as one of the modes of executing a decree for restitution of conjugal rights, but still a Court can pass an effective decree; and

Civ. Pro. Code (1908)—(Continued).

where the wife is a minor, her parents can be directed to hand her over to her husband, and in case of their default or failure to show sufficient cause therefor, execution can proceed against their persons as well as property (b). *Sivarama Pillai v. Veerappa Pillai*, 23 Ind. Cas. 828.

WHITE, C.J., and OLDFIELD, J.

References:—(a) 23 C. 37=5 C.W.N. 195; 12 C. 140; D. (b) 1 A. 501, D.

(324-a) O. XXI, r. 33 (1). See No. 324, *supra*.

(325) O. XXI, r. 35. See MORTGAGE (USE-FRUCTURY), No. 2, 16 M.L.T. 229.

(326) O. XXI, rr. 35 (2), 95 and 96—*Sale of specified undivided share in a house in execution of a decree—Effective possession.*

O. XXI, r. 96, Civ. Pro. Code, has no application to a case where an auction-purchaser of the judgment-debtor's specified undivided share in a house, the rest of which belongs to a person not a party to the case, applies for a delivery of possession by ejectment of the judgment-debtor.

The provisions of O. XXI, r. 95, Civ. Pro. Code, may be read with those of O. XXI, r. 35, cl. (2). Civ. Pro. Code, whenever it is a question of giving effective actual possession of an undivided share either to a decree-holder or to an auction-purchaser under a decree. *Sarvi Begum v. Taj Begum*, 12 A.L.J. 259=36 A. 181=22 Ind. Cas. 971.

RYVES and PIGGOTT, JJ.

(327) O. XXI, r. 35 (2), O. XLI, r. 33—*Suit by one of many joint owners for possession—Other co-owners pro forma defendants—Form of decree.* See CO-OWNERS, No. 1, 12 A.L.J. 23.

(327-a) O. XXI, r. 36. See No. 84, *supra*.

(328) O. XXI, r. 40—*Poverty or other sufficient cause—Burden of proof—'Some part thereof,' meaning of.*

Where a judgment-debtor is arrested and brought before a Court, the burden is on him to prove that from poverty or other sufficient cause he is unable to pay the amount of the decree or, if that amount is payable by instalments, the amount of the instalment due.

A Court should refuse to direct a release of a judgment-debtor under O. XXI, r. 40 of the Civil Procedure Code, if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so.

The words "some part thereof" in r. 40 (2) (d) of O. XXI, refer to decrees for payment of money generally and not only to instalment decrees. *Chas. R. Gwile & Co. v. W.H.A. Skidmore*, 7 Bur. L.T. 242.

HARTNOLL, OFFG. C.J. and TWOMEY, J.

(329) O. XXI, r. 40—*Poverty and other sufficient cause—Burden of proof—"Some part thereof," meaning of.*

Civ. Pro. Code (1908)—(Continued).

When a judgment-debtor is arrested and brought before a Court, the burden is on him to prove that, from poverty or other sufficient cause, he is unable to pay the amount of the decree or, if that amount is payable by instalments, the amount of the instalment due.

A Court should refuse to direct a release of a judgment-debtor under O. XXI, r. 40, Civ. Pro. Code, if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, as the case may be, and has refused or neglected to do so.

The words "some part thereof" in r. 40 (2) (d) of O. XXI refer to decrees for payment of money generally and not only to instalment decrees. *Chas R. Cowie & Co. v. W. H. A. Skidmore*, 23 Ind. Cas. 833.

HARTNOLL, OFFG. C.J. and TWOMEY, J.

(329-a) O. XXI r. 40 (1). See No. 81, *supra*.

(330) O. XXI, r. 46—*Mortgage-debt—Mortgagee in possession—Mode of attachment*.

The attachment of a mortgage-debt should be made under O. XXI, r. 46, Civ. Pro. Code (1908) (a). The fact of the mortgagee being in possession, actual or constructive, of the mortgaged property makes no difference. *Chullile Peetikayil Nammad v. E. Othenam Namblar and E. Cheela*, 27 M.L.J. 339.

WALLIS and AYLING, JJ.

References :—(a) 37 M. 51=22 M.L.J. 105, *Foll.*

(330-a) O. XXI, r. 50 (1) (c). See No. 81, *supra*.

(330-b) O. XXI, r. 52. See Nos. 107 and 119, *supra*.

(331) O. XXI, r. 54—*Attachment—Mortgaged-debt—Moveable property*. *Nataraja Aiyar v. The South Indian Bank Ltd., Tinnevely*, (1911) 2 M.W.N. 590=10 M.L.T. 503=37 M. 51. See Final Part, 3911, Col. 345.

(332) O. XXI, r. 57—*Attachment before judgment—Application for arrest of judgment-debtor upon decree—Dismissal in default—Attachment not dissolved*. See ATTACHMENT BEFORE JUDGMENT, No. 1, 26 M.L.J. 215.

(333) O. XXI, r. 58—*Execution of decree—Attachment of mortgaged property—Objection by party in possession—Duty of Court to enquire into merits of the objection*.

The executing Court dismissed the objection filed by the petitioner under r. 58, O. XXI of the Civ. Pro. Code, to the attachment of mortgaged property in execution of mortgage-decree obtained by the decree-holder against the mortgagor.

Held, on revision, that the objection should have been decided on the merits. *Amir Chand v. Ram Saran Das*, 248 P.L.R. 1914=162 P.W.R. 1914.

SHADI LAL, J.

References :—8 P.R. 1897, F.; 4 C. 631, R.

Civ. Pro. Code (1908)—(Continued).

(334) O. XXI, rr. 58 to 63—*Claim petition dismissed—Revision to High Court whether lies*. *Subbu Reddier v. Kumaraswamy Reddier*, (1913) M.W.N. 856=21 Ind. Cas. 461. See Final Part, 1913, Col. 392.

(335) O. XXI, rr. 58, 63 and S. 47—*Claim petition filed by certain trustees claiming under trust-deed—Trust-deed found to be for benefit of judgment-debtors—Disallowance of claim in consequence—Finality of order—Appeal*.

The question whether an order is one governed by O. XXI, r. 63, or not, and whether it is conclusive or not, depends upon what the claimants allege in their claim petition on which the Court passes its order, and not what the Court finds in its order to be the real state of facts at the close of the inquiry into the claim petition.

So where certain trustees allege in their claim petition that they are the trustees appointed for the benefit of the creditors of the judgment-debtors, the order passed on such petition is one passed under O. XXI, r. 63, and is, therefore, conclusive and not appealable, although the Court may find that the trustees held the property for the benefit of the judgment-debtors.

If a mere perusal of the claim petition itself shows, that the claimant who puts the claim under r. 58, is really a trustee for the judgment-debtor, he cannot evade the provisions of S. 47 by choosing to call his application an application under O. XXI, r. 58, but if the refusal of the claim petition does not show that it cannot constitute a claim petition under r. 58, r. 63 of O. XXI will apply to any kind of order passed on such petition. *Muthukumara Chettiar v. Muthu K R V. Algappa Chettiar*, 21 Ind. Cas. 748.

SADASIVA IYER and SPENCER, JJ.

(335-a) O. XXI, r. 59. See Nos. 198, 334, *supra*.

(335-b) O. XXI, r. 60. See Nos. 85, 86, 198, 334, *supra*.

(335-c) O. XXI, r. 61. See Nos. 198, 334, *supra*.

(335-d) O. XXI, r. 62. See No. 334, *supra*.

(336) O. XXI, r. 63—*Objection proceedings—judgment-debtor when a party to.*

The question whether a judgment-debtor is to be regarded as a party to objection proceedings must depend upon the facts of each case. Where in objection proceedings, the contest was throughout between the judgment-debtor and the objector, and the executing Court allowed the objection despite the protests of the judgment-debtor.

Held, that the order of the executing Court was an order passed against the judgment-debtor and that he was a party to the execution proceedings and, therefore, entitled to bring a suit under O. XXI, r. 63. *Anant Ram v.*

Civ. Pro. Code (1908)—(Continued).

Damodar Das, 102 P.L.R. 1914=59 P.W.R. 1914=22 Ind. Cas. 797=84 P.R. 1914.

JOHNSTONE and BEADON, JJ.

References:—15 O. 674; 11 B. 114, F.

(337) O. XXI, r. 63—*Lis pendens—Execution of decree—Attachment of properties—Claim—Order allowing—Purchase of attached properties after order on claim petition but within one year—Purchaser not party to suit under S. 283—Not necessary party—No bar of limitation—Limitation Act, S. 22, cls. 1 and 2—Transfer of Property Act, S. 52.*

A attached certain properties as those of his judgment-debtor B in execution of a decree against the latter. C put in a claim as the owner of the attached properties and they were released by order passed on the claim petition. K purchased the properties from C after the date of the order in C's favour, but within one year from such date, within which period A instituted a suit under S. 283, Civ. Pro. Code, (1882) to set aside the order in favour of C. A did not make K a party to his suit, but K brought himself on record as a party after the expiry of one year from the date of the order on the claim petition.

Held, that K must be deemed to be an alienee pendente lite, (a) that he was not therefore a necessary party and that the suit was not barred by limitation.

A person who is not a necessary party to a suit cannot advance the plea of limitation, as S. 23, cl. 2 of the Limitation Act, excluded the operation of cl. 1 in such cases.

A suit under S. 283, Civ. Pro. Code (1882), O. XXI, r. 63 is only a continuation of the claim proceedings. Suits of this class, though called original suits, are not on their essence original actions but merely forms of appeal allowed by the Civ. Pro. Code in the guise of original suits (b). **Krishnappa Chetty v. Abdul Khader Saheb**, 26 M.L.J. 449.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 31 M. 262, R. (b) 35 C. 202 (P.C.), Appl.; 6 M.L.T. 154, F.; 18 B. 260; 12 C. 696; 4 M. 131; 35 C. 519; (1913) M.W.N. 134, R.

(338) O. XXI, r. 63—*Suit by decree-holder against judgment-debtor—Defence that decree was collusively obtained, whether available to defendant—Insolvency—Adjudication—Creditor of insolvent, if can enforce claim, without leave of Court—Pleadings.*

In a suit under O. XXI, r. 63 of the Civ. Pro. Code, a Court is not restricted to determine only the question as to whether the property ought to be attached or not. But when the decree-holder has been guilty of fraud in obtaining a decree, and has owing to that fraud purchased the property himself, if he brings a suit under the rule on the rejection of his claim, the defendant in the suit, against

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whom he had fraudulently obtained the decree and purchased the property, is entitled to set up the case that the suit from the beginning to the end was a fraud (a).

After an adjudication order, no creditor of a person, who has been adjudicated an insolvent, is at liberty to enforce any claim against the insolvent or against his property without the leave of the Court, as provided by both the Presidency Towns Insolvency Act and the Provincial Insolvency Act. **Sama Charan Bhattacharyya v. Bogala Charan Kundu**, 23 Ind. Cas. 755.

FLETCHER and RICHARDSON, JJ.

References:—(a) 17 M. 389, F.; 10 B. 659, D.

(339) O. XXI, r. 63—*Suit by judgment-debtor under—Maintainability—Prayer for possession, not necessary.*

It is open to the judgment-debtor to bring a suit of the nature contemplated in O. XXI, r. 63, Civ. Pro. Code, and it is not necessary for him to include a prayer for possession (a).

Therefore, where a judgment-debtor sued for a declaration of his right to certain lands attached by a creditor and for setting aside the summary order on a claim petition, it is unnecessary to consider whether he is in possession or not. **Sabella Appanna v. Malladi Appanna**, 16 M.L.T. 300=(1914) M.W.N. 893.

OLDFIELD and SESHAGIRI IYER, JJ.

References:—(a) 13 M. 366; 13 M.L.J. 367, R.

(340) O. XXI, r. 63—*Value of suit for purposes of jurisdiction—Right of appeal governed by Act in force at time of filing appeal—Alienation made pending temporary injunction not void—Sale by debtor to defeat creditor—Purchaser aware of fraudulent intention of vendor—Fraudulent transfer.*

In a suit for declaration under O. XXI, r. 63, of the Civ. Pro. Code, by the decree-holder, where there is no dispute as to title between the judgment-debtor and the other objector, and the former is merely a *pro forma* defendant, the value of the suit for purposes of jurisdiction is the amount of the decree.

Under the Punjab Courts Act, as it stood before the amending (Punjab Act I of 1912) there was no right of further appeal in a case decided by the first appellate Court, but at the date of filing an appeal from the appellate decree the Amending Act had come into force which conferred a right of second appeal from the decree appealed from.

Held, that the second appeal was competent under the circumstances of the case.

An alienation made pending a temporary injunction is not void.

A sale effected by a debtor with intent to defeat the just claims of a creditor is void if the purchaser is aware of the fraudulent intentions of the debtor. **Bhagwan Das v. Lala Kanshi Ram**, 253 P.L.R. 1914=145 P.W.R. 1914.

CHEVIS and SHADI LAL, JJ.

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(841) O. XXI, r. 63—Suit under—Proper Court fee—Nature of evidence to be taken in such suit. See COURT FEES ACT, No. 22, U.B.R. 1918, 3rd Cr., 181.

(841-a) O. XXI, r. 63. See Nos 334 and 395, *supra*.

(841-b) O. XXI, r. 66. See Nos. 87 and 88, *supra*.

(842) O. XXI, r. 69, cls. 1 and 3—Power of Court to adjourn sale after partially holding it—Meaning of 'debt and costs'—Judgment-debtor's right to adjourn sale by tendering balance.

Where properties of the judgment-debtor were sold in three lots, and, after the sale of two lots, he tendered to the bidding officer that portion of the decree amount which would have remained if the purchasers of the first two lots paid up the amounts, but the officer proceeded with the sale, *held*, the sale of the 3rd lot is not vitiated by irregularity or illegality and could not be set aside to the prejudice of a *bona fide* purchaser at the Court auction.

The words 'the debt and costs' in cl. (3) of O. XXI, r. 69, Civ. Pro. Code, could not be interpreted to mean the balance of the decree-debt and costs, which would remain, if by a legal fiction the sales of previous lots (not yet completed by the payment of the whole purchase-money) were taken as completed by treating the whole of the purchase-money as actually paid up.

A Court may, even without an application from the judgment-debtor, adjourn the sale after the sale of the first two lots, under O. 21, r. 69, cl. (1). *Raja of Kalahasti v. Sri Raja Venkataramiah Row Bahadur Garu*, (1914) M.W.N. 873.

SADASIVA IYER and NAPIER, JJ.

(343) O. XXI, r. 83, sub-r. (2), *provisos*, r. 92—Certificate to judgment-debtor to raise money by private transfer of property about to be sold in execution—Payment of money into Court—Payment to judgment creditor's pleader under order of Court—Confirmation of transfer, how to be made.

Payment to a judgment-creditor's pleader under the order of the Court is payment into Court within the meaning of the first proviso to sub-r. (2) of r. 83 of O. XXI of the Code of 1908. The pleader is, in such a case, made the agent of the Court to receive the money.

It is not necessary that any formal application should be made for the purpose of obtaining the Court's confirmation of a private transfer, nor is there any provision under which a formal order declaring such confirmation should be recorded (a).

When the Court directs a private purchaser under O. XXI, r. 83, to pay the purchase-money to the decree-holder and makes no objection to the sale, it, in effect, confirms the sale.

It is extremely doubtful whether a sale to a private purchaser under r. 83, comes within the purview of r. 92. But even if r. 92

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governs r. 88, there is no legal bar to the confirmation of a sale before the expiry of 80 days from the date of the sale.

On January 15, 1911, a Court gave a certificate to a judgment-debtor under O. XXI, r. 83, Civ. Pro. Code, for private sale of his property. On January 24, 1911, the property was attached in execution of another decree. On January 31, 1911, the judgment-debtor, the first decree-holder and the proposed purchaser appeared before the Court and informed it that the private sale had been effected, whereupon the Court ordered the proposed purchaser to deliver the money to the decree-holder, which was done. The purchaser made an application for the withdrawal of the attachment of January 24, 1911.

Held, that the purchaser had acquired an absolute title and the attachment could not proceed. *Mijan Ali v. Rup Chandra Sarma*, 21 Ind. Cas. 210.

STEPHEN and MULLICK, JJ.

Reference:—(a) 13 B. 670, R.

(344) O. XXI, r. 88—Pre-emption—Persons entitled to—Vendee a complete stranger.

The object of O. XXI, r. 88, is to enable co-sharers in a mahal to keep out strangers. It provides for only one class of pre-emptors and lays down one rule, namely, that one who is a co-sharer of the undivided property of which a share is sold is entitled to pre-empt that share when the highest bid is made by a person who is not a co-sharer. *Dambar Singh v. Murari Lal*, 12 A.L.J. 1148.

CHAMIER, J.

(345) O. XXI, r. 89—Deposit of money by judgment-debtors, other than those applying to set aside sale—Decree-holder in position to receive amount.

It is not necessary that a judgment debtor applying to set aside a sale under O. XXI, r. 89, should deposit the entire amount mentioned in the sale proclamation; he can take advantage of the sums deposited by the other judgment-debtors, provided that the entire amount mentioned in the sale proclamation is fully made up and the decree-holder is in a position to draw the full amount from Court. *Muttathil Krishna Menon v. The Collector of Malabar*, 22 Ind. Cas. 53.

TYABJI, J.

References:—23 B. 723, D.; Civil Appeal No. 82 of 1911, R.

(346) O. XXI, r. 89—Is the judgment-debtor liable to pay interest on the amount specified in the proclamation of sale from the date of payment made by the auction-purchaser to the date he actually paid money under this rule.

Held, that an order requiring the judgment-debtor to pay to the mortgagee (decree-holder) interest on the amount due to him from the date of payment into Court by the auction-purchaser till the date of payment made by the

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judgment-debtor under this rule was illegal. **L. D. Attadies v. R. M. K. Chetty**, 7 Bur. L. T. 68=24 Ind. Cas. 479.

HARTNOLL, OFFG. C.J., and ORMOND, J.

(347) O. XXI, r. 89—*Deposit by judgment-debtor to have sale set aside—Deposit short—Mistake of judgment-debtor due to information received from Sheristadar or chief ministerial officer of Court, effect of—Act of Court.*

Under O. XXI, r. 89 of the Code, a judgment-debtor deposited in Court within the prescribed period an insufficient amount represented to him by the Sheristadar of the Court as being recoverable under the decree. The judgment-debtor, however, petitioned for permission to deposit the balance, but the lower Court rejected the petition as filed after the prescribed time and confirmed the sale:

Held, that, as the judgment-debtor was led into the mistake by an officer of the Court who was entitled in the course of his duties to represent what was the amount due from the judgment-debtor, the sale should be set aside. **Ghulam Mahomed Mustafa v. Manindra Nath Bhattacharyya**, 22 Ind. Cas. 842.

FLETCHER and CHATTERJEE, JJ.

References:—18 O. 255; 7 Ind. Cas. 52, F.; 6 O. 449 (F.B.)=8 C.W.N. 288, R.

(348) O. XXI, r. 89—*Application need not be in writing.* **Mariappa Annam v. Hari Hara Iyer**, 14 M.L.T. 534=(1914) M.W.N. 62=22 Ind. Cas. 291. See Final Part, 1913, Col. 385.

(349) O. XXI, r. 89—*Sale set aside—Fees paid—Whether subject of contribution.* See MORTGAGE (CONTRIBUTION), No. 1, 12 A.L.J. 394.

(349-a) O. XXI, r. 89. See No. 217, *supra*.

(350) O. XXI, r. 89, and S. 115—*Person owning property or possessing interest, meaning of—S. 115—Erroneous decision—Revision.*

Under O. XXI, r. 89 of the Code, the judgment-debtor would continue to own the property sold in Court auction, on the date of the application, (1) if the auction sale has not been confirmed and (2) if the judgment-debtor has not before that date conveyed away all his rights (a).

A decision of the lower Court is not revisable under S. 115 of the Code because it is erroneous in law. **Adapa Subbarayudu v. Lakshminarasimma**, (1914) M.W.N. 147=15 M.L.T. 98=22 Ind. Cas. 198.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 32 O. 107; 25 B. 681, *Expt.*; (1913) M.W.N. 101, F.; 31 A. 186, *Approved in part*.

(351) O. XXI, r. 90—*Material irregularity—Effect of a sale made after stay order by High Court—High Court order—Date of taking effect.*

Where a stay order has been passed by a superior Court, it immediately suspends the

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power and jurisdiction of the lower Court to conduct further proceedings, and take effect immediately unless it is stated to take effect from the date of communication.

A sale held in contravention of an order of stay by a superior Court must be set aside as having been held without jurisdiction.

Where the material irregularity is very grave, it is unnecessary to prove substantial injury also. **Ramanatha Chetty v. Arunachalam Chetty**, (1914) M.W.N. 46=15 M.L.T. 151=26 M.L.J. 275=22 Ind. Cas. 99.

SADASIVA IYER and SPENCER, JJ.

(352) O. XXI, r. 90—*“Immoveable property”—Whether sale of some of properties sold can be set aside—Substantial loss with regard to some if vitiated sale as to whole.*

Where four lots of immoveable properties were sold in execution and it was found that there was substantial injury caused to the judgment-debtors with regard to one of the lots, but not with regard to the other three.

Held, that, in O. XXI, r. 90, “immoveable property” means any one of the immoveable properties, the sale of which is liable to be set aside upon the grounds mentioned in the section.

That the Court was not bound to set aside the sale of all the four lots by reason of irregularity and substantial loss caused thereby with regard to one of them. **Rajani Nath Rakshit v. Kusum Kamini Mazumdar**, 18 C.W.N. 947=24 Ind. Cas. 64.

WOODROFFE and CARNDUFF, JJ.

Reference:—9 C. 656 (662), R.

(353) O. XXI, r. 90—*Sale of immoveable property in execution of money-decree—Holder of another decree against the same judgment-debtor whose application for execution had been dismissed for non-prosecution prior to sale, if entitled to apply for setting aside the sale.*

In execution of a decree for money the immoveable properties of the judgment-debtors were sold and purchased by the opposite party on 9th April 1912. The petitioner who also held a decree for money against the same judgment-debtors had applied on the 18th March 1912, for execution of his decree; but his application was dismissed for non-prosecution on the 18th May 1912, and on the 20th May 1912, the petitioner applied to the Court to have the sale set aside under r. 90, O. XXI, Civ. Pro. Code, on the ground of fraud and material irregularity. The lower Court rejected this application holding that he was not entitled to make it.

Held, that the dismissal of the petitioner's application for execution of his decree on the 18th May for non-prosecution did not affect the right of the petitioner to a share in a rateable distribution of the assets, and on the date on which the application to set aside the sale was made under r. 90, it was made by a person

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entitled to a share in the rateable distribution of the assets and consequently should have been entertained by the Court. **Byomkesh Chackrabarthi v. Jatindra Nath Roy**, 18 C.W.N. 1311=24 Ind. Cas. 83.

MOOKERJEE and BEACHCROFT, JJ.

(354) O. XXI, r. 90—Civ. Pro. Code. (1882) S. 311—Landlord and tenant—Non-transferable occupancy holding—Transfer of portion of holding—Sale of holding in execution of rent-decree—Application by transferee for reversal of sale, if maintainable—Transfer of entire holding and that of portion, distinction between.

A transferee of a portion of a non-transferable occupancy holding is entitled to apply under r. 90 of O. XXI, Civ. Pro. Code, for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords (a).

If a tenant has transferred his entire holding, which is not transferable, and has surrendered possession to the transferee, he has in essence abandoned the holding. The tenancy has terminated and the landlord has become entitled to re-enter. On the other hand, if a portion only of the holding has been transferred, even though the holding be non-transferable, there is no forfeiture. The tenancy still subsists and the landlord is entitled to look to his tenant for payment of rent (b).

Distinction between S. 311 of the old Code of Civil Procedure and r. 90 of O. XXI of the present Code pointed out. **Abdul Aziz v. Tafajoddin**, 23 Ind. Cas. 839.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 9 C.W.N. 134, Rel.; 8 C.W.N. 232; 8 C.W.N. 55; 7 C.L.J. 282; 7 Ind. Cas. 477=12 C.L.J. 609; 16 Ind. Cas. 977=17 C.W.N. 163=16 C.L.J. 548; 17 Ind. Cas. 125=16 C.L.J. 139; 17 Ind. Cas. 126=16 C.L.J. 141. R.; 11 C.W.N. 312; 3 Ind. Cas. 461=13 C.W.N. 652; 13 Ind. Cas. 487=15 C.L.J. 388=16 C.W.N. 421, D. (b) 20 C. 590; 1 C.W.N. 160; 1 C.W.N. 162, Rel.

(355) O. XXI, r. 90—Decree holder not applying to Court for execution before receipt of assets—Not a person whose interests are affected—No right to apply for setting aside sale on account of fraud—Scope of the term 'interests'.

A decree-holder who did not apply to the Court for execution of his decree before the receipt of the assets by the Court is not a person 'whose interests are affected by the sale' and is therefore not entitled to apply under O. XXI, r. 90, to have the sale set aside on the ground of fraud (a).

In other words, any person who has not obtained the right to share in a rateable distribution is not entitled to apply for setting aside the sale.

The term 'interest' must be limited to and have reference to the immovable property

Civ. Pro. Code (1908)—(Continued).

sold (a). **Kathiresam Chettiar v. Ramasami Chettiar**, 27 M.L.J. 301=1914) M.W.N. 871.

SADASIVA IYER and NAPIER, JJ.

Reference:—(a) 17 C.W.N. 80, F.

(356) O. XXI, r. 90—Formal array of parties in the preamble of application, necessity of.

Held, that there is no absolute necessity for a judgment-debtor filing an application under O. XXI, r. 90, Civ. Pro. Code, to set out in the preamble of application any formal array of parties; and therefore such an application should not be thrown out simply because an auction-purchaser was not shown therein as a party. **Ghazaffar Husain (Syed) v. Lala Ram Ratan**, 17 O.C. 306.

KENDALL, J.C.

Reference:—39 C. 687, R.

(357) O. XXI, r. 90—Mis-statement in the sale proclamation—Both decree-holder and judgment-debtor under mistake as to property sold—Estoppel of judgment-debtor—Rights of auction purchaser before and after confirmation. **Raja of Kalahasti v. Maharaja of Venkata-giri**, 25 M.L.J. 198=14 M.L.T. 320=21 Ind. Cas. 389. See Final Part, 1913, Col. 387.

(357-a) O. XXI, r. 90. See No. 217, *supra*.

(358) O. XXI, rr. 90, 92—Sale without attachment—Irregularity—Hindu Law—Joint family—Son's right to set aside sale held in execution of decree against his father.

If property is sold in execution of a decree without attachment, it is a mere irregularity (a).

Where the property is ancestral and it is the pious duty of the sons to pay the father's debt, the sons must prove that the debt was contracted for immoral purposes, before they can claim to set aside the sale of the property held in satisfaction of that debt (b). **Panaru Shukul v. Baldeo Saha**, 21 Ind. Cas. 46.

LYLE, J.

References:—(a) 21 A. 311=A.W.N. (1899) 84, F.; (b) 15 Ind. Cas. 903=9 A.L.J. 653, F.

(359) O. XXI, rr. 90, 92—Auction sale—Insufficient notice of—Loss.

Held, that, where several improper orders are passed relating to the sale of judgment-debtor's property, and the decree-holder does not comply with the instructions given by the executing Court, and the judgment-debtor has suffered substantial loss thereby, the proper course is to set aside the sale, and not to direct the judgment-debtor to resort to the cumbrous remedy by fresh suit against his guardian and the decree-holder.

Held, also, that, where, on account of insufficient notice of sale, the property of a judgment-debtor has been knocked down for an inadequate price, the sale is liable to be set aside as irregular. **Miraj Din v. Dilbagh Rai**, 48 P.W.R. 1914=144 P.L.R. 1914.

KENSINGTON, J.

Civ. Pro. Code (1908)—(Continued).

(360) O. XXI, r. 90, O. XLIII, r. 1 (e), and S. 141—*Application to set aside sale—Dismissal for default—Application for restoration, dismissal of—Appeal—S. 141—O. XLIII, r. 1 (e)—Sufficient cause for restoration.*

An application to set aside a sale under r. 90 of O. XXI of the Civ. Pro. Code, having been dismissed for default, the applicant applied for restoration of the case, but this application was refused:

Held, that no appeal lay against the order refusing to restore the case.

Cl. (e) to r. 1 of O. XLIII of the Code did not apply to this order.

S. 141 of the Code which replaces S. 647 of Act XIV of 1882 has not effected any alteration in the law.

On the date fixed for hearing of appellant's application to set aside a sale, the appellant came to Court, and finding the Judge engaged in the trial of another suit, left the Court and went on another business leaving no instructions to his pleader. Returning later, he found that his case had been called on in the meanwhile and dismissed for non-prosecution.

Held, that there were no grounds for restoring the case. *Charu Chandra Ghosh v. Chand Charan Row Chowdhry*, 19 C.W.N. 25.

MOOKERJEE and BEACHCROFT, JJ.

References:—13 B. 12; 10 Bom. L. R. 904, *Rel.*; 26 M. 599; 34 A. 426, *N.F.*

(361) O. XXI, r. 91—*Execution sale—Saleable interest none or small—Whether sale may be set aside—Civ. Pro. Code (1882), S. 813.*

O. XXI, r. 91, Civ. Pro. Code, contemplates that either the judgment-debtor had no interest at all or that the interest was not one which he could sell.

When there is a total failure of consideration and the judgment-debtor had no saleable interest whatever in the property, the sale can be set aside and the purchaser can get a refund of his purchase-money. But when the judgment debtor had saleable interest, however small, the purchaser purchases at his own risk, and there is no warranty that the property will answer to the description given of it, and the sale cannot be set aside. *Sheo Gobind Singh v. Dhanukdhari Singh*, 21 Ind. Cas. 774.

N. R. CHATTERJEE and WALMSLEY, JJ.

References:—8 C.L.R. 468; 9 C. 506=12 C. L.R. 488; 9 C. 626; 10 C. 368, R.; 28 C. 235; 9 A. 167=A.W.N. (1887) 6, *Rel.*

(362) O. XXI, r. 91—*Setting aside auction sale on the ground that judgment-debtor had no saleable interest—Fraud of decree-holder concealing his knowledge.*

Where an auction-purchaser of land and two houses on it at a Court sale found that the judgment-debtor had interest only in the

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houses and not in the land and then sought to set aside the sale.

Held that r. 91 of O. XXI does not apply where the judgment-debtor has no saleable interest in a portion only of the property sold at the auction.

Held further that the contention that the decree-holder knew that the judgment-debtor had no interest in the land and fraudulently concealed that knowledge thus inducing the auction-purchaser to buy the land, was not supported by the facts found in the case. *Maung Tha Dun v. S. S. Chockallogam Chetty*, 7 Bur. L.T. 18=23 Ind. Cas. 388.

PARLETT, J.

(363) O. XXI, rr. 91, 92 (2)—*Auction sale—Proceedings to set aside sale—Real owner not necessary party.*

A person alleged by the auction-purchaser as the real owner of the property is not a necessary party to a proceeding to set the sale aside. The proper course is to proceed against him by suit, otherwise he would be deprived of the benefit of a second appeal. Proceedings under O. XXI, r. 92 (2), are not final and a third person is not concluded by an order under that rule. *Koll Kandadai Amman Ramannajachariar v. The Conjeevaram Hogsanpet Danarakshaka Nidhi Ltd.*, 24 Ind. Cas. 44.

OLDFIELD, J.

References:—8 M. 99; 11 M. 269, *F.*

(363-a) O. XXI, r. 92. See Nos. 358 and 359, *supra*.

(363-b) O. XXI, r. 92 (2). See No. 363, *supra*.

(363-c) O. XXI, r. 95. See No. 826, *supra*.

(364) O. XXI, rr. 95, 97—*Limitation Act (1908), Sch. II, Art. 167—Failure to complain of obstruction within thirty days—Fresh application for possession, whether barred.*

The failure of the decree-holder purchaser to take proceedings under O. XXI, r. 97, Civ. Pro. Code, within the time limited by Art. 167 of the Limitation Act, does not prevent him from putting in a fresh application for delivery of possession under O. XXI, r. 95. *Abdul Karim Sahib v. Timmaraya Chetty*, 24 Ind. Cas. 512

WALLIS and AYLING, JJ.

Reference:—13 M. 504, *F.*

(364-a) O. XXI, r. 96. See No. 326, *supra*.

(364-b) O. XXI, r. 97. See No. 864, *supra*.

(364-c) O. XXI, r. 99. See No. 426, *infra*.

(364-d) O. XXI, r. 100. See Nos. 89, 199, and 205, *supra*.

(365) O. XXI, r. 101—*Title, if can be investigated—Mortgagee, if holds on his account.*

No question of title can be investigated in a proceeding under r. 101 of O. XXI of the Civ. Pro. Code.

A mortgagee from a tenant is in possession of the holding on his own account within the

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meaning of r. 101 of O. XXI of the Code (a). *Kedar Nath Bag v. Saday Chandra Nandi*, 19 O.L.J. 13=22 Ind. Cas. 707.*

MOOKERJEE and BEACHCROFT, JJ.

. *References* :—(a) 20 W.R. 378 ; 89 C. 487, D.

(366) O. XXI, r. 101—*Claim to be restored to possession—Joint family member of purchaser from—Execution purchaser. Radha Gobind Misra v. Raghunath Misra*, 18 C.L.J. 138=20 Ind. Cas. 253=18 O.W.N. 695. See Final Part, 1913, Col. 388.

(366-a) O. XXI, r. 101. See Nos. 89 and 205, *supra*.

(367) O. XXI, r. 101 and S. 70—*Decree—Execution proceeding transferred to Collector—Sale of property—Purchaser put in possession—Dispossession of third party—Third party applying to Court to be restored to possession—Jurisdiction of the Court to make the order—Rules 13, 14 of the rules made under S. 70 of the Civ. Pro. Code.*

In execution of a decree sent to him under S. 68 of the Civ. Pro. Code, the Collector sold property in dispute and issued to the purchaser a certificate of sale. The Collector subsequently put the purchaser in possession of the property displacing a third party who claimed to be in possession in his own right. The third party applied to the Civil Court under O. XXI, r. 101, and was reinstated in possession. The purchaser thereupon applied to the High Court, contending that, as the Collector was seized of the execution proceedings, the Civil Court was without jurisdiction in making the order it did :—

Held, that the order passed by the lower Court was within its jurisdiction and that it was properly made. *Arjun Raghu Narok v. Krishnaji Yenlmadhav Yalimbe*, 16 Bom. L. R. 637=38 B. 673.

BEAMAN and HAYWARD, JJ.

(368) O. XXI, r. 103—*Hindu Law—Document merely declaring the divided status of family—Whether registrable—Civ. Pro. Code, 1882, S. 335—Art. 11—Limitation Act—Undivided share in joint family purchased in Court auction—Effect of symbolical delivery—Suit for partition and separate possession—Limitation. See REGISTRATION, No. 1, 15 M.L.T. 168.*

(368-a) O. XXI, r. 133.—See No. 426, *infra*.

(369) Ors. XXI, XXXVIII—*Attachment of property as that of insolvent—Claim proceedings—Procedure applicable. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 11, 12 A.L.J. 24.*

(370) O. XXII—*Death of one plaintiff who had no interest in suit—Legal representative of such plaintiff, whether should be impleaded.*

In a mortgage suit H was made a co-plaintiff simply because he held succession certificate to the estate of one A who was one of the mortgagees. As a matter of fact, H had no

Civ. Pro. Code (1908)—(Continued).

interest in the mortgage in suit. H died pending the litigation :

Held, that it was not necessary to bring his representatives on to the record. *Gulsher Khan v. Mashuq Ali Khan*, 22 Ind. Cas. 929.

RICHARDS, C.J., and BANERJEE, J.

(371) O. XXII, r. 3—*Jurisdiction—Rule, hearing of—Rule obtained on behalf of dead person. Aanandamoy Das v. Rudra Mahanti*, 18 O.L.J. 141=21 Ind. Cas. 407. See Final Part, 1913, Col. 388.

(372) O. XXII, r. 3, O. XXX, r. 4—*Contract Act, S. 45—Death of one of the plaintiffs—Whether legal representative of the deceased, a necessary party. Bal Kissen Das Daga v. Kanhya Lal*, 17 O.L.J. 648=21 Ind. Cas. 509. See Final Part, 1913, Col. 389.

(372-a) O. XXII, r. 4 (2). See No. 384, *infra*.

(373) O. XXII, r. 4 (3)—*Suit for declaration of shares in joint property—Death of defendant during pendency of appeal—Application for substitution of heirs barred—Ignorance of law no excuse—Abatement of appeal—Interpretation of r. 4 (3).*

During the pendency of an appeal in the Chief Court, one of the defendants-respondents died. More than six months after his death an application was made to bring his heirs on the record as defendants-respondents, and ignorance of law was pleaded to account for the delay in applying :

Held, that ignorance of the law was not sufficient cause (a).

In a suit, in which the sharers of the parties in joint property have to be determined, the Court must have all the shares before it, and where the heirs of one of the parties who has died have not been brought on the record, the suit or the appeal, as the case may be, must abate (b). *Hadu v. Lala*, 15 P.L.R. 1914=16 P.W.R. 1914=21 Ind. Cas. 951.

JOHNSTONE and BEADON, JJ.

References :—(a) 15 Ind. Cas. 708 ; 204 P.L.R. 1912 ; 257 P.W.R. 1912, R. ; 13 M. 269 ; 81 P.R. 1886 (F.B.) ; 43 P.R. 1889, *Expl.* (b) 17 C. 906 (910) ; 18 Ind. Cas. 182 ; 62 P.R. 1914 ; 85 P.L.R. 1913 ; 89 P.W.R. 1913 ; 53 P.R. 1906 ; 103 P.L.R. 1906, *F.*

(374) O. XXII, rr. 4 and 9—*Application for substitution of names beyond time—Application of S. 5, Limitation Act. See LIMITATION ACT (1908), No. 7, 12 A.L.J. 299.*

(375) O. XXII, r. 5—*Decree against wrong representative—Execution of decree—Property recovered—Rightful representative substituted—Property restored to person who had been in possession—Order not appealable—Pleadings—Practice.*

D sued R for possession of a house. R having died during the pendency of the suit, both K and A applied to be brought on the record as representative of the deceased, each claiming to be his sole heir. K was entered as representative and the application of A was disallowed.

IV. Pro. Code (1908)—(Continued).

K confessed judgment and a decree for possession of the property was passed in favour of D, who in execution of the decree took possession. In the meanwhile A had appealed against his exclusion, and the appellate Court having decided that he was the representative of R, the case was sent back for disposal. A applied for recovery of possession of the property D had obtained possession of in execution. There was nothing on the record to show that A had been in possession or that he was evicted by the executing Court. H's application, however, was granted and N who had been previously in possession was evicted. Thereupon N applied for restoration of a *satus quo* and obtained an order in his favour from the Court.

Held, that no appeal lay from the order restoring the *satus quo*.

The Chief Court will not allow an appellant to raise a new point in the course of second appeal. *Amle Chand v. Narasing Das*, 222 P.L.R. 1914 = 123 P.W.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

(376) O. XXII, r. 8—*Suit instituted by insolvent after adjudication of insolvency—Receiver, whether can continue such suit.*

After a person has been adjudicated an insolvent, he has no right to institute a suit for recovery of debts which had become legally vested in the Receiver; nor can the Receiver continue such a suit under O. XXII, r. 8. *Ramasami Aiyengar v. Pavadal Chetty*, 28 Ind. Cas. 813.

SADASIVA IYER, J.

(377) O. XXII, r. 9—*Abatement of appeal, order as to, setting aside of—Death of principal respondent, plea as to ignorance of, weight of—Limitation, saving of—Presumption—Appellant, duty of, to keep himself informed of respondent's death.*

An order as to abatement of an appeal because of the death of a principal respondent cannot be set aside on the mere statement of the appellant to the effect that owing to his ignorance of the respondent's death he could not, within the prescribed period of limitation, apply for bringing the legal representatives of the deceased on to the record; especially where it is found that the appellant and the respondent resided at no great distance from each other and no reason can be shown why the former did not, as in duty bound, keep himself informed of the occurrence. *Lala Govind Prasad v. Ganga Prasad*, 24 Ind. Cas. 275.

PIGGOTT, J.C.

References:—12 Ind. Cas. 871 = 60 P.R. 1911 = 42 P.L.R. 1912 = 238 P.W.R. 1911, &c.

(377-a) O. XXII, r. 9. See No. 874, *supra*.

(378) O. XXII, r. 9, O. I, r. 10—*Application to set aside abatement—S. 5, Art. 171, Limitation Act (1908)—Probate and Administration Act, S. 4—Delay in obtaining probate—Executor applying for probate—Effect.*

IV. Pro. Code (1908)—(Continued).

Plaintiff sued the defendants 1 to 4 on 15-9-1913 on a contract of partnership and prayed for an account and for his share of the profits. The 2nd defendant died on 23-11-1913, leaving a will whereby he appointed the plaintiff as his executor. Plaintiff applied for probate on 5-3-1914. On 18-9-1914 the Court made a declaration that the suit abated as against the 2nd defendant and adjourned the case for 3 weeks in order that the plaintiff might apply to set aside the abatement. Plaintiff applied on 2-10-1914 to set aside the abatement, and to excuse the delay in making the application on the ground that the testator's son used threats to the plaintiff, that plaintiff for a long time hesitated to take out probate and finally determined to apply on 5-3-1914 and had not yet obtained the grant, and that he was also under the impression that, if he came on record as the legal representative of the 2nd defendant, he could not sue himself.

Held that no sufficient cause was shown for excusing the delay in bringing the legal representative on the record or in applying to set aside the abatement, and that the application was barred by limitation (*vide* S. 5 and Art. 171, Limitation Act) (a).

Where an executor applies for probate, he must be taken to have accepted the office of executor and he accordingly becomes the legal representative of the deceased for all purposes, and the property of the deceased vests in him as such. (S. 4, Probate and Administration Act). *Kandasami Chetti v. Murugappa Chetti*, 16 M.L.T. 547.

BAKEWELL, J.

Reference:—(a) 35 B. 393, D.

(379) O. XXII, r. 10—*Suit, maintainability, of—Devolution of interest pendente lite—Suit, if can be continued by original plaintiff—Cause of action—Decree in such suit, effect of.*

The trial of a suit cannot be arrested merely by reason of the devolution of the interest of the plaintiff. The successor in interest may, if he chooses, obtain leave of the Court under O. XXII, r. 10 of the Code to continue the suit; but if he does not do so, the original plaintiff may continue the suit, and his successor will be bound by the result of the litigation. The consequence will be that the plaintiff, if successful, will obtain a decree which will anure to the benefit of his successor.

The suit, carried on with the leave of the Court by the person who has acquired an interest by devolution, is not a new suit. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

A suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement. An exception to this rule, namely, that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of

Civ. Pro. Code (1908)—(Continued).

the altered conditions, is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. **Rai Charan Mandal v. Biswa Nath Mandal**, 20 O.L.J. 107.

MOOKERJEE and BEACHCROFT, JJ.

(379-a) O. XXII, r. 11. See No. 129, *supra*.

(380) O. XXIII and S. 107—*Suit dismissed in lower Court and appeal preferred—Power of appellate Court to permit appellant to withdraw from appeal with liberty to bring fresh suit.*

A plaintiff-appellant cannot be permitted by the appellate Court to withdraw from his appeal with liberty to bring a fresh suit, his suit having been dismissed in the lower Court and his appeal having been against that dismissal. **Choragudi Chinna Kotayya v. Sri Raja Varadaraja Appa Row Bahadur Zamindar Garu**, 16 M.L.T. 186=27 M.L.J. 244.

OLDFIELD and NAPIER, JJ.

References :—35 B. 261, *F.*; 11 M. 322; (1912) M.W.N. 1003, *Not F.*

(381) O. XXIII, r. 1—*Withdrawal of suit with permission to bring a fresh suit—Absence or incompleteness of evidence. Khub Chand v. Ajodhya Prasad*, 11 A.L.J. 733=21 Ind. Cas. 76. See Final Part, 1913, Col. 391.

(381-a) O. XXIII, r. 1. See Nos. 19, 200, 201 and 278, *supra*.

(382) O. XXIII, r. 1, (2) (b) and S. 115—*Sufficient cause, meaning—Leave to withdraw with liberty to bring a fresh suit—Ill-advised grant of—Material irregularity—Revision.*

Where a District Munsif granted permission to withdraw a suit with liberty to bring a fresh suit, after a substantial portion of the plaintiff's case had been heard, on his affidavit that (1) he could not attend the hearing owing to his brother's death, (2) he wished for the issue of a commission, apparently then first mentioned, and (3) that he wished to have certain measurements and a plan prepared.

Held, that the order granting permission was unsustainable because he acted on nothing in any way resembling a formal defect.

Held also that his discretion was not exercised judicially, since it was exercised in spite of the defendant's opposition to condone defects in the plaintiff's conduct of the case which were entirely due to his default.

An ill-advised grant of permission to withdraw suit with leave to sue again under O. XXIII, r. 1 (2) (b) may be such a material irregularity as is contemplated by S. 115 (c), Civ. Pro. Code (1908).

The term 'sufficient ground' referred to in O. XXIII, r. 1 (2) (b) must be *ejusdem generis*

Civ. Pro. Code (1908)—(Continued).

with the defect referred to in r. 1 (2) (a). **Alia Gounden v. Jagan Mandalathipathi Gopanna Mauradiyar**, 16 M.L.T. 253=(1914) M. W.N. 832=27 M.L.J. 480.

OLDFIELD and SESHAGIRI IYER, JJ.

References :—37 B. 682, *F.*; (1911) M.W.N. 105, *R.*

(383) O. XXIII, r. 1 (3)—*Applicability to execution proceedings. See EXECUTION OF DECREE, No. 2, (1914) M.W.N. 159.*

(384) O. XXIII, r. 1, O. XXII, r. 4 (2)—*Legal representative of deceased defendant not brought on record within time—Withdrawal of suit with liberty to bring fresh suit—New suit lies against whom. Gade Seshumma v. Bulusu Venkatasuryanarayana*, 14 M.L.T. 485=(1914) M.W.N. 61=22 Ind. Cas. 260. See Final Part, 1913, Col. 391.

(385) O. XXIII, r. 3—*Compromise of suit—Razinama, terms of—Executable as decree—Terms—Validity of—Not impeachable in execution proceedings—Tender—Which is proper—Conditions essential—Costs—When to be awarded.*

When a particular term is a part of the decreed provisions in a suit, and not merely one of the recorded provisions, such term being part of the decree creates a liability which can be enforced in execution proceedings.

Even if a term could not be lawfully made part of the decree, once it has been so made the person bound by the decree cannot, in execution, object to that term as not binding upon him (a).

A mere offer by a posted letter that a defendant is ready to execute a release, without having a document of release ready for delivery, is not a proper offer.

A plea of tender is incomplete as an answer to an action unless accompanied by a tender in Court (b).

When the plaintiff relies upon several invalid and even dishonest pleas, besides the plea on which he has succeeded, he is not entitled to any costs. **Sabapathi Pillay v. Yanmahalinga Pillay**, 15 M.L.T. 206=(1914) M.W.N. 256=26 M.L.J. 331=23 Ind. Cas. 581.

AYLING and SADASIVA IYER, JJ.

References :—(a) 36 C. 192, *D.*; 30 M. 421, *F.* (b) 16 B. 141; 24 A. 401, *F.*

(386) O. XXIII, r. 3—*Alienation of religious office—Validity—Suit in respect of such office—Compromise—Validity—Plaintiff representing the public—Compromise by such plaintiff whether binding on public. See RELIGIOUS OFFICES, No. 1, 26 M.L.J. 315.*

(386-a) O. XXIII, r. 3. See Nos. 134 and 214, *supra*.

(387) O. XXIII, r. 4—*Agreement to abide by sum fixed by other party—Signature by some parties and by pleader of the rest—No objection taken to the sum mentioned—Decree—Lawful adjustment—Valid—*

Civ. Pro. Code (1908)—(Continued).

Authority to compromise question of fact—Vakalat—Form of—Sind Civil Court Circulars, Form No. 4.

Where some of the appellants actually signed an agreement to abide by the sums to be mentioned by the other side in settlement of the litigation, and the rest of the appellants were present when their pleaders signed the agreement on their behalf, and where, in the presence of the appellants' pleader, the other side mentioned the sums to which no objection was made, and the Court granted a decree for the sums so mentioned.

Held, that the compromises were properly accepted as lawful compromises by the lower Court under O. XXIII, r. 4, Civ. Pro. Code (1908) (a).

A pleader has ordinarily no power to compromise and the power to compromise could not now be given in the *vakalatnama* in view of Form No. 4 prescribed at p. 160, Sind Courts Civil Circulars. But the question whether a pleader was duly authorised to compromise or not is a question of fact. *Mistri Mahomed Umar v. Seth Chhansing*, 8 S.L.R. 91.

HAYWARD, J.C., and CROUCH, A.J.C.

Reference :—(a) 6 S.L.R. 166, F.

(388) O. XXIII, and Sch. II, r. 17—Compromise amending award—Decree to be based thereon—Ten days time for objection not necessary. See *AWARD*, No. 5, 27 P.W.R. 1914.

(389) O. XXV—Security for costs—Court's power to require—Poverty of plaintiff, whether ground for taking security—Substantial interest in suit—Agreement to give portion of decretal property on supplying funds to carry on litigation—Illegality—Maintenance—Public policy. *Harl Nath Singh v. Ram Kumar Bagchi*, 20 Ind. Cas. 703=18 C.W.N. 119=19 C.L.J. 59. See *Final Part*, 1913, Col. 393.

(390) O. XXVI, r. 10 (2)—Application by one of the parties to examine Commissioner—Court when can refuse. See *ACKNOWLEDGMENT*, No. 1, 19 C.L.J. 87.

(390-a) O. XXVI, r. 11. See No. 8, *supra*.

(391) O. XXVI, rr. 12, 16—Appendix D, Form 21—Preliminary decree—Commissioner to be formally appointed—Receiver or Commissioner—Conduct of parties—Estoppel as to powers of the person appointed—Objections to report of Commissioner—His examination.

In a suit for dissolution of partnership and accounts, the Court passed an order giving a preliminary decree for dissolution and fixing the shares of the partners. No formal decree, however, was drawn up, but on the same day an order was passed directing *inter alia* that S be appointed Receiver and that a copy of the decree should be sent to him, and he was instructed to submit a 'report'.

Held, that the Court should have passed a formal preliminary decree in Form 21, Appendix D, Civ. Pro. Code, and if it wanted S to

Civ. Pro. Code (1908)—(Continued).

do any more than act as a Receiver, it should have recorded an order to that effect.

But where the conduct of the parties, and the action of, and expressions used by them and by the Court, made it clear that all parties accepted S, as a Commissioner to examine accounts, neither party could, in view of S. 99, Civ. Pro. Code, be allowed in the Chief Court to go back upon this.

Where objections are filed to the report of a Commissioner, the objectors should be allowed to examine the Commissioner upon his report, and to substantiate their objections by evidence. *The Firm of Murl Mal Dayal Chand through Nihal Chand v. Lachman*, 74 P.L.R. 1914=45 P.W.R. 1914=24 Ind. Cas. 526.

JOHNSTONE and CHEVIS, JJ.

(391-a) O. XXVI, r. 16. See No. 391, *supra*.

(392) O. XXIX, r. 1—*Plaint—Suit by Corporation—Plaint signed by principal officer who is also am-mukhtear, if sufficient.*

In a suit brought by a Corporation, a limited Company, the plaint was signed by the principal officer of the Corporation who also was the *am-mukhtear* of the Corporation :

Held, that this was a sufficient compliance with the provisions of r. 1, O. XXIX of the Civ. Pro. Code, and that the additional circumstance that he was also the *am-mukhtear* of the Company did not invalidate his act as the principal officer. *Chandra Sekhar Zemindary Co., Ltd. v. Ram Kumar Halder*, 22 Ind. Cas. 674=20 C.L.J. 39.

MOOKERJEE and BEACHOROT, JJ.

(393) O. XXX, r. 1—*Suit in the name of firm—Plaint, verification of.*

Two or more persons carrying on a business in the name of a firm can institute a suit in the name of the firm itself (a).

When a suit is brought in the name of the firm any of the partners can sign and verify the plaint. It is not necessary that all or even two partners should sign or verify it. *Swarath Ram Ramsaram Ram v. Sarup Lal Ram*, 12 A.L.J. 1020.

SUNDAR LAL, J.

Reference :—(a) T.L.R. 805, R.

(393-a) O. XXX, r. 3. See No. 81, *supra*.

(394) O. XXX, r. 4. See *CONTRACT ACT*, No. 42, 24 Ind. Cas. 268.

(394-a) O. XXX, r. 4. See No. 372, *supra*.

(394-b) O. XXX, r. 5. See No. 81, *supra*.

(394-c) O. XXX, r. 7. See No. 81, *supra*.

(394-d) O. XXX, r. 8. See No. 81, *supra*.

(394-e) O. XXXII, r. 3. See No. 46, *supra*.

(395) O. XXXII, r. 7—*Application for mutation proceedings—Compromise without Court's permission—Registration Act (1877).*

Civ. Pro. Code (1908)—(Continued).

S. 17—Family settlement—Transfer of property worth over Rs. 130—Registration—Evidence Act, S. 91, vary or alter the terms of compromise.

O. XXXII, r. 7 of the Code of Civil Procedure, does not apply to proceedings under S. 85 of the Land Revenue Act and a compromise entered into by the guardian of minor parties in mutation proceedings cannot be set aside simply on the ground that the Court did not give the guardian leave to enter into it on behalf of the minors.

A compromise filed in the Revenue Court about immovable property worth over Rs. 100 laying down the rights of parties to the proceedings requires registration and it cannot be exempted on the ground that it evidences a family settlement (a).

Semble.—When the terms of a compromise are found to be set out in a petition, the petitioner is to prove the terms of the compromise and oral evidence would not be admissible to vary or alter its terms. *Bharosa v. Sikhdar*, 12 A.L.J. 998.

CHAMBER, J.

References:—(a) 33 A. 356; 11 A.L.J. 157, D.; 31 A. 13; 33 A. 728, R.; 22 M. 508; 20 A. 171, *Appl.*

(396) O. XXXII, r. 7—Minor—Compromise decree when can be set aside. See COMPROMISE, No. 3, 22 Ind. Cas. 923.

(397) O. XXXII, r. 7—Compromise—Party present but not signing it—Effect—Minor when cannot repudiate it. See COMPROMISE, No. 9, 139 P.W.R. 1914.

(398) O. XXXII, r. 7, Sch. II, paras 15, 16—*Decree passed in accordance with award—No objection taken before first Court as to reference being illegal—Appeal—Agreement to refer—Parties minors—Whether leave of Court necessary—Application of O. XXXII, r. 7.*

The intention of the legislature in using the words 'otherwise invalid' in para 15 of the Second Schedule to the Code is that all questions raised about the invalidity of the award, whether legal or otherwise, should be tried by the Court which refers a case to arbitration and by no other Court. Where a matter in dispute between parties, some of whom were minors, represented by guardians, was referred to arbitration through Court, but leave of Court was not obtained before the order of reference was made, and no objection was taken before the Court of first instance to the invalidity of the award on the ground that leave of Court to refer was not obtained, and the Court passed a decree in accordance with the award, *held*, that no appeal lay against the decree (a).

Per Richards, C.J., and Ryves, J.—All that the parties, when they wish to refer a matter to arbitration, have to do is to apply to the Court to make the reference, and the order of reference is made by Court. It is, therefore, unnecessary to obtain the leave of Court before

Civ. Pro. Code (1908)—(Continued).

making an application to refer O. XXXII, r. 7, does not control proceedings under the Second Schedule to the Code of 1908. *Lutawan v. Lachiya*, 12 A.L.J. 57 = 36 A. 69 = 21 Ind. Cas. 989 (F.B.).

RICHARDS, C.J., BANERJI and RYVES, JJ.

Reference:—(a) 29 C. 167, F.

(398-a) O. XXXII, r. 15. See No. 46, *supra*.

(399) O. XXXIII, r. 1, *Expl.*, and r. 6—*Pauper suit—Defendant entitled to adduce evidence in disproof of plaintiffs' pauperism—Opportunity to be given to defendant to prove allegations—Plea that part of property in suit is in possession of plaintiff—Defendant to be allowed to prove his plea.*

A defendant is entitled at the hearing to adduce evidence in disproof of the alleged pauperism of the plaintiff. Therefore, a Court should not allow a plaintiff to sue *in forma pauperis*, without opportunity afforded to the defendant to prove that the plaintiff is not a pauper.

If a defendant seeks to prove that part of the property sought to be recovered from him is really in the possession of the plaintiffs and that consequently the plaintiffs are possessed of sufficient means to enable them to pay the prescribed Court-fee, the defendant is entitled to establish the truth of his allegation by evidence. *Zillar Rahman v. Guzunfur Hosain*, 23 Ind. Cas. 974.

MOOKERJEE and BEACHCROFT, JJ.

References:—10 B. 207; 30 B. 593 = 8 Bom. L.R. 671, *Rel.*

(400) O. XXXIII, r. 3—Applicability. See AWARD, No. 9, (1914) M.W.N. 865.

(401) O. XXXIII, rr. 3 and 5, and S. 141—*Pauper application—When to be rejected—Amendment of petition—Court's inherent power.*

In an application under O. XXXIII, r. 3 of the Code, it can be rejected under r. 5, only when the Judge finds the existence of any or all the conditions laid down in cls. (a) to (e) of the section.

Where there is a ground for reasonable doubt, leave should be granted and should not be refused (a).

If an application is improperly framed, through misjoinder of cause of action and reliefs, the Court has got the power to amend the application and the power to do so is a power inherent in the Court. Moreover, S. 141, applicable to miscellaneous proceedings, will cover also pauper applications. *Kanakammal v. Panchapakasa Udayar*, 26 M.L.J. 343 = (1914) M.W.N. 329 = 23 Ind. Cas. 82.

SADASIVA IYER, J.

References:—(a) 19 M. 197, F.; 13 M.L.J. 292 (F.B.); 4 M. 323, D.

Civ. Pro. Code (1908)—(Continued).

(40f-a) O. XXXIII, r. 5. See No. 401, *supra*.

(402) O. XXXIII, r. 9—*Agreement with reference to subject matter of suit—Meaning of the expression. Edulji Cowasji v. Dadabhoy*, 7 S.L.R. 52=21 Ind. Cas. 536. See Final Part, 1913, Col. 894.

(403) O. XXXIV, r. 1—*Hindu Law—Mitakshara joint family—Mortgage for benefit of family executed in favour of Karta—Suit brought by Karta alone, parties.*

A suit was brought by the Karta of a joint Mitakshara family alone upon a mortgage executed in his favour, without joining the other member of the family, his nephew.

Held, that the suit offended against O. XXXIV, r. 1 of the Civ. Pro. Code as the plaintiff did not make his nephew who was interested in the mortgage a party, being well aware of his interest, and as the nephew could not subsequently be made a party effectively owing to the limitation bar, the suit must fail (a).

O. XXXIV, r. 1, does not refer merely to defendants but applies to plaintiffs as well, as it enacts that all interested persons must be joined as parties. *Sidheshuri Pershad Narain Singh v. Dharamjit Narain Singh*, 22 Ind. Cas. 570=19 C.L.J. 437=41 C. 727.

COXE and CHATTERJEE, JJ.

References :—(a) 15 Ind. Cas. 126=9 A.L.J. 819=34 A. 549 (F.B.); 15 Ind. Cas. 138=9 A.L.J. 844=34 A. 572, *Not F.*; 28 C. 517=5 C.W.N. 640, *F.*

(404) O. XXXIV, r. 1—*Transfer of Property Act, S. 85—Party—Person asserting title paramount or opposed to that of mortgagor.*

O. XXXIV, r. 1, Civ. Pro. Code, does not prohibit a person claiming a title paramount or opposed to that of a mortgagor being made a party to a mortgage suit, although S. 85 of the Transfer of Property Act was construed as enacting otherwise. *Obalampalli Ramalakshamma, In re*, 22 Ind. Cas. 976=(1914) M. W. N. 623.

SADASIVA IYER, J.

References :—33 C. 425=3 C.L.J. 205, *D.*

(405) O. XXXIV, r. 1—*Suit upon mortgage—Mortgage deed executed by a Burma Buddhist husband—Authority to bind wife's interest—Omission to join wife as a party—Decree not binding on wife's share.*

Among Burman Buddhists, it may be reasonably held that the husband's mortgage of joint property was effective against his wife's share as well as against his own (a).

But where, in a suit upon a mortgage executed by the husband, there was nothing to suggest that the husband was being sued in the capacity of representative of his wife as well as in his personal capacity, and where the wife was not joined as a party to the suit.

Civ. Pro. Code (1908)—(Continued).

Held that the necessity for joining her did not become any the less because she was an implied and not an express joint mortgagor, and that the decree obtained against the husband, in a suit to which she was not a party, would not affect her interests in the mortgaged properties (b). *Ma Sein v. M.M.K.A. Muthucurpan Chetty*, 7 L.B.R. 135.

TWOMEY, J.

References :—(a) 7 Bur. L.T. 113, *R.* (b) 17 A. 537, *R.*

(406) O. XXXIV, r. 1—*Necessary party not brought upon the record—Interested only in part of property—Effect. Alam Singh v. Gokal Singh*, 11 A.L.J. 749=35 A. 484=21 Ind. Cas. 271. See Final Part, 1913, Col. 395.

(407) O. XXXIV, rr. 2, 4—S. 34—*Mortgage—Preliminary decree—Interest—Discretion of Court to reduce interest.*

S. 34 of the Code does not permit the Court to reduce the interest below the contracted rate, when it is taking the accounts and making the decree as provided for by O. XXXIV, Civ. Pro. Code. Under O. XXXIV, rr. 2 and 4, the Court is bound to ascertain the amount due on a mortgage up to the date fixed by it for payment of the mortgage, and, unless the Court, for some legal reasons, sees fit to interfere with the contract as to the rate of interest, the amount payable must be calculated according to the contract between the parties. *Rajwanta Kuar v. Shiam Narayan Singh*, 12 A.L.J. 283=36 A. 220=23 Ind. Cas. 88.

RICHARDS, C.J., and BANERJI, J.

(407-a) O. XXXIV, r. 3. See No. 162, *supra*.

(408) O. XXXIV, r. 4—*Decree—Mortgage—Costs of suit become part of mortgage debt.*

The amount declared to be due under O. XXXIV, r. 4, cannot be regarded as two distinct debts, one on account of principal and interest and the other on account of costs. The costs allowed by the decree become part of the debt secured by the mortgage. *Panday Jagannath v. Musammam Junian*, 24 Ind. Cas. 63.

CHAMIER, J.

Reference :—11 O. C. 377, *R.*

(409) O. XXXIV, r. 4—*Mortgage decree—Sale of mortgaged property—Reversal of decree—Sale whether can be set aside—Fund representing mortgaged property—Appropriate remedy. See EXECUTION SALE, No. 5, 20 C.L.J. 469.*

(410) O. XXXIV, r. 4—*Mortgage decree—Executable as decree for money against other properties. See MORTGAGE (GENERAL), No. 20, (1914) M.W.N. 497.*

(410-a) O. XXXIV, r. 4. See No. 407, *supra*.

(411) O. XXXIV, rr. 4, 6—*Mortgage decree for principal and costs—Splitting up of decree—Appropriation of payments—Sale of mortgaged property—Contract Act, S. 59.*

In a preliminary decree in a suit for sale on a mortgage, the amount declared to be due, under

Civ. Pro. Code (1908)—(Continued).

O. XXXIV, r. 4 of the Civ. Pro. Code cannot be regarded as two distinct debts, one on account of principal and interest and the other on account of costs. The rules regarding appropriation of payments do not apply to money realised by sale of mortgaged property, and where a decree under r. 6 is barred, it is barred with respect to the entire debt due under the mortgage decree. **Jaganath v. Jhunia**, 12 A.L.J. 645.

CHAMIER, J.

Reference :—11 O.C. 377, D.

(412) O. XXXIV, r. 5—*Transfer of Property Act, S. 88—Decree-holder's right to apply for order absolute barred under Art. 178 of old Limitation Act—Such right not revived by O. XXXIV, r. 5, Civ. Pro. Code.*

Where a mortgage decree was passed under S. 88 of the Transfer of Property Act, in January 1905, directing the judgment-debtor to pay the mortgage amount in July 1905, and by reason of the judgment-debtor's default, the mortgagee decree-holder's right to apply for an order absolute for sale accrued in July 1905 and became barred in July 1908 under Art. 178 of the old Limitation Act, held, his application in 1909 for a second decree for sale under the provisions of O. XXXIV, r. 5, cl. (2) of the new Code, is unsustainable. **Yemmaraju Ramamma v. Mygopala Narayanaswami**, (1914) M.W.N. 251=22 Ind. Cas. 40.

SADASIVA IYER and SPENCER, JJ.

Reference :—26 M. 780, R.

(413) O. XXXIV, r. 5—*Mortgage—Decree in foreclosure suit—Settlement out of Court after preliminary decree, whether Court will recognise—Payment into Court obligatory—Court bound to pass final decree where payment not made.* **Benarsi Das v. Nathu Mal**, 281 P.W.R. 1912=16 Ind. Cas. 987=12 P.R. 1913=276 P.L.R. 1914. See Final Part, 1912, Col. 377.

(414) O. XXXIV, r. 5—*No decree absolute passed—Execution of decree ordered after notice to judgment-debtor—Failure to take objection as to absence of decree absolute—Effect—Not open to judgment-debtor to raise the plea at a later stage.* See MORTGAGE (GENERAL), No. 10, 26 M.L.J. 255.

(414-a) O. XXXIV, r. 5. See No. 6, *supra*.

(415) O. XXXIV, rr. 5 and 6—*Mortgage decree against two defendants—Private sale of mortgaged properties by one defendant—Adjustment in part—Validity—Balance due on mortgage—Prayer for personal decree—Personal decree to be granted only as against judgment-debtor who was party to adjustment and not against the other defendant.*

O. XXXIV, rr. 5, 6, contemplate a judicial sale for decree amount and a decree for balance. An adjustment in full or in part may, however, be made by the judgment-debtor by means of a private sale. But where a person obtained a mortgage-decree against two defendants and a

Civ. Pro. Code (1908)—(Continued).

sale of the mortgaged property from one defendant, the other defendant who is not a party to the sale will not be bound by it, and he can insist upon a judicial sale of the mortgaged properties being held before a personal decree under r. 6 can be passed against him. **M.A. Srinivasa Iyengar v. Kundasawmy Nalcker**, 15 M.L.T. 235=16 M.L.J. 375=(1914) M.W.N. 316=23 Ind. Cas. 544.

SANKARAN NAIR and AYLING, JJ.

Reference :—2 A.L.J. 353, D.

(416) O. XXXIV, r. 6—*Decree for sale of mortgaged property and personal decree against other property—Decree, construing of.*

Held, that it is not necessary to obtain a decree under O. XXXIV, r. 6, Civ. Pro. Code, if the decree originally passed is both a decree for the sale of the property mortgaged and a personal decree against the other property of the judgment-debtor (a).

Held further that a decree might be construed in the light of the judgment (b). **Bisheshwar Bakhsh Singh v. Debi Bakhsh Singh**, 17 O.C. 153.

STUART and PANDIT KANHAIYA LAL, J.C.S.

References :—(a) 29 A. 12; 21 C. 26, R. (b) 21 M. 344*(P.C.), R.

(417) O. XXXIV, r. 6—*Mortgage decree—Direction in decree that no application shall be entertained against property other than the mortgaged property whether legal.* See MORTGAGE (GENERAL), No. 26, 23 Ind. Cas. 389.

(417-a) O. XXXIV, r. 6. See Nos. 229, 415, *supra*.

(418) O. XXXIV, rr. 7, 8—*Maintainability of application under where final decree for redemption is passed under S. 92, Transfer of Property Act—Amendment of final decree—Execution—Limitation.* See MORTGAGE (REDEMPTION), No. 5, 22 Ind. Cas. 283.

(418-a) O. XXXIV, r. 8. See No. 418, *supra*.

(419) O. XXXIV, r. 10—*Preliminary decree in a suit for sale on a mortgage—Appellate decrees for costs against only one of the defendants—Final decree, costs in appellate decrees not included—Effect of—Decree against only one defendant.* **Muhammad Sa'diq v. Ghous Muhammad**, 11 A.L.J. 975=22 Ind. Cas. 42. See Final Part, 1913, Col. 399.

(420) O. XXXIV, rr. 12, 13—*Sale under mortgage decree—Process—Order of appropriation—Costs interest and principal—No direction by Court—Presumption of Court having followed the law—Right of party interested to benefit of r. 13—Cases not governed by r. 12—Applicability of principle of r. 13.* **Sabapathi Pillai v. Chockalinga Pillai**, 25 M.L.J. 552=21 Ind. Cas. 691. See Final Part, 1913, Col. 400.

(420-a) O. XXXIV, r. 13. See No. 420, *supra*.

(421) O. XXXIV, r. 14—*Usufructuary mortgage of portion from a co-sharer—Decree for*

Civ. Pro. Code (1908)—(Continued).

rent obtained by such mortgagee how to be executed—Applicability of O. XXXIV, r. 14, Civ. Pro. Code to such a decree. See ACT VIII OF 1885 (BENGAL TENANCY), No. 78, 19 C.W.N. 1016.

(422) O. XXXIV, r. 14—Money decree obtained by mortgagee against Hindu father—Sale of property—Purchase by mortgagee—Right of sons to redeem—Estoppel of mortgagor—Possession of mortgagee—Waiver of claim. See TRANSFER OF PROPERTY ACT, No. 84, 12 A.L.J. 855.

(422-a) O. XXXIV, r. 14. See Nos. 210, 250, *supra*.

(422-b) O. XXXVIII. See No. 369, *supra*.

(423) O. XXXVIII, r. 5—Attachment before judgment—Property outside Court's jurisdiction—Interpretation of Statute—Reference to proceedings of Legislature.

A Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction (a).

A Court is not justified in referring to the proceedings of the Legislature, which resulted in the passing of an Act, as an aid to the construction of any of its provisions. *Bhai Khan v. Des Raj*, U.B.R. (1914), 2nd Qr. 16 = 25 Ind. Cas. 771.

MCCOLL, J.C.

Reference:—(a) 8 B.H.C.R. (O.C.J.) 29, *Appr*.

(424) O. XXXVIII, r. 5—Decree Execution—Attachment before judgment—Judgment-debtor dying after decree—Property passing by survivorship—Subsequent execution proceedings cannot defeat the right of survivorship. *Subrao Mangesh Chandavarkar v. Mahadevi Manji Bhatta*, 15 Bom. L.R. 848 = 21 Ind. Cas. 380 = 38 B. 105. See Final Part, 1913, Col. 401.

(425) O. XXXVIII, rr. 5, 6—Attachment before judgment—Conditions to be fulfilled—Conditional attachment before judgment, when determines.

An order of attachment before judgment can only be made after a defendant fails to show cause to the contrary or to furnish the security required. The conditional attachment permissible under O. XXXVIII, r. 5, has effect only until the defendant, to whom notice has been issued, either furnishes the required security or appears to show cause. *Nathu Mal v. Kishori Lal*, 23 Ind. Cas. 107.

RYVES and PIGGOTT, JJ.

(425-a) O. XXXVIII, r. 6. See No. 425, *supra*.

(425-b) O. XXXIX, r. 1. See No. 165, *supra*.

(426) O. XXXIX, rr. 1, 2, O. XXI, rr. 99, 103—Decree—Execution—Obstruction—Suit to remove obstruction—Temporary injunction, grant of.

A person who brings a suit under O. XXI, r. 103 of the Civ. Pro. Code, after being defeated under r. 99 of the same order, cannot obtain a temporary injunction, under O. XXXIX, r. 1 or 2, to restrain the defendant from taking

Civ. Pro. Code (1908)—(Continued).

possession of the property. *Chhotalal Hira-chand v. Jithalal Varajbhai*, 16 Bom. L.R. 676.

BEAMAN and HAYWARD, JJ.

(427) O. XXXIX, r. 2—Interlocutory injunction—Mandatory injunction—Jurisdiction of Court to grant the injunction.

The defendants erected on their land a screen of corrugated iron sheets to block the openings which the plaintiff had made in his wall overlooking the defendant's premises. The plaintiff filed a suit to have the erection pulled down. Pending the suit, he applied for a mandatory injunction directing the defendants to remove the screen. The lower Courts having granted the injunction the defendants applied to the High Court.

Held, setting aside the injunction, that the lower Courts had, in granting the mandatory injunction, acted illegally and with material irregularity in the exercise of their jurisdiction.

Per Beaman, J.—Where an application for a mandatory injunction pending a suit is made, the proper course, upon grounds of general expediency, would be rather to expedite the proceedings than to grant the injunction. Where the matter is really one of urgency, as in the case of pestilent nuisances, and the Court feels that it ought to interfere at the earlier stage, something like the procedure which is not infrequently adopted in England might be followed in this country; that is, the order upon the interlocutory application might be treated as a decree in the suit.

It is doubtful whether the mofussil Courts of this country have any jurisdiction to grant mandatory injunctions before the hearing. *Rasul Karim v. Pirubhai Amirbhai*, 16 Bom. L.R. 288 = 38 B. 381 = 24 Ind. Cas. 625.

BEAMAN and SHAH, JJ.

(428) O. XXXIX, r. 2—Mandatory injunction—Interlocutory application—Court—Jurisdiction.

The plaintiffs leased certain premises from the defendants for a term of years, the latter covenanting that they would make, keep and maintain at their own expense two roads leading to the premises. In May 1914, the defendants having blocked up one of the roads, the plaintiff commenced an action to restrain the defendants from keeping any debris on the road and from raising the level thereof to a height greater than before. On the plaintiffs' application, the Court granted a mandatory injunction until the hearing of the suit, restraining defendants from doing any of the acts threatened. The defendants appealed on the ground that the Court had no jurisdiction to grant the mandatory injunction:

Held, that the Court was justified in granting the mandatory injunction it did.

Per Davar, Acting C.J.—The Court has power, under O. XXXIX, r. 2, of the Civ. Pro. Code, to make a mandatory injunction on an

Civ. Pro. Code (1908)—(Continued).

interlocutory application. **Champsey Bhimji & Co. v. The Jamna Flour Mills Co., Ltd.**, 16 Bom. L.R. 566.

DAVAR, A.C.J. and HEATON, J.

(429) *O. XXXIX, r. 2—Appeal—Power given under — Only additional.* **Ottapurakkal Thayeth Suppi v. Sayid Alabi Masahur Koya**, (1913) M.W.N. 1019=14 M.L.T. 545= (1914) M.W.N. 90=26 M.L.J. 37=22 Ind. Cas. 404. See Final Part, 1913, Col. 403.

(429 a) *O. XXXIX, r. 2.* See No. 426, *supra*.

(430) *O. XXXIX, r. 2 (2)—Court's power to demand security from guardian of female ward—Appeal against order demanding security—Death of person at whose instance order was passed—Order whether abates.* See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 37, 20 P.L.R. 1914.

(431) *O. XXXIX, r. 2, S. 24—(Act IV of 1882), S. 493—Temporary injunction by Munsif—Suit transferred to the file of District Judge after injunction by Munsif—Breach of injunction after transfer—Jurisdiction of District Judge to punish for contempt—Bengal Civil Courts Act (XII of 1887).*

In case of breach or disobedience of a temporary injunction, the Court which actually granted the injunction may punish the contempt under *O. XXXIX, r. 2 (3)*.

There is nothing in S. 24 of the Civ. Pro. Code or in Ch. IV of the Bengal Civil Courts Act authorising, either expressly or by necessary implication, a Court to which the suit may be transferred but which did not grant the injunction, to exercise the special jurisdiction under *O. XXXIX, r. 2 (3)*. **Sheikh Jaharuddi v. Hari Charan Podder**, 18 C.W.N. 470=22 Ind. Cas. 499.

CARNDUFF and RICHARDSON, JJ.

(432) *O. XL, r. 1—Application for temporary injunction—Order putting both parties in possession during pendency of suit—Legality of order.* **Dan Prasad v. Gopi Kishen**, 11 A.L.J. 973=36 A. 19=23 Ind. Cas. 59. See Final Part, 1913, Col. 404.

(433) *O. XL, r. 1—Mortgage suits—Receiver when may be appointed.* See RECEIVER, No. 7, (1914) M.W.N. 771.

(434) *O. XL, r. 1, and S. 99—Receiver, suit by, for possession of immovable property—Lunacy Act (XXXV of 1858), scope of enquiry under—Pardanashin lady, document executed by, under circumstances rendering it inoperative—Suit relating to lunatic's property how to be brought.*

The plaintiffs were the Receivers of the estate of one G who died leaving two widows K and N. On the 8th August 1906 one of the co-widows N brought a suit for a declaration that she was entitled to a half share in the estate of G and prayed that the properties might be partitioned and her share allotted to her. In

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this suit, the plaintiffs were appointed Receivers with all the powers provided under *O. XL, r. 1, cl. (d)* of the Civ. Pro. Code. It was further ordered that the Receivers should have power to bring and defend suits in their own names and also should have power to use the names of the plaintiff and the defendant. The plaintiffs instituted the present suit to recover possession of a certain immoveable property and for a declaration that a lease, dated 16th September 1906, purporting to have been executed by N by virtue of which the defendant claimed to be a permanent tenant was void and inoperative. Subsequent to the institution of the present suit an order was made in the suit in which the plaintiffs were appointed Receivers that the plaintiffs as Receivers be at liberty to continue the present suit. It appeared that proceedings under the Lunacy Act were instituted in November 1906 and in those proceedings the District Judge on the 24th September 1907, held that N was of unsound mind and incapable of managing her affairs:

Held, that ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it and by his appointment no property becomes vested in a Receiver. But this rule like all others is subject to modification by the Legislature and the Code of Civil Procedure, in *O. XL, r. 1*, empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has.

That the co-widows of G were the present owners of the property and the suit in which the Receivers had been appointed comprised that property. The Receivers therefore were as competent to bring the present suit as the owners would have been.

That the omission of the plaintiffs to get leave, in the suit in which they were appointed Receivers, to institute the present suit, may have consequences adverse to them in that suit, but it cannot affect their powers to bring the present suit.

That the Lunacy Act contemplates only the question of lunacy or sanity at the time of the enquiry; there is no provision in it that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind, and the finding of the District Judge in the lunacy proceedings did not carry things back further than the enquiry which commenced in November 1906, and notwithstanding the result of that enquiry, the burden still rested on the plaintiffs of showing that N was of unsound mind on the 16th September 1906—the date of the execution of the lease.

That N being of unsound mind at the time of the execution of the lease, it created no title in the defendant which barred the plaintiffs' right to possession.

That, even if lunacy at the date of the execution of the lease was not established, the transaction could not stand, as it did not appear

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that the lease was explained to N, a *pardana-shin* lady of weak intellect, and was understood by her.

Held (as to the contention that apart from lunacy the transaction would be voidable and not void and could not be avoided by any one but N and in a suit to which her manager was a party)—that the Receivers were competent plaintiffs even if the lease was not void but voidable.

That even if a lunatic's manager can sue, still there is no established rule of practice in the Calcutta High Court that requires suits relating to the lunatic's property to be brought by him and not by the lunatic. On the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind whether so adjudged or not. It is true that a person so incapacitated has to sue by a next friend; but a next friend is not a party and the absence of a next friend in the present suit was immaterial.

That, in any case, as the objection did not affect the merits of the decision of the lower Court, under S. 99, Civ. Pro. Code, it was not a ground for reversal of that decision. *Haji Cassim Mamooji v. K.B. Dutt and P. Chaudhuri*, 19 C.W.N. 45.

JENKINS, C.J., and N.R. CHATTERJEE, J.

(435) O. XL, r. 1 (2)—*Receiver, appointment of—Property in possession of defendant, if may be taken over—Object of appointment.*

Where the plaintiff sued to recover property in the possession of the adoptive mother, and the suit was resisted *inter alia* on the ground that the defendant was entitled to retain possession of the estate for her life:

Held that O. XL, r. 1 (2), which clearly refers to a case of removal of property from the possession or custody of a person other than the parties to the suit, was no bar to the appointment of a Receiver on the application of plaintiff when it was established that the estate was being grossly mismanaged by the defendant.

The effect of the appointment of a Receiver would not be to prejudice the case in any way, as the only object and effect of so doing would be to maintain the estate in its present condition during the pendency of the suit. *Kumar Satya Narain Singh v. Srimati Rani Kesha-bati Kumari*, 18 C.W.N. 537.

CHITTY and TEUNON, JJ.

(436) O. XL, r. 1 (d), 2 and O. XLIII, r. 1 (a)—*Order increasing remuneration of Receiver whether appealable.* See *RECEIVER*, No. 4, 22 Ind. Cas. 352.

(437) O. XII, rr. 1—*Appeal—Failure to file copy of decree—Further time allowed for appeal—'Sufficient cause'—Limitation.* See *APPEAL (GENERAL)*, No. 1, 2 P.W.R. 1914.

(437-a) O. XLI, r. 1. See No. 97, *supra*.

(438) O. XLI, r. 4—*'May'—Discretion exercised by Court below—Second appeal.*

Civ. Pro. Code (1908)—(Continued).

A mortgage was made in favour of the plaintiff by some of the defendants. A suit upon the mortgage was brought against the mortgagors and transferees of part of mortgaged property. The defence was that the mortgage was not made for legal necessity. The Court of first instance found necessity proved and decreed the suit. The mortgagors did not appeal but the other defendants did and made the mortgagors parties. The Judge in appeal found that there was no necessity for the mortgage and dismissed the suit against the appellants. The mortgagors appealed to the High Court. *Held*, that, although the decree of the Court of first instance proceeded on a ground common to all the defendants, the Court below was not bound to dismiss the whole suit on the finding that the mortgage was not made for legal necessity. The appellate Court had a discretion in the matter and the High Court will not ordinarily interfere with the exercise of such discretion. *Narain Dikshit v. Binaik Bhat*, 12 A.L.J. 883=36 A. 510=24 Ind. Cas. 439.

CHAMIER and RAFIQ, JJ.

Reference :—8 M. 192, F.

(439) O. XLI, r. 4—*Party not appealing—Power to reverse decree against him—Ground of reversal common—Powers of appellate Court.* See *BENAMI TRANSACTIONS*, No. 5, 23 Ind. Cas. 620.

(440) O. XLI, r. 4—*Appeal by some of the unsuccessful plaintiffs—Common ground—Power of appellate Court to set aside whole decree.* See *CONTRACT ACT*, No. 39, 11 P.L.R. 1914.

(440-a) O. XLI, r. 4. See No. 314, *supra*.

(441) O. XLI, r. 5, and S. 47—*Appellate Court's order refusing to stay execution pending appeal—Whether appeal lies against the order—Applicability of S. 47.*

No appeal lies against an order passed by the appellate Court under O. XLI, r. 5, Civ. Pro. Code, refusing to stay the execution of a decree passed by the lower Court against which an appeal is pending before the appellate Court. S. 47, Civ. Pro. Code, only applies to orders passed by the Court executing the decree, and not to orders passed by the appellate Court which is not the Court executing the decree (a). *Malamal Yittil Krishnan Nair v. Kavalapara Moopil Nair*, 27 M.L.J. 171.

SANKARAN NAIR and SPENCER, JJ.

Reference :—(a) 29 B. 71, R.

(442) O. XLI, r. 10—*Vakalatnamah—Omission to mention the name of the pleader—Appointment invalid—Appeal presented by him not properly presented—Objection may be taken at any stage.* *Mohammed Ali Khan v. Jasram*, 11 A.L.J. 1015=36 A. 46=23 Ind. Cas. 464. See *Final Part*, 1918, Col. 406.

(443) O. XLI, r. 11 (1)—*Order of dismissal—Decree—Appeal competent—No decree prepared—Revision—Mistake of fact.*

Civ. Pro. Code (1908)—(Continued).

An order passed under O. XLI, r. 11 (1), Civ. Pro. Code, is a 'decree' from which an appeal lies in the ordinary course. Where, however, in such a case no decree has been drawn up, the so-called appeal must be treated merely as an application for revision.

Where the order of dismissal under O. XLI, r. 11 (1), was passed under a mistake of fact, the Chief Court interfered in revision. **Bishen Singh v. Bishen Kaur**, 191 P.L.R. 1914=116 P.W.R. 1914=93 Ind. Cas. 902.

KENSINGTON, C.J., and RATTIGAN, J.

(444) O. XLI, r. 11, O. XLVII, r. 1—*Dismissal of application for admission of second appeal—Order whether can be reviewed on ground of new and important evidence.*

Where an application for admission of second appeal is dismissed under O. XLI, r. 11, Civ. Pro. Code, the order cannot be reviewed merely on the ground of the discovery of new and important evidence. **Rajani Kanta Das v. Kali Prasanna Mukherjee**, 41 C. 809.

COXE, J.

References:—16 W.R. 112, F.; 18 M. 480; 32 A. 71, R.; 23 W.R. 323, Cons.

(444-a) O. XLI, r. 14. See No. 279, *supra*.

(445) O. XLI, r. 20—*Addition of parties—Court's power to direct—Law of limitation—Applicability to action taken under the rule—Power discretionary—Extreme negligence—Discretion not to be exercised in cases of.*

The law of limitation has no application to action taken by the Court under O. XLI, r. 20, Civ. Pro. Code (1908) (a).

The power to take action under O. XLI, r. 20, is however discretionary and the Court should decline to exercise it in cases of extreme negligence. **Shahab Din v. Miran Bakhsh**, 79 P.R. 1914=268 P.E.R. 1914=169 P.W.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

References:—(a) 13 A. 78; 14 A. 154 (F.B.); 15 M. 362 (F.B.); 33 C. 329; (1893) A.W.N. 35; 10 C. 445; 8 P.W.R. 1911; 12 C.W.N. 625, R.

(445-a) O. XLI, r. 20. See No. 61, *supra*.

(446) O. XLI, r. 21, O. XLIII, r. 1 (i)—*Application for rehearing of appeal—Order refusing application—Appeal whether lies—Application in suit—What the term 'suit' includes. See ACT VIII OF 1885 (BENGAL TENANCY), No. 74, 19 C.L.J. 310.*

(447) O. XLI, r. 22—*Partition suit—Cross objections by one respondent against another—Practice.*

On an appeal in a partition suit where accounts are taken between all the parties, whether plaintiffs or defendants, there is no bar to cross-objections being preferred by one

Civ. Pro. Code (1908)—(Continued).

respondent against another. **Balgobind v. Ram Sarup**, 12 A.L.J. 892=36 A. 505.

CHAMIER and RAFIQ, JJ.

References:—16 C.W.N. 612; 28 A. 95, R.

(448) O. XLI, r. 22—*Appeal—Respondent, whether can support judgment appealed from without filing cross objection—Matters not opened by either party cannot be re-opened by appellate Court itself.*

If an appeal it is open to a respondent without filing a cross-objection to support the judgment and decree of the lower Court by traversing any ground which that Court may have found against him (a).

But it is the respondent who must support the judgment and decree; he cannot throw upon the appellate Court the burden of raising a case for him which he does not choose to raise himself.

Therefore, where a matter is not agitated before an appellate Court by either party, it is not the duty of that Court to, in fact it cannot, re-open a finding which both parties accept and do not move against. **Nagendra Nath Ghose v. Ram Bharosa Halual**, 24 Ind. Cas. 68.

HOLMWOOD and CHAPMAN, JJ.

References:—(a) 17 I.A. 57=17 C. 809; 13 B. 75 (77), R.

(449) O. XLI, r. 22—*Relief against co-respondent—Cross-objections.*

Under the Civ. Pro. Code of 1908 and the Rules, a party to an appeal can claim relief against a co-respondent by way of memorandum of objections. **Muniawamy Mudaly v. Abbu Reddy**, 27 M.L.J. 740=(1915) M.W.N. 45.

WHITE, C. J., MILLER and SADASIYA AIYAR, JJ.

Reference:—15 C.L.J. 61, Diss.

(450) O. XLI, r. 22—*Cross-objections—Respondent filing cross-objections against co-respondent—Practice. Nursey Virji v. Alfred H. Harrison*, 15 Bom. L.R. 781=37 B. 511=21 Ind. Cas. 7. See Final Part, 1913, Col. 407.

(450-a) O. XLI, r. 23. See Nos 140, 152, *supra*.

(451) O. XLI, r. 23 (1), O. XLIII, r. 1 (u)—*Remand—Appeal when lies—Punjab Courts Act (XVIII of 1884) as amended by Act I of 1912, S. 40 (3)—Second appeal—Certificate that appeal is fit for second appeal.*

According to r. 1 (u) of O. XLIII, an appeal lies from an order passed under r. 23 of O. XLI remanding a case, where an appeal would lie from the decree of the appellate Court.

The word 'decree' in cl. (u) does not mean such final decree as might ultimately be passed by the appellate Court, taking the words 'final decree' to mean the decree which might be passed by the appellate Court on an appeal preferred to it by the aggrieved party from the decree passed by the first Court after the order of remand.

Civ. Pro. Code (1908)—(Continued).

There is no appeal against an order of remand if that order is based upon a finding of fact only.

109 P.R. 1887 at p. 253, 1 P.R. 1903=1 P. L.R. 1903 (F.B.) allowed unqualified right of appeal on questions of fact as well as on questions of law but the law on this point has been changed.

A suit was dismissed on the ground that custom did not govern the case and the parties were bound by their personal law. The Divisional Judge on appeal held that the parties were governed by custom and remanded the case to the original Court. On appeal against order of remand,

Held, that the order was not appealable. An appeal could lie if the appellant had an unqualified right of appeal from the decree of the Divisional Judge in the event of that officer passing a decree in this very proceeding instead of making an order of remand. Since the question involved was not one of law but of custom only, and the appellant could only appeal if he were to obtain a certificate in terms of sub-S. 3 of S. 40 of the Punjab Courts Act, his appeal against the order of remand did not lie. The certificate might or might not have been granted and therefore the appellant would not have had an unrestricted right of appeal. *Sawan Singh v. Mothu*, 162 P.L.R. 1914=120 P.W.R. 1914=85 P.R. 1914=23 Ind. Cas. 817.

SHAH DIN and CHEVIS, JJ.

(452) O. XLI, r. 24 and O. XLII, r. 1—Power of High Court to decide a case on merits in second appeal. See EVIDENCE ACT, No. 11, 108 P.W.R. 1914.

(453) O. XLI, r. 25—*Remand order—Trial on issues—Direction to call for particular kind of evidence—Appellate Court, power and jurisdiction of—Material irregularity.*

Where an original Court comes to clear findings on the issues material to the decision of a case, an appellate Court is not competent to remand the case for trial on the same issue and define the particular kind of evidence required for their determination. It is quite improper, after the parties go to trial and have ample opportunity of producing evidence in support of their respective cases, to allow the losing party to have the case re-opened again with directions to call for a particular kind of evidence. The appellate Court ought to form its own estimate of all the evidence on the record before it. *Baba Ragnath Dass v. Babu Randhir Singh*, 92 Ind. Cas. 128.

LINDSAY, J.C.

(453-a) O. XLI, r. 25. See No. 140, *supra*.

(454) O. XLI, r. 27—*Appellate Court—Additional evidence—Mode of letting in—Practice.*

Where an appellate Court thinks, either with the consent of the parties or on the application of any one of the parties, that there is sufficient

Civ. Pro. Code (1908)—(Continued).

ground under r. 27 of O. XLI of the Civ. Pro. Code, to admit additional papers in an appeal, it should state the reasons for admitting the papers in evidence, and the papers should be formally admitted in evidence. *Daji Abaji Sawant v. Sakharam Krishna Kulkarni*, 16 Bom. L.R. 641=38 B. 665.

HEATON and SHAH, JJ.

(455) O. XLI, r. 27—*No evidence offered in Court of first instance—Power of appellate Court to call for additional evidence.*

When a party has declared that he has no witness in the Court of first instance, the appellate Court has no power under O. XLI, r. 27 (b), to call for fresh evidence, which admittedly was not forthcoming at the trial on behalf of that party. *Arasappa Pillai v. Manikka Mudaliar*, 16 M.L.T. 301.

SPENCER and HANNAY, JJ.

References:—31 B. 381 (P.C.)=(1913) M.W.N. 450, R.

(456) O. XLI, r. 27—*Additional evidence at hearing—Effect—Admission.*

Where the judgment of the lower appellate Court is based on evidence admitted during the hearing of the appeal in contravention of O. XLI, r. 27, it should be set aside. *Aryamuthu Pillai v. Serinaya Pillai alias Muthukarappa Pillai*, (1914) M. W. N. 795.

AYLING and OLDFIELD, JJ.

(457) O. XLI, r. 27—*Reception of additional evidence in appeal—When appellate Court will not interfere even if wrongly admitted.*

An appellate Court can admit additional evidence where such is necessary for a proper judgment. 'Any other substantial cause' is not a cause *ejusdem generis* with those enumerated in the previous part of O. XLI, r. 27, Civ. Pro. Code (1908):

An appellate Court will not interfere with the decision of a subordinate Court even where a document is wrongly admitted, unless it is satisfied that the decision is wrong on the merits and unless further the improper admission has resulted in a wrong decision on the merits. *Peddibotla Kameswaramma v. Bezawada Chelapathi*, (1914) M.W.N. 864.

SADASIVA IYER and NAPIER, JJ.

(458) O. XLI, r. 93—*Limitation Act, Art. 120—Suit, when right to sue accrued—Decree on cross-objection of plaintiff.*

The plaintiff sued P.K. and R for recovery of certain money. The suit was dismissed against P, but decreed against R. On appeal of R, the plaintiff filed cross-objections that he was entitled to decree against P also. R's appeal was accepted, but the Court held that, the plaintiff having omitted to file appeal against P, no decree could be passed against P and that claim against him in any case was barred by limitation under Art. 120 of the Limitation Act, for the cause of action arose in 1901, when

Civ. Pro. Code (1908)—(Continued).

wood was purchased by P or supplied to him. It appeared that the plaintiff was forced to pay back the money to R, in 1908—which gave him right to recover it from P.

Held, that, under O. XLI, r. 33, decree could be passed against P, though no appeal was filed against him.

Held, also, that the cause of action arose in 1908, and the suit was consequently not barred. *Ranglal Mal v. Pheru*, 93 P.L.R. 1914=37 P.W.R. 1914=23 Ind. Cas. 410.

SCOTT-SMITH, J.

(459) O. XLI, r. 33—*Appellate Court's power to vary decree in favour of party not appealing.*

In a mortgage suit, the plaintiff got a decree subject to his paying a certain amount due to a prior mortgagee. The plaintiff accepted the decision and did not appeal, but on defendant's appeal the appellate Court found that a smaller sum was due to the prior mortgagee:

Held, that, as the plaintiff had not appealed against the decree, the appellate Court could not reduce the amount due under the prior mortgage. *Pitam v. Gaya Prashad*, 23 Ind. Cas. 886.

RICHARDS, C.J., and BANERJI, J.

(460) O. XLI, r. 33—*Court's power—Interference, extent of—Discretion.*

The words of r. 33 of O. XLI of the Code are widely expressed, but they must be applied with discretion. No hard and fast rule can be laid down, but ordinarily the power contained in the rule should be limited to those cases where, as the result of the appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.

In a suit for possession the first Court granted the plaintiff a decree for possession against defendant No. 6 and directed payment of *salami* by defendants Nos. 1 to 5. The plaintiff appealed with the result that the appellate Court, so far from modifying the decree of the first Court in his favour, deprived him of what had been awarded to him, though no cross-appeal or cross-objection had been filed by any of the defendants:

Held, that the proper order for the lower appellate Court to have made would have been to dismiss the appeal, and that the decree actually made was beyond the legitimate scope of r. 33. *Ganga Dhar Muradi v. Banabashi Padihari*, 24 Ind. Cas. 208.

JENKINS, C.J. and N.R. CHATTERJEE, J.

(461) O. XLI, r. 33—*Power of an appellate Court—No memo of objection necessary.* *Imbichunni Nair v. Narayana Nambudri*, (1913) M.W.N. 1024=21 Ind. Cas. 767. See Final Part, 1918, Col. 411.

Civ. Pro. Code (1908)—(Continued).

(461-a) O. XLI, r. 33. See Nos. 133, 327, *supra*.

(461-b) O. XLII, r. 1. See No. 452, *supra*.

(461-c) O. XLIII (m). See No. 134, *supra*.

(461-d) O. XLIII, r. 1 (e). See No. 360, *supra*.

(461-e) O. XLIII, r. 1 (m). See No. 135, *supra*.

(461-f) O. XLIII, r. 1 (o). See No. 162, *supra*.

(461-g) O. XLIII, r. 1 (s). See No. 436, *supra*.

(461-h) O. XLIII, r. 1 (t). See No. 446, *supra*.

(461-i) O. XLIII, r. 1 (u). See Nos. 152, 451, *supra*.

(461-j) O. 43, r. 1, cl. (w). See No. 157, *supra*.

(462) O. XLIII, r. 1 (w), O. XLVII, r. 7—*Order granting review of judgment—Appeal.*

O. XLVII, r. 7, Civ. Pro. Code, provides that an order rejecting an application for review shall not be appealable, but that an order granting such application may be objected to on certain grounds specified in r. 7 of the order.

O. XLIII, r. 1 (w) must be read with, and subject to, r. 7 of O. XLVII. *Harl Charan Saha v. Baran Khan*, 41 C. 746.

CARNDUFF and RICHARDSON, JJ.

References:—Mis. A. No. 341 of 1909; O. Rule No. 123 of 1913; Mis. A. No. 188 of 1912, R.

(462-a) O. XLIII, r. 10 (a). See No. 163, *supra*.

(462-b) O. XLV, r. 16. See No. 65, *supra*.

(463) O. XLVI, r. 1—*Reference—Duty of Subordinate Courts—Judgment of Privy Council—Practice—Interest—Interest Act (XXXII of 1839).* *G.T. Fillingham v. Captain C. L. Dunn*, 266 P.L.R. 1913=20 Ind. Cas. 194=8 P.R. 1914. See Final Part, 1918, Col. 413.

(464) O. XLVII, r. 1—*Suit dismissed for want of notice required by law and on the merits—Maintainability of review application—Discovery of new evidence affecting the decision on the merits.*

The provisions of O. XLVII, r. 1, contemplate grounds which would alter or cancel the original decree.

Where a suit was dismissed on two grounds, (1) that notice given by the plaintiff under the Court of Wards' Act was defective; and (2) that the plaintiff was illegitimate, and an application was made for review of judgment on the ground of discovery of new and important evidence on the question of illegitimacy, *held*, that that application could not be entertained, inasmuch as the decision on the question of legitimacy on the reception of new evidence would not modify or set aside the original decree. *Mahabir Prasad v. The Collector of Allahabad*, 12 A.L.J. 382=36 A. 277=23 Ind. Cas. 514.

RAFIQ and PIGGOT, JJ.

(465) O. XLVII, r. 1—*Review—Appeal—Jurisdiction to hear review application, not taken away by presentation of appeal.*

Civ. Pro. Code (1908)—(Continued).

Where an application for review has been presented by a party and a rule nisi granted by the Court, the jurisdiction of the Court to hear the review application is not taken away if an appeal is afterwards presented from the decree under review. *Narayan Pureshottam Gargote v. Laxmibai Datto Bhagvan*, 16 Bom. L.R. 189—28 Ind. Cas. 518—88 B. 416.

HEATON and SHAH, JJ.

Reference :—82 M. 416, F.

(466) O. XLVII, r. 1, *Review—Grounds for—Appeal badly drafted or badly argued by counsel—No ground for review.* *Hussaina v. Sahib Nur*, 208 P.W.R. 1913=197 P.L.R. 1914=103 P.L.R. 1914—22 Ind. Cas. 785. See Final Part, 1913, Col. 414.

(466-a) O. XLVII, r. 1. See Nos. 173, 444, *supra*.

(467) O. XLVII, r. 2—*Jurisdiction—Application for review entertained by Judge who passed decree but disposed of by his successor—Grounds for review.*

An application for review was made before a Small Cause Court Judge who had passed the decree complained of. Subsequently the Judge was transferred :

Held, that his successor had jurisdiction to dispose of the application according to law.

It is not the intention of the Legislature that the provisions of the Code of Civil Procedure dealing with applications for review should be made use of by a litigant who has mismanaged his case, in order to secure a re-hearing of the case on the same materials. *Gita Ram v. East Indian Railway*, 23 Ind. Cas. 894.

PIGGOTT, J.

(467-a) O. XLVII, r. 2. See No. 80, *supra*.

(467-b) O. XLVII, r. 4. See No. 157, *supra*.

(467-c) O. XLVII, r. 7. See Nos. 157, 462, *supra*.

(468) O. XLVII, r. 7 and S. 115—*Appeal—Review, grant of—Jurisdiction—Application for review—Insufficient stamp—Court hearing insufficiently stamped application for review, if acts without jurisdiction.*

An appeal lies under O. XLVII, r. 7, against an order by which the Court below has allowed an application for a review of judgment and directed an appeal to be restored to its file (a).

It cannot be said that a Court has no jurisdiction to hear an application for review because it is insufficiently stamped. *Surendra Nath Talukdar v. Sitanath Das Gupta*, 21 Ind. Cas. 943.

CARNDUFF and RICHARDSON, JJ.

Reference :—(a) 22 C. 784, F.

(469) Sch. II, rr. 8, 8 and 15—*Arbitration—Order of reference authorising arbitrator to extend time made by consent of parties—*

Civ. Pro. Code (1908)—(Continued).

Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, it would invalidate award.

Where an order of reference to an arbitrator under Sch. II of the Code of 1908 fixed three months' time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order :

Held, that when the Court had made the order by consent of the parties, there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired.

But the arbitrator can only extend the time in such cases, before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effluxion of time *functus officio* and had no further jurisdiction in the matter. As in this case the arbitrator had extended the time after the three months originally fixed by Court had expired, the award must be set aside, although it was submitted within the time so extended by the arbitrator.

If an arbitrator, unknown to one of the parties, has personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator. If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the Court would not be disposed to set aside the award. *Co-operative Hindustan Bank, Ltd. v. Bhola Nath Borooah*, 19 C.W.N. 165.

CHITTY, J.

(470) Sch. II, para 4, sub-cl. (1); para 5, cl. (b), sub-cl. (ii) — *Arbitration—Arbitrator—Non-submission of award within time fixed by Court—Neglect or refusal—Appointment of second arbitrator without discharging first—Validity of reference—Agreement by parties to be bound by opinion of majority—Omission of Court to record that fact, effect of—Invalidity of reference to arbitration.*

Where an arbitrator does not submit his award within the time fixed for filing it, his authority to submit the award lapses and it may be held that he has refused or neglected to act within the meaning of Sch. II, para. 5, cl. (b), sub-cl. (ii) of the Civ. Pro. Code.

Therefore, if another arbitrator is appointed without formally discharging the first arbitrator, the validity of the award of the second arbitrator cannot be questioned on the ground that the arbitrator was appointed without jurisdiction.

Civ. Pro. Code (1908)—(Continued).

Where the parties have agreed to be bound by the opinion of the majority of arbitrators, the omission of the Court to record the fact in the order of reference does not invalidate the reference to arbitration. *Narendra Nath Day v. Brojeswari Dasl*, 23 Ind. Cas. 842.

MOOKERJI and BEACHROFT, JJ.

References:—4 W.R. 4; 14 W.R. 150; 8 A. 64=A.W.N. (1886) 82; 7 M. 174, D.

(470-a) Sch. II, para. 5, cl. (b) sub-cl. ii. See No. 470, *supra*.

(470-b) Sch. II, cl. 8. See Nos. 214 & 469, *supra*.

(470-c) Sch. II, para. 14. See No. 155, *supra*.

(471) Sch. II, paras. 14, 15, 20, 21—Award—Private arbitration—Arbitrators determining matters not referred to them.

Held, that a private award determining matters not referred to arbitration cannot be filed in Court, and no decree can be based thereon even if these matters are separable from the rest of the award (a).

Held, also, that, in proceedings under paras. 20 and 21 of Sch. II of Act V of 1908, the only points for consideration are:

(1) Whether or not the matter has been referred to arbitration. (2) Whether or not an award has been made. (3) Whether or not any ground such as is mentioned or referred to in para. 14 or 15 is proved. *Lala Dhonpat Rai v. Khan Devi*, 11 P.W.R. 1914=31 P.L.R. 1914=30 P.R. 1914=23 Ind. Cas. 422.

JOHNSTONE and BEADON, JJ.

References:—(a) 84 P.R. 1907=123 P.W.R. 1907; 27 A. 526; 29 M. 303, F.; 15 C.L.J. 110, D.

(471-a) Sch. II, para. 15. See Nos. 202, 214, 398, 469, 471, *supra*.

(471-b) Sch. II, para. 16. See No. 398, *supra*.

(472) Sch. II, para. 16, S. 115—Award—Judgment in accordance therewith—Decree thereon—No appeal—No revision—High Court's powers under S. 115, Civ. Pro. Code—No formal application necessary. *Batcha Sahib v. Abdul Gunny*, 14 M.L.T. 314=25 M.L.J. 507=21 Ind. Cas. 308=(1914) M.W.N. 142. See Final Part, 1913, Col. 418.

(473) Sch. II, cl. 17—Application to file agreement to refer to arbitration—Land to be partitioned—Matter not cognizable by Civil Court—Agreement not to be accepted in part.

A applied, under cl. 17 of the second Schedule to the Civ. Pro. Code, that an agreement for reference to arbitration between himself and certain other parties might be filed in Court, and that the agricultural land and certain cattle, belonging to the parties to the agreement, which related to the said land, be partitioned between the parties through the arbitrators.

Civ. Pro. Code (1908)—(Continued).

Held, (1) that the Civil Court had no jurisdiction to entertain the application as it related to the partition of agricultural land, within the meaning, and for the purposes, of S. 158 (2), cls. (17) and (18) of the Punjab Land Revenue Act, 1887;

(2) that the agreement could not be accepted in part, i.e., as to the division of the cattle. *Fazl Din v. Shah Nawaz*, 46 P.L.R. 1914=55 P.W.R. 1914=22 Ind. Cas. 381.

RATTIGAN, J.

References:—(a) 5 P.R. 1888, F.; 60 P.R. 1893; 19 P.R. 1892; 16 Ind. Cas. 752=261 P.W.R. 1912=247 P.L.R. 1912, D.

(473-a) Sch. II, r. 17. See No. 388, *supra*.

(474) Sch. II, cls. 17, 18, 19, 20—Application under cl. 20—Award defective—Abandonment by agreement of parties—Joint application for reference by Court to new arbitrators—Reference by Court—Award—Decree—Application of cls. 17 to 19—Appeal.

In proceedings under cl. 20 of the second Schedule of the Code of Civil Procedure, it was found that the document purporting to be an award was defective. Upon this the parties, having agreed to abandon the reference to the original arbitrators, made a joint application to the Court appointing certain other arbitrators and praying that the Court would direct these new arbitrators to file an award, and would appoint an umpire in the event of the arbitrators being unable to agree. The Court then referred the matter to the new arbitrators, who delivered their award within time. The Court, after hearing and disposing of the objections to this award, passed a decree in accordance with the award:

Held, (1) that the award was made on an order of reference by the Court on an agreement by the parties to refer to arbitration:

(2) that cls. 17 to 19 of the second Schedule to the Code applied; and that no appeal lay from the decree (a). *Wali Mohammad v. Bahawal Baksh*, 14 P.L.R. 1914=20 P.W.R. 1914=21 Ind. Cas. 925=28 P.R. 1914.

REID, C.J., and BEADON, J.

References:—(a) 16 Ind. Cas. 996=9 P.R. 1913=248 P.L.R. 1913, R.

(475) Sch. II, S. 18—Appointment of arbitrator—Award as to part only of matter referred—Arbitrators signing award on different dates—Effect—Ss. 7, 107, Contract Act—Proposal—Acceptance—Re-sale of goods on breach—Default of settler—Right to damages for loss on re-sale—Presumption as to place of performance of contract—Defendant responsible for litigation—Costs. *Bhagwan Dass v. Shiv Dial*, 92 B.K. 1913=109 P.L.R. 1914=22 Ind. Cas. 811. See Final Part, 1913, Col. 420.

(475-a) Sch. II, cl. 18. See No. 474, *supra*.

(476) Sch. II, cls. 18 and 22—Agreement to refer to arbitration—Suit filed notwithstanding—Procedure.

Civ. Pro. Code (1908)—(Concluded).

Where a plaintiff, who had agreed to refer to arbitration a dispute between himself and the defendants, brought a suit against the latter in respect of that dispute, the plaintiff's suit should not be dismissed altogether, but the Court should allow the defendant reasonable opportunity for enforcing the agreement and should make an order staying the suit to enable him to take necessary steps. In case no steps are taken it should proceed with the trial of the suit in the ordinary manner. **Sheo Babu v. It Narain**, 12 A.L.J. 757=24 Ind. Cas. 490.

PIGGOTT, J.

(477) Sch. II, cl. 19—*Pending suit—Private reference to arbitration—Stay of suit.*

After the institution of a suit, the plaintiff and one of the defendants entered into an agreement to submit the matters in difference between them to arbitration. The defendant then moved the Court, to stay the suit. The lower Courts declined to do so. The defendant having applied to the High Court:

Held, dismissing the application, that the agreement did not fall under any of the clauses of the second Schedule of the Civ. Pro. Code, 1908. **Vyankatesh Mahadev v. Ramchandra Krishna**, 16 Bom. L.R. 653=38 B. 687.

BEAMAN and HAYWARD, JJ.

(477-a) Sch. II, cl. 19. See No. 474, *supra*.

(478) Sch. II, para. 20—*Private arbitration—Award—Appeal—Jurisdiction.* See **AWARD**, No. 4, 19 C.L.J. 260.

(479) Sch. II, r. 20. See Nos. 154, 158, 471, 474, *supra*.

(480) Sch. II, para. 21. See Nos. 159, 471, *supra*.

(481) Sch. II, para. 21, cl. (2). See No. 154, *supra*.

(482) Sch. II, cl. 22. See No. 476, *supra*.

Civil Rules of Practice (Madras).

(1) *Pleader's fee in appeal from order under Ss. 244, 212, Civ. Pro. Code, 1882.* See **CIV. PRO. CODE (1908)**, No. 227, 24 Ind. Cas. 283.

(2) *R. 277 as amended—Pleader retained for a party—Pleader drafting written statement and not engaged for the subsequent stages of the suit—Whether entitled to appeal for the opposite side—Onus.*

A, a First Grade pleader, was attending to Government work in the Sub Judge's Court at Cocanada and was engaged by the Government to defend a suit filed by R. He drafted a written statement and before anything was done, the suit was transferred to the file of the Sub-Judge of Rajahmundry. When the suit was so transferred, the Collector did not engage A to appear before the Rajahmundry Court, but engaged the Government pleader at Rajahmundry to appear for the Government, and A had nothing further to do with the case. Some time after the transfer of the suit to Rajahmundry, A resigned his Government Pleadership and P was appointed. Subsequently the

Civil Rules of Practice (Madras)—(Concl'd.).

Subordinate Judge's Court of Rajahmundry was ordered to be held at Cocanada and the suit came back to Cocanada for trial before the Sub-Judge. The Collector engaged to defend the suit and no engagement was offered to A. The Vakil for the plaintiff died and R offered the brief to A. A applied for permission under r. 277 of the Civil Rules of Practice to appear for the plaintiff.

Held, that, under the circumstances, r. 277 clearly entitled A to appear for R. Apart from any question of permission, the proviso to r. 277 threw the onus on the other side, because the engagement of another Pleader when the case came back to be tried at Cocanada raised the presumption that A's services were not required and that he was free to appear for the opposite side. **Atchutaramayya v. Secretary of State**, 16 M.L.T. 349.

KUMARASWAMI SASTRY, J.

(3) Rule 277—*Pleader—Appearance for one side—Whether he can appear for the other side.* See **PLEADER AND CLIENT**, No. 2, (1914) M. W.N. 785.

(4) Rule 279 (6)—*Civil Rules of Practice—Meaning of "realised."* See **CIV. PRO. CODE (1882)**, No. 36, (1914) M.W.N. 309.

Claim Petition.

(1) *Duty of Court in—Court not determining question of possession—Revision by High Court.* See **CIV. PRO. CODE (1908)**, No. 198, 24 Ind. Cas. 62.

(2) *Claim disallowed—Order for joint possession of claimant and decree-holder—Claimant not evicted—Claimant's right to sue for sole possession.* See **CIV. PRO. CODE (1882)**, No. 44, (1914) M.W.N. 897.

Co-heirs.

(1) *Possession of a co-heir whether adverse to other co-heirs—Possession traceable to a lawful title is not adverse—Hindu widow alienating property by gift to one of the presumptive reversioners—Validity—Alienation by donee—Suit by alienee from the other reversioners—Adverse possession when commences.* See **ADVERSE POSSESSION**, No. 16, 16 M.L.T. 580.

(2) *Liability of co-heirs to contribute—Expenses incurred in litigation—Expenses of Shradh—Equitable set off—Time-barred debt.* See **CONTRIBUTION**, No. 1, 21 Ind. Cas. 716.

Collectors of Land Revenue Regulation.

See **REG. XVI** of 1827.

Commission. *

Revision—Commission for examination of witnesses—Order refusing to issue—No abuse of process of Court—No material irregularity—Not open to revision—Charter Act, S. 15, Civ. Pro. Code (1908), S. 115.

Where the lower Court refused to issue a commission for the examination of certain witnesses in a case where there was a possibility of

Commission—(Concluded).

the commission being returned before the hearing itself took place.

Held that it cannot be said that, under S. 15 of the Charter Act, nor S. 115, Civ. Pro. Code, (1908), the refusal of the lower Court amounts to an abuse of the process of the Court or that it has acted with material irregularity in the exercise of its jurisdiction. *Ohlund alias Sabapathi Goundan v. Sambandamurthi alias Kandgaivela Gounden*, 15 M.L.T. 339=23 Ind. Cas. 522.

SESHAGIRIYER, J.

References:—9 M. 256, F.; 28 M. 28, D.; 21 M.L.J. 899; 12 C.W.N. 678, R.

Commission Agent.

Rights and liabilities of. See CONTRACT ACT, No. 87, 7 L.B.R. 110.

Commissioner.

(1) Application by one of the parties to examine Commissioner—Court when can refuse. See ACKNOWLEDGMENT, No. 1, 19 C.L.J. 87.

(2) Partition suit—Whether Commissioner can execute order of Court directing parties to deposit his fees. See PARTITION, No. 1, 21 Ind. Cas. 191.

Companies Act.

See ACT VI OF 1882.

See ACT VII OF 1913.

Company.

(1) *Company—Refusal to register a transfer—Power of Manager—Delegation of power by the Company—Articles of Association—Application of.*

A refusal to register shares in the name of a transferee of those shares can only be by a resolution of the Company in pursuance of the Articles of Association. Where the managing agent of the Company refuses to register a transfer when the power to do so was not conferred upon him by the Company, held that there was no refusal by the Company to register the transfer.

Articles of Association cannot apply to transfers which are made before their coming into operation. *Bahadur Singh v. Shiam Sunder Tug*, 12 A.L.J. 629=36 A. 365=23 Ind. Cas. 900.

RICHARDS, C.J., and BANERJEE, J.

(2) *Company—Presentation of winding up petition to the Court—Resolution of the shareholders for voluntary winding-up and appointing certain persons as liquidators—Order of Court directing compulsory winding-up—Appeal—Liquidators appointed pendente lite not competent to appeal.*

Persons appointed as liquidators by a resolution of the shareholders of a limited company, passed after the presentation to the Court of a winding-up petition by certain creditors of the

Company—(Continued).

company, have no *locus standi* to present an appeal against an order of Court directing a compulsory winding-up. Once that order was passed, the only persons competent to appeal therefrom were the Company itself of such shareholders or creditors as felt aggrieved by it. *People's Bank of India, Ltd. v. Narain Das*, 73 P.R. 1914=279 P.L.R. 1914.

KENSINGTON, C.J., and RATTIGAN, J.

(3) *Ss. 482, 486—Penal Code—Merchandise Marks Act (IV of 1889), Ss. 6, 7—Person—Limited Company—Liability of, to be convicted and punished—Words "he" and "whoever," meanings of—Mens rea—Innocence—Proof—Interpretation of Statutes—Ambiguous language—Penal Act.*

A body corporate can be lawfully prosecuted and on conviction punished for an offence under S. 482 or S. 486, Penal Code.

The word "he" in Ss. 6 and 7 of the Indian Merchandise Marks Act includes "she" and "it."

Per Hartnoll, Offg C.J.—The word "whoever" in Ss. 482 and 486, Penal Code, does not refer only to a definite individual or definite individuals and can apply to a corporate body.

Where the language of a Statute is not clear to ascertain the real meaning the cause or necessity of the law being made should be considered.

Every clause of a statute should be construed with reference to the context and the other clauses of the Act so far as possible, to make a consistent enactment of the whole Statute or series of statutes relating to the subject-matter.

Under Ss. 482 and 486, Penal Code, the prosecution has not to prove the *mens rea*; and, as the burden of proving innocence is thrown on the accused under those sections, when once a *prima facie* case has been established, a limited Company, when accused, can prove its innocence by the evidence of its agents or servants or otherwise as it thinks fit.

Per Ormond, J.—The word "whoever" with which Ss. 482 and 486 begin means the same thing as "every person who" in S. 2 (2) of the English Merchandise Marks Act and shows that the provisions of the sections apply to persons generally.

The scope of a penal section in an Act would (so far as the language is concerned) be the same whether it began with the words "every persons who" or with the word "whoever," unless the word "person" is defined so as to have a more restrictive or a more extended meaning than it in fact has. Limited Companies are not excluded from the operation of Ss. 482 and 486, Penal Code, and there is nothing inherent in the nature of a Limited Company which would prevent it from proving its innocence either by showing that it acted without intent to defraud under S. 482, or under S. 486 in any of the ways prescribed in that section.

Company—(Continued).

Seena M. Haniff & Co. v. Liptons, Limited,
15 Cr. L.J. 337=23 Ind. Cas. 689=7 Bur. L.
T. 116.

HARTNOLL, OFFG. C.J., and ORMOND, J.

References:—(1889) 24 Q.B.D. 90=59 L.J.
M.C. 13=62 L.T. 73=38 W.R. 204=17 Cox.
C. C. 55=54 J.P. 436; (1898) 2 Q.B.D. 19=62
J.P. 439=67 L.J.Q.B. 601=78 L.T. 658=14
T. 395=46 W.R. 573=19 Cox. C.O. 127;
(1901) 2 K.B. 1=71 E.J.K.B. 656=66 J.P.
704=87 L.T. 51=18 T.L.R. 538=20 Cox. C. C.
279, F.

(4) *Company—Liquidation—Security deposit by an employee of a Bank—Payment of interest on the deposit—Employee ranks as ordinary creditor in liquidation proceedings.*

The claimant, a Branch Manager of a Banking Company, paid the sum of Rs. 4,500 to the Bank as security for the faithful discharge of his duties. The amount was entered in the Security Deposit Account of the Company and bore interest at six per cent. At the liquidation of the affairs of the Company, the claimant urged that he was entitled to recover the amount in full in preference to the creditors of the Bank as he had paid it to the Bank as an employee and not as a creditor:

Held, that the claimant ranked merely as an ordinary creditor of the Company, for he agreed that the Bank should receive and hold the money paying interest at six per cent. for its use, the money being repayable if not forfeited for losses occasioned through the claimant's default upon his ceasing to be the Bank's agent.

In the case of a going Bank, the Bank is entitled to treat a security deposit as earmarked for a particular purpose and refuse to deal with it for any other purpose. But in a liquidation of an insolvent Bank, the question is whether the security fund can be identified and followed by the giver, if the occasion for realizing the security has not arisen. If the money has, with the consent of the giver of the security, been received by the Bank and mixed with its funds in consideration of an agreement to pay interest on it, the Bank is only a debtor and not a trustee. **G. K. Malvankar v. The Credit Bank of India, Ltd.,** 16 Bom. L.R. 733.

SCOTT, C.J., and DAVAR, J.

(5) *Company—Liquidation—Minor shareholder—Receipt of dividends even after attaining majority—Liability as contributory.*

The appellant purchased fifty shares of the respondent Banking Company in 1910. He was then a minor; but he attained majority in August 1912. From the date of his purchase to November 1913, when the affairs of the Company were wound up by the Court, he had regularly received dividends on his shares. If the liquidation proceedings he contended that he was not liable to be included in the list of contributories of the Company, for he was, at the date of the purchase of the shares, a minor;

Company—(Continued).

Held, negating the contention, that inasmuch as he had intentionally permitted the Company to believe him to be a shareholder and in that belief to pay him dividends on his shares since he attained majority, he was estopped by his conduct while a person *sui juris* from denying as between himself and the Company's representative that he was a shareholder.

A registered holder of shares in a statutory Company is a person with a vested interest in property which may be burdened with an obligation to pay calls in the future. The registered member cannot keep the interest and prevent the Company from having it and dealing with it as their own without being bound to bear the burthen attached to it. **Fazulbhoy Jaffer v. The Credit Bank of India, Ltd.,** 16 Bom. L.R. 730.

SCOTT, C.J., and DAVAR, J.

(6) *Company—Secretary—Managing Director, powers of—Grant of permanent lease—Principal and agent—Act done by agent in course of enjoyment—Binding upon principal—Presumption by third party that act of Managing Director is regular—Specific performance against Company—Discretion.*

The two Secretaries and the Managing Director of the defendant Company agreed to grant to the plaintiffs a permanent lease at a certain premium and rent. The premium was paid and the lease engrossed and stamped and tendered to the officers of the Company, but the Managing Director declined to execute the document because his act was not approved by the Directors. The plaintiffs sued the Company for specific performance:

Held, (1) that, although a Secretary to a Joint Stock Company cannot ordinarily be treated as a general agent of the Company but is *prima facie* a person invested with authority to give effect to the decisions of the Directors, yet when the terms of the agreement were approved by the Managing Director also, it became operative against the Company (a).

(2) that the grant of a permanent lease would be clearly within the scope of the apparent authority of the Managing Director (b);

(3) that every act done by an agent in the course of his employment on behalf of the principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorized to do the particular act and the person dealing with him has notice that in doing such act he is exceeding his authority;

(4) that the plaintiffs were entitled to presume that the Managing Director had acted regularly within the scope of his authority and in the manner provided in the Articles of Association (c).

As in this case there was in fact no agreement made by any person duly authorized to grant a permanent lease on behalf of the Company—

Company—(Continued).

Although by reason of the position of the Managing Director the Company might not be free to repudiate and to obtain a cancellation of the agreement entered into by him — and the Company never ratified or acquiesced in the act of the Managing Director but repudiated it at the earliest possible opportunity, specific performance cannot be granted against the Company (*d*). *Khulna Loan Company, Limited v. Jahir Goldar*, 24 Ind. Cas. 209.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 54 L.J.Q.B. 428=53 L.T. 242=49 J.P. 628; 18 Q.B.D. 815=56 L.J.Q.B. 452=57 L.T. 436=35 W.R. 640, R. (b) (1867) 1 H.L. (Sc.) 145; (1894) 2 Q.B. 40=63 L.J.Q.B. 451=10 R. 280; (1893) 1 Q.B. 346=5 R. 143=67 L.T. 831=41 W.R. 222=56 J.P. 839, R. (c) (1855) 5 H.L.C. 297=101 R.R. 163=24 L.J. Ch. 457=3 Eq. R. 605=3 W.R. 423=40 Eng. Rep. 927; (1906) A.C. 196=75 L.J.P.C. 93=94 L.T. 229=13 Manson 184; (1869) 4 Ch. App. 460=39 L.J. Ch. 27=20 L.T. 641=17 W.R. 689; (1895) 1 Ch. 629=64 L.J. Ch. 451=12 R. 183=72 L.T. 375=43 W.R. 486=2 Manson 223; (1901) 2 K.B. 314=70 L.J.K.B. 625=84 L.T. 847, R. (d) 2 Sch. and Lefroy 549=9 R.R. 98; 5 Ind. Cas. 286=14 C.W.N. 451=11 C.L.J. 346, *Rel.*

(7) *Company—Articles of Association—Power of Directors regarding allotment of shares—Allotment by Secretary and treasurer—Validity—Directors whether can delegate their powers—Acceptance of share certificate—Effect—Nature of contract made by the allotment—Right to rescind allotment on ground of fraud and misrepresentation—When to be exercised—Effect of delay.*

Allotment is a duty primarily falling on the directors, and if directors have no power under the articles to delegate this duty, then a purely ministerial officer such as the secretary could not allot.

In cases where the judgment of the individual directors is required for the allotment by reason of special features, they could not delegate (*a*).

A person to whom shares have been irregularly allotted has the right to apply to have his name taken off the register, but this right cannot be allowed after acceptance of the share certificate.

The contract made by allotment is a contract to issue shares, and when the shares have been issued and accepted, the title of the allottee becomes complete and he is in an entirely different position to that occupied by him before allotment.

Where a person has contracted to take shares in a company and his name has been placed on the register, he must exercise his rights of repudiation with extreme promptness after the discovery of fraud or misrepresentation for this reason: the presence of his name on the register may have induced other persons to give credit to the company or to become members of it (*b*).

Company—(Concluded).

Lapse of time without rescinding will furnish evidence of an intention to affirm the contract.

As between two private persons, the right to rescind may actually be lost by the conduct of the person entitled to apply even within the period of the statute of limitation, and in the case of shareholders, want of promptitude in repudiating will, by reason of its far reaching consequences, be always held fatal to the claim.

In this case, the Articles of Association did not in terms provide that the allotment shall be by the directors, but they provided that the general management of the company shall be carried on, subject to the control and supervision of the directors, by the secretaries and treasurers, and that the directors may from time to time entrust and confer upon the secretaries and treasurers such of the powers exercisable under the articles by the directors as they may think fit. The form of application for the shares issued by the company also put forward the secretaries and treasurers, as the persons to whom applications are to be made, and not the directors.

Held that the allotment by the secretaries and treasurers was regularly made and was valid. *Pasarala Sannyasi v. The Guntur Cotton, Jute and Paper Mills Company Limited*, 16 M.L.T. 538.

SADASIVA IYER and NAPIER, JJ.

References:—(a) 1 Ch. App. 561, R. (b) 21 M. 42; (1869) 4 Eng. and Ir. App. 64; (1870) 9 Eq. 263; (1896) A.C. 278; (1891) 7 Ex. 26; (1891) 20 Ch. D. 13; (1888) 23 Ch. D. 418, R.

(8) *Contract with—Conflict between terms of contract in correspondence and Company's minutes—Effect—Right of heir to enforce terms of sale.* See *CONTRACT*, No. 3, 18 C.W.N. 1185.

Compensation.

Order granting compensation under S. 95, Civ. Pro. Code—Appeal—Second appeal. See *CIV. PRO. CODE* (1908), No. 131, 21 Ind. Cas. 756.

Composition Deed.

Essential test of—Registration. See *REGISTRATION ACT* (1877), No. 7, 16 Bom. L.R. 286.

Compounding Offence.

Pro-note executed for compounding a charge of grievous hurt—Legality. See *CONTRACT*, No. 4, 37 M. 385.

Compromise.

(1) *Compromise decree—Penalty and forfeiture—Power of Court to relieve parties against them.*

A compromise decree is subject (like a contract between the parties) to the exercise of the powers of a Court of Equity to relieve against forfeitures and penalties, just as if it were a contract that contained the provisions in respect of forfeiture or penalty (*a*).

Compromise—(Continued).

A penal provision in a compromise decree can be relieved against, provided the judgment-debtor did not make wilful default and provided also that the defaulted obligation was performed within a reasonable time after the default.

Where the default was caused by reason of the death of the mother of the judgment-debtor, held, it was not 'wilful' and its consequences must be relieved against.

The general presumption is that time is not intended to be of the essence of the contract. *Ann Sheik Mohidin Tharagan v. Yadiyalaganambala Pillai*, (1914) M.W.N. 92=22 Ind. Cas. 37.

SADASIVA IYER and SPENCER, JJ.

References :—(a) 24 M. 265; 8 M.I.A. 239, F.

(2) *Construction—Matters between legatee and heirs settled—Heirs to pay money—Condition precedent—Equity.*

In accordance with a certain will, the plaintiff was to stand possessed of the entire estate of the deceased, to make certain payments each year for charities *et cetera*, and to divide the surplus of each year's income between the heirs of the deceased. The will led to litigation which resulted in a compromise, whereby the heirs got certain portions of the property and were to pay annually certain fixed sums out of its income towards the objects mentioned in the will.

Held that the plaintiff was entitled to get from each of the heirs the sums that were payable under the compromise, but having got those sums he was bound to expend them upon the purposes mentioned in the will and was bound to give reasonable accounts to the defendants showing that he had so spent the money. The rendering of the account was not a condition precedent to the payment of the money. *Zanulabdin v. Zakir Hussain*, 12 A.L.J. 513.

RICHARDS, C.J., and BANERJI, J.

(3) *Minor—Next friend—Guardian ad litem—Compromise—Consent of Court—Negligence—Fraud—Decree based on compromise, when can be set aside—Civ. Pro. Code (1908), O. XXXII, r. 7.*

A compromise decree cannot be set aside until fraud or collusion on the part of the next friend or gross negligence of the guardian ad litem is established (a).

A compromise entered into with the consent of the Court cannot be set aside, unless the consent was obtained by fraud or concealment of material facts (b). *Ajdhya Pershad v. Mahabir Pershad*, 22 Ind. Cas. 923.

KANHAIYA LAL, A.J.C.

References :—(a) 7 Ind. Cas. 538=18 O.C. 158 and 11 Ind. Cas. 105, R. (b) 6 C. 687; 27 M. 377=14 M.L.J. 159; 34 C. 70=11 C.W.N. 178=5 O.L.J. 175=17 M.L.J. 59=2 M.L.T. 166(P.G.), B.

Compromise—(Continued).

(4) *Res judicata—Compromise—Not accepted by Court—Suit dismissed for want of Succession Certificate—Second suit—Maintainability of.*

An oral compromise arrived at during the pendency of a suit for sale upon a mortgage cannot supersede the mortgage, unless the Court accepts the compromise and passes a decree in accordance therewith. Where a compromise is arrived at between the parties, but the Court does not accept it but dismisses the suit on the ground that Succession Certificate had not been filed, held, that the dismissal is no bar to the maintenance of a second suit. *Ram Ratan v. Subhan*, 12 A.L.J. 672=24 Ind. Cas. 93.

BANERJI, J.

(5) *Compromise decree challenged on the ground of absence of consent—Application for review dismissed—Fresh suit, if lies.*

Where a party to a suit applied for review of a decree passed upon a compromise on the ground that he had not consented to the compromise, and failed :

Held—That a suit to set aside the decree on the same ground was not maintainable. *Kailash Chandra Poddar v. Gopal Chandra Poddar*, 18 C.W.N. 1204.

JENKINS, C.J., and WOODROFFE, J.

References :—2 C.L.J. 508=10 C.W.N. 527, F.; 10 C.L.J. 420; 13 C.W.N. 1197, D.

(6) *Decree in terms of compromise—Appeal—Second appeal—Decree itself not passed by consent of parties, but Court passing decree holding that there was a consent—Appeal whether lies—Terms forming the consideration for adjustment of matters in dispute whether they form part of subject-matter of suit or not can be embodied in the decree—Ss. 96 (3), 104 (2), O. XXIII, r. 3, O. XLIII (m), Civ. Pro. Code (1908).*

Where a Subordinate Court passed a decree in accordance with a compromise agreement after recording it, an appeal lies to the District Judge against the Subordinate Court's decree and a second appeal lies from the decree of the District Judge on appeal.

Where the decree itself was not passed by the consent of the parties, but the Court held that there was a consent of parties to the terms of a compromise agreement which was recorded, and it passed a decree in accordance therewith, notwithstanding the objection of one of the parties, an appeal lies from such a decree and S. 96 (3), Civ. Pro. Code, does not prohibit the appeal.

Where a suit is adjusted by a compromise one of the terms of which is that the defendant should execute a sale-deed outside the Court, a decree can be passed in accordance with such a term.

All terms which form the consideration for the adjustment of the matters in dispute in the suit, whether they form part of the subject-matter of the suit or not, do become related

Compromise—(Continued).

to the suit and can be embodied in the decree
(a). **Ayyagari Veerasalingam v. Kovvuri Basavareddy**, 16 M.L.T. 125=27 M.L.J. 173.

SADASIVA IYER and TYABJI, JJ.

References:—(a) 33 M. 102; 35 C. 837, F.

(7) *Civ. Pro. Code* (1908), S. 96 (3), O. XLIII, r. 1 (m)—*Compromise—Order to record compromise in decree—Appeal—Agent compromising without power to do so—Compromise not binding on principal—Minor—Complete surrender of minor's rights, whether for his benefit.*

According to the strict provisions of the law, when a suit is compromised, the Court should first pass an order directing the compromise to be recorded, and then pass a decree in accordance therewith.

An order directing a compromise to be recorded does not cease to be such simply because it directs at the same time a decree to be passed in accordance with the compromise. An appeal will lie from such an order under O. XLIII, r. 1, cl. (m), and S. 96 (3) is not applicable to the case.

Where the power-of-attorney did not authorize the agent to adjust a suit by compromise, any compromise by the agent, being in excess of his authority, will not bind the principal and will be set aside by the appellate Court.

A compromise which completely surrenders a minor's rights cannot possibly be for the minor's benefit and cannot bind him. **Muhammad Rashid v. Rahmatullah**, 212 P.L.R. 1914 = 134 P.W.R. 1914 = 24 Ind. Cas. 630 = 96 P. R. 1914.

RATTIGAN and SHADI LAL, JJ.

(8) *Compromise evidencing release by a co-parcener of his rights in family property—Admissibility in evidence without registration.*

Where a compromise evidences an actually effected release by a co-parcener of his rights in the family property, it is admissible in evidence without registration, to prove the release. **Sellappa Koundan v. Gurumoorti**, 27 M.L.J. 396.

MILLER and SANKARAN NAIR, JJ.

References:—20 A. 171 (P.C.), F.; 33 M. 102; 36 M. 46, R.

(9) *Compromise—Party present but not signing it—When minor cannot repudiate it—Civ. Pro. Code* (1908), O. XXXII, r. 7.

Held, that a person, who is a party to a suit and who is present in Court at the time of compromising it, but does not object to its terms, is bound by the compromise, although he has not actually signed it, particularly where he also gets some benefit thereunder.

Held, also, that, on attaining majority, a minor is incompetent to repudiate a compromise made by his next friend or guardian in a suit if it was made for his benefit and with the sanction of the Court. **Amir v. Faqira**, 139 P.W. R. 1914 = 242 P.L.R. 1914.

JOHNSTONE and RATTIGAN, JJ.

Compromise—(Continued).

(10) *Hindu Law—Compromise—Consideration—Parties in doubt about their rights—Minor son bound by compromise of father.*

The minor sons of a Hindu father are bound by a *bona fide* compromise of a doubtful claim entered into by their father as manager of the joint family (a).

Where a Hindu lady claims to maintenance from her husband's family, and her brother (maintaining the lady) agrees to forego her right in consideration of her husband's relations giving up their rights to a share in a village for themselves, there is a good consideration for supporting the compromise even if the lady herself was not a party to the compromise.

Where the rights asserted on one side and denied on the other were fairly considered, and a compromise was entered into, that compromise should not be disturbed even if one of the parties was under a misapprehension as to his rights (b). **Venkatagiri Nayani Varu v. K. J. Subbarayalu Nayani Varu**, 24 Ind. Cas. 491.

WALLIS and SADASIVA IYER, JJ.

References:—(a) 27 A. 203 = 2 A.L.J. 720 = A.W.N. (1904) 244; 4 Ind. Cas. 954 = 106 P.W. R. 1909 = 139 P.L.R. 1909; 7 Ind. Cas. 134 = 12 Bom. L.R. 621; 1 Ind. Cas. 573 = 9 C.L.J. 197; 12 C.W.N. 687; 11 M.L.J. 70; 10 Ind. Cas. 477 = 15 C.W.N. 545 = 8 A.L.J. 552 = 13 C. L.J. 575 = 13 Bom. L.R. 427 = 10 M.L.T. 25 = (1911) M.W.N. 432 = 21 M.L.J. 645 = 38 I.A. 87 = 33 A. 355 (P.C.); 10 Ind. Cas. 221 = 9 M.L. T. 498 = (1911) M.W.N. 145; 14 Ind. Cas. = 295 (1912) M.W.N. 532; 20 Ind. Cas. 44 = 35 A. 428 = 11 A.L.J. 645, F. (b) 18 M.L.J. 469 = 31 M. 474, F.

(11) *Compromise—Suit on pro-note—Suit for cancellation of the pro-note in another Court—Agreement to abide by decree in latter Court—No bar to the suit—No adjustment—Nature of adjustment—Right of Court to decide suit—Not to be interfered with—Exceptions. Raja of Venkatagiri v. Yemuru Chinta Reddi*, 11 M. L.T. 209 = (1912) M.W.N. 893 = 15 Ind. Cas. 378 = 22 M.L.J. 447 = 37 M. 408. See Final Part, 1912, Col. 398.

(12) *Compromise-deed—Consideration—Withdrawal of proceedings to file submission to arbitration—Civ. Pro. Code* (1882), S. 523—*Registration—Deed of compromise containing provision for execution of future document—Registration Act*, 1908, Ss. 17, 49. **Murli Dhar v. Gobind Ram**, 306 P.L.R. 1913 = 20 Ind. Cas. 817 = 205 P.W.R. 1913 = 20 P.R. 1914. See Final Part, 1913, Col. 423.

(13) *Compromise of bona fide claim based on void agreement, whether valid—Onus to show invalidity—Contract Act*, S. 27—*Agreement not to supply coolies in consideration of monthly payment by rival coolie supplier—Restraint of trade. P. P. Thangavelu Chetty v. P. Mukunda Naidu*, 14 M.L.T. 491 = 21 Ind. Cas. 768 = (1914) M.W.N. 108. See Final Part, 1913, Col. 423.

Compromise—(Continued).

(14) *Compromise—Question as to factum of—Finding of Court—Conclusive in second appeal—Civ. Pro. Code (1908), O. XXI, r. 2—Certificate of adjustment of decree—To be filed in Court whose duty it is to execute the decree—Filing in appellate Court—Not sufficient—Decree granting possession of immoveable property—Filing of certificate of satisfaction—Not necessary—Decree directing execution on furnishing security—No security given—Family Karar or compromise—Possession under—Invalidity of—Fraud upon Court. Kulu Nair v. Meenakshi, 25 M.L.J. 586=14 M.L.T. 574=21 Ind. Cas. 639. See Final Part, 1913, Col. 424.*

(15) *Compromise as to nature of tenancy—Binding effect. See ACT II OF 1901 (AGRA TENANCY), No. 10, 21 Ind. Cas. 124.*

(16) *Petition of compromise filed in mutation proceedings—Estoppel. See ACT III OF 1901 (U. P. LAND REVENUE), No. 12, 23 Ind. Cas. 965.*

(17) *Question whether a compromise decree is against S. 375, Civ. Pro. Code, and is erroneous, to be raised in appeal and not in execution—Decree passed without jurisdiction—Question not to be raised in execution proceedings. See CIV. PRO. CODE (1882), No. 50, 15 M.L.T. 415.*

(18) *Terms of Razinama—Validity of terms not impeachable in execution proceedings. See CIV. PRO. CODE (1908), No. 385, 15 M.L.T. 206.*

(19) *Application for mutation proceedings—Compromise by guardian without Court's permission—Registration whether necessary—Family settlement—Transfer of property worth over Rs. 100—Registration—Terms of the compromise whether can be varied or altered. See CIV. PRO. CODE (1908), No. 395, 12 A.L.J. 998.*

(20) *Suit to remove mutwali of mosque—Compromise by which plaintiff agrees to withdraw suit for consideration whether lawful—Compromise if may be recorded before question whether endowment public or private decided. See CIV. PRO. CODE (1908), No. 125, 18 C.W.N. 1264.*

(21) *Compromise—Authority of pleader to enter into—Form of vakalat. See CIV. PRO. CODE (1908), No. 387, 8 S.L.R. 91.*

(22) *Compromise petition purporting to be by all the defendants filed by those actually present in Court—Decree passed on such compromise petition—Subsequent repudiation by defendants not present at filing of petition—Jurisdiction to set aside decree as *ex parte*. See CIV. PRO. CODE (1908), No. 290, 19 C.W. N. 118.*

(23) *Document executed in pursuance of compromise of suit—Whether has the binding force of decree—Agreement of compromise not registered—Right of parties to rely on terms which have not passed into decree or order of Court. See HINDU LAW (MAINTENANCE), No. 6, 27 M.L.J. 656.*

Compromise—(Concluded).

(24) *Dispute between daughters of a deceased Hindu and widow of his alleged adopted son—Settlement of dispute by compromise—Widow who is party if thereby alienates property in excess of her powers. See HINDU LAW (WIDOW), No. 11, 18 C.W.N. 929.*

(25) *Petition for compromise—Pleading—Registration. See REGISTRATION ACT (1908), No. 8, 22 Ind. Cas. 35.*

(26) *Agreement relating to matters not in dispute—Agreement not registered, whether admissible as to those matters—Matters not embodied in decree. See REGISTRATION ACT (1908), No. 8, 22 Ind. Cas. 687.*

(27) *Alienation of religious office—Validity—Suit in respect of such office—Compromise—Validity—Plaintiff representing the public—Compromise by such plaintiff whether binding on the public. See RELIGIOUS OFFICES, No. 1, 26 M.L.J. 315.*

(28) *Decree based upon compromise—How far operates as *res judicata*. See RES JUDICATA, No. 13, 12 A.L.J. 1011.*

Conciliation System.

(1) *Termination of the system by Government—Time taken up in conciliation—Exclusion of time—Excuse of delay. See LIMITATION, No. 5, 16 Bom. L.R. 441.*

(2) *Time taken up in obtaining conciliator's certificate—Conciliation system abolished after grant of certificate and before date of suit—Exclusion of time. See LIMITATION, No. 6, 16 Bom. L.R. 444.*

Confiscation.

Effect of confiscation on custom of pre-emption. See PRE-EMPTION, No. 15, 12 A.L.J. 725.

Consent Decree.

Consent decree—Payment by instalments—Penalty clause on failure to pay two instalments—The claim cannot be relieved against by the Court but be varied only by consent.

A consent decree provided for payment of the sum found due in certain fixed instalments. It was also provided that, on failure to pay two instalments, the plaintiff was at liberty to recover possession of certain lands. A default having occurred in payment, the plaintiff applied to recover possession. The lower Courts declined to assist the plaintiff in enforcing the penalty clause. The plaintiff having appealed:

Held, that there having been a default in the payment of instalments as provided in the decree, the plaintiff was entitled to take possession of the property.

A consent decree can only be varied by consent.

The ratio in Krishnabai v. Hari (a) and Balambhat v. Vinayak (b) is inapplicable where the relation of landlord and tenant is not

Consent Decree—(Concluded).

created by the decree. **Lachiram Dagdaram Marwadi v. Jana Yesu Mang**, 16 Bom. L. R. 668.

SCOTT, C.J., and BEAMAN, J.

References :—(a) 8 Bom. L.R. 843 = 31 B. 15.
(b) 13 Bom. L.R. 154 = 35 B. 239, D.

Consequential Relief.

Meaning of the expression—Consequential relief not warranted by averments in plaint—Nature of suit. See COURT FEES ACT, No. 5, 24 Ind. Cas. 316.

Consideration.

(1) *Promissory note—More than one executant—Consideration received by some—Consideration for all.* **Sornalinga Mudali v. Pachi Nalcken**, 14 M.L.T. 559 = (1914) M.W.N. 27 = 26 M.L.J. 113 = 22 Ind. Cas. 1. See Final Part, 1913, Col. 427.

(2) *Hundi—Endorsee of payees—Presumption of holder in due course—Want of consideration between payee and the drawer—Effect.* See ACT XXVI OF 1881 (NEG. INSTRUMENTS), No. 2, 16 Bom. L.R. 743.

(3) *Pro-note payable to 'so and so or order or bearer'—Pro. note void—Suit on original consideration.* See ACT III OF 1905 (PAPER CURRENCY), No. 1, U.B.R. (1914), 1st Qr., p. 13.

(4) *Agreements to stifle prosecution in respect of offence of a public nature—Validity—Compromise in respect of offences of a public nature but involving civil liability to an injured party—Validity.* See AGREEMENT, No. 1, 17 O.C. 213.

(5) *Plaintiff not suing on mortgage for a long time—Presumption as to passing of.* See AMENDMENT, No. 4, 12 A.L.J. 635.

(6) *Pro-note executed for compounding a charge of grievous hurt—Legality.* See CONTRACT, No. 4, 37 M. 385.

(7) *Agreement to forego portion of claim—Consideration not necessary—Effect of S. 26, Madras Estates Land Act, upon the operation of the general law as to consideration.* See CONTRACT ACT, No. 49, 16 M.L.T. 184.

(8) *Concurrent finding as to receipt of consideration cannot be questioned in second appeal.* See CUSTOMS (PUNJAB—ALIENATION), No. 15, 86 P.W.R. 1914.

(9) *Recital of amount of consideration and of receipt thereof in full—Oral evidence to vary the amount of consideration recited can be adduced by defendant in a suit for recovery of unpaid balance of consideration.* See EVIDENCE ACT, No. 57, 12 A.L.J. 969.

(10) *Recital in mortgage deed as to—Admissibility in evidence against transferee of mortgagor—Finding based on such recital—Second appeal.* See EVIDENCE ACT, No. 12, 21 Ind. Cas. 841.

(11) *Barred debt whether sufficient consideration for a sale.* See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

Consideration—(Concluded).

(12) *Infant setting aside deed of guardian—Consideration—Major part satisfactorily proved—Presumption.* See GUARDIAN AND MINOR, No. 1, (1914) M.W.N. 490.

(13) *Assignment of property subject to mortgage—Non-payment of consideration for the assignment—Mortgagor whether can take advantage of non-payment.* See HINDU LAW (JOINT FAMILY), No. 9, (1914) M.W.N. 684.

(14) *Admission of execution of deed and receipt of consideration—Burden of proof—Effect of non-receipt of—Right to question consideration for assignment.* See HINDU LAW (WIDOW), No. 1, 21 Ind. Cas. 8.

(15) *Lease—Failure of—Suit for refund of—Limitation.* See KHORPOSH GRANT, No. 1, 19 C.W.N. 102.

(16) *Admission of receipt of consideration in mortgage-deed—Admissibility against purchaser of mortgaged property.* See LIMITATION ACT (1908), No. 9, 12 A.L.J. 941.

(17) *Question as to payment of consideration whether can be raised in second appeal—Recital in mortgage deed and admission made by mortgagor at registration when admissible in evidence against auction-purchaser of mortgaged property.* See MORTGAGE (GENERAL), No. 4, 21 Ind. Cas. 554.

(18) *Admission as to payment of consideration in a mortgage-deed—Evidence against mortgagor and persons claiming under him—Burden of proof.* See MORTGAGE (GENERAL), No. 23, 12 A.L.J. 806.

(19) *Mortgage without consideration whether operative.* See MORTGAGE (GENERAL), No. 32, 23 Ind. Cas. 805.

(20) *Pro-note executed in consideration of giving evidence in executant's favour—Validity.* See PROMISSORY NOTE, No. 5, (1914) M.W.N. 322.

(21) *Immoveable property—Non-payment of consideration—Transfer whether operative—Sale or gift—Test—Intention of the parties.* See SALE, No. 2, 19 C.L.J. 239.

(22) *Registered sale-deed—Purchaser suing for possession after long delay and after vendor's death—Burden of proof of consideration.* See SALE, No. 10, 58 P.R. 1914.

(23) *Execution of mortgage-deed admitted—Burden of proving failure of consideration.* See TRANSFER OF PROPERTY ACT, No. 66, 1 Ind. Cas. 581.

Construction.

1.—OF ACTS.

2.—OF DOCUMENTS.

3.—OF WORDS.

1.—Of Acts.

(1) *Canon of construction—Retrospective operation—Construction of Pensions Act.* See ACT XXIII OF 1871 (PENSIONS), No. 4, 86 P. R. 1914.

Construction—(Continued).**—1.—Of Acts—(Concluded).**

(2) Right of suit if a vested right—Taking away of vested right without saving—Decision of Privy Council on the construction of a different Act, binding effect of. See ACT VIII OF 1885 (BENGAL TENANCY), No. 102, 18 C.W.N. 804.

(3) Transaction entered into after passing of Act, but before commencement of the Act—Effect—Construction. See ACT VIII OF 1885 (BENGAL TENANCY), No. 96, 24 Ind. Cas. 9.

(4) Conflict between the Civ. Pro. Code and its schedule—Construction. See CIV. PRO. CODE (1908), No. 154, 22 Ind. Cas. 690.

(5) A word keeps the same meaning throughout an Act. See CIV. PRO. CODE (1908), No. 138, 10 N.L.R. 28.

(6) Retrospective effect—Construction. See CIV. PRO. CODE (1908), No. 316, 16 Bom. L. R. 30.

(7) Alterations in procedure—Construction of Statutes. See CIV. PRO. CODE (1908), No. 52, 87 P.R. 1914.

(8) Reference to proceedings of the Legislature as an aid to the—See CIV. PRO. CODE (1908), No. 423, U.B.R. (1914), 2nd Qr., p. 16.

(9) Interpretation—Language ambiguous—Duty of Court—Penal Acts—Construction. See COMPANY, No. 3, 7 Bur. L.T. 116.

(10) Same word used in a section of the subsequent Act in which it was re-enacted—Construction. See LIMITATION ACT (1908), No. 93, 37 M. 175.

(11) Right barred under old statute—New statute cannot revive. See LIMITATION ACT (1908), No. 45, (1914) M.W.N. 875.

(12) References in documents to provision in repealed Acts—Construction. See LUNATIC, No. 2, 16 M.L.T. 529.

(13) Right if may be taken to have been conferred by an application. See OCCUPANCY, No. 4, 18 C.W.N. 1290.

(14) Power to make regulations given by Statute—Whether regulations can abridge right conferred by the Statute. See SMALL CAUSE COURT RULES (PRESIDENCY), No. 1, (1914) M.W.N. 216.

(15) Statute conferring right or imposing liability on owner or obligor—Right or liability of his representative or assignee. See TRANSFER OF PROPERTY ACT, No. 67, 27 M.L.J. 494.

(16) Speeches made in the Legislative Council whether can be looked at in construing an Act—Retrospective enactments to be strictly construed. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 19-a, 16 M.L.T. 576.

—2.—Of Documents.

(1) Construction of document—Will or non-testamentary instrument—Test—Date of effect, decisive—Name immaterial—Registration Act (1877), S. 17.

Construction—(Continued).**—2.—Of Documents—(Concluded).**

Where an instrument is intended to take effect from the date of execution, it is a non-testamentary instrument requiring registration under S. 17 of the Registration Act and not a "Will," notwithstanding that that word is used in the instrument. *Krishnasawmi Odayan v. Kamalambal Ammal*, 22 Ind. Cas. 661.

WHITE, C.J., SANKARAN NAIR and OLD-FIELD, JJ.

(2) Custom—*Ikrar malikandeh*—Construction. See EJECTMENT, No. 1, 21 Ind. Cas. 256.

(3) Question of, is a question of law. See FRAUDULENT TRANSFERS, No. 1, (1914) M. W.N. 595.

(4) Authority to adopt "a son"—Construction. See HINDU LAW (ADOPTION), No. 6 27 M.L.J. 306.

(5) On what depends. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(6) Construction of one document with reference to another—Interpretation of deed of endowment. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 24 Ind. Cas. 72.

(7) Agreement between lessor and lessee—Acquisition of land—Compensation to whom payable. See LEASE, No. 7, 22 Ind. Cas. 956.

(8) References in documents to provisions in repealed Act—Construction. See LUNATIC, No. 2, 16 M.L.T. 529.

(9) Patni of 9 villages—Mortgage of 7—Enumeration of total—Patni rent—Whether 2 villages not mentioned in mortgage-deed were mortgaged—Construction. See MORTGAGE (GENERAL), No. 43, 24 Ind. Cas. 465.

(10) Deeds of endowment—Ancient deeds—Terms ambiguous—Construction—Admissibility of external evidence. See RELIGIOUS ENDOWMENTS, No. 1, 20 C.L.J. 312.

(11) Sale of devised property by executor along with other beneficial owners—Sale-deed—Language to be interpreted in its natural sense. See SALE, No. 9, 27 M.L.J. 93.

(12) With help of documents executed under different circumstances—Document named 'Diggu Bhogiam'—Construction. See TRANSFER OF PROPERTY ACT, No. 47, 16 M.L.T. 444.

(13) Will—Disposition in consideration of protection—No contract—Revocation. See WILL, No. 13, (1914) M.W.N. 889.

—3.—Of Words.

(1) Meaning of 'Santhathi Paramaryamayi.' See HINDU LAW (GENERAL), No. 1, 27 M.L.J. 694.

(2) 'Putra-pautradi' whether words of limitation or general inheritance. See HINDU LAW (SUCCESSION), No. 6, 18 C.W.N. 1249.

Construction—(Continued).**—3.—Of Words—(Concluded).**

(3) Construction—Deed—Use of the words "sarva swatantra Badyamayum, Santati Pravasamayum"—Effect. See HINDU LAW (WOMAN'S ESTATE), No. 1, 26 M.L.J. 479.

(4) Meaning of 'Rusum,' 'Jari Tanakha' See LIMITATION ACT (1908), No. 195, 27 M. L.J. 195.

(5) Meaning of "Rukka indul talab." See PROMISSORY NOTE, No. 2, 21 Ind. Cas. 199.

(6) Meaning of 'ghair malik'. See WAJIB-UL-ARZ, No. 2, 223 P.L.R. 1914.

(7) 'Aulad' and 'khandan,' meaning of. See WILL, No. 2, 18 C.W.N. 401.

Contempt of Court.

(1) Receiver appointed by the Court, interference with, while discharging his duty—Interference by one not a party to the suit, if contempt—Strangers to the suit, duty of, when affected by order appointing Receiver—Practice in contempt matter—Affidavit.

The right of a stranger in possession to continue in possession is not affected by the order appointing a Receiver, but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court for the redress of his grievance. If he interferes with the Receiver, he does so at his peril. The Court will not permit a Receiver appointed by its authority to be interfered with or dispossessed of the property he is directed to receive, by any one, although the order appointing him may be perfectly erroneous. The Court requires and insists that application should be made to the Court for permission to take possession of any property of which the Receiver either has taken possession or is directed to take possession. **P. Ray Chaudhury v. Nolini Prokas Sen**, 18 C.W.N. 289.

IMAM, J.

Reference:—20 Beav. Rep. 353 (1856), F.

(2) Criminal offence—Comment on pending case—Offence to be proved by legal evidence—Statement resting on information and belief, no legal evidence—Materials on which application for summary process for contempt, not to be amplified by other materials—High Court—Jurisdiction—Power of High Court to commit for contempt of Mofussil Magistrate. Comment on case pending before Mofussil Magistrate—Comment in newspaper published in Calcutta—Remonstrating against universal house search—Protesting against harsh treatment of accused—Deprecating Police methods—Request that case should not be tried by Magistrate—Appeal to Government's recognized fairness—Whether contempt of High Court—Interference with due administration of justice—Deterring witnesses from giving evidence—Comments on pending cases deprecated—Summary process of contempt—Technical contempt of Court not enough—

Contempt of Court—(Concluded).

Substantial interference with administration of justice necessary—Costs as between party and party awarded. **The Governor of Bengal v. Moti Lal Ghosh**, 14 Cr.L.J. 321=20 Ind. Cas. 81=17 C.W.N. 1253=18 C.L.J. 452=41 C. 173 (S.B.). See Final Part, 1913, Col. 436.

(3) Temporary injunction by Munsif—Suit transferred to the file of the District Judge after injunction—Breach of injunction after transfer—Jurisdiction of District Judge to punish for. See CIV. PRO. CODE (1908), No. 431, 18 C.W.N. 470.

Contract.

(1) Benefit under—Assignability of—Terms prohibiting assignability without seller's consent—Effect.

The benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term 'benefit' the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby, provided the benefit sought to be assigned is not coupled with any liability or obligation that the assignor is bound to perform (a).

But where the contract, as in the present case, imposes liability on the purchaser such as would preclude his transferring it without the consent of the seller, the contract becomes one not assignable without the seller's consent. **Messrs. Diekmann Brothers & Co., Ltd. v. Sulaiman Hajee Brothers & Co.**, 7 L.B.R. 95=7 Bur. L.T. 51=22 Ind. Cas. 940.

PARLETT, J.

References:—(a) 33 C. 702, R.; 9 Bom.L.R. 114, F.; 16 B. 441; L.R. (1903) A.C. 414, D.

(2) Contract, breach of—'Shipment'—Delivery, late—Obligation to take delivery—Damages, measure of—Burden of proof.

The defendant entered into a contract with the plaintiff to deliver 50 tons of Rangoon rice in June and another 50 tons in July. There was a clause in the contract to the following effect: "It is hereby likewise agreed that no objection is to be raised by you in the case of the delivery of the goods being delayed by reason of the non-arrival in time of the steamer carrying the goods on account of the shallowness of water at Diamond Harbour, damage to the steam engine, accidents of the sea and other causes not under human control, as also owing to late shipment at Rangoon."

Held, that the contract was that the goods should be put on board in such time as to make it possible to have them delivered to the purchaser at Calcutta on the dates specified, if the ship started on such a day as to arrive in Calcutta in time, but that if for any reason for which the vendor was not responsible the ship could not start in time and consequently arrived in Calcutta, too late to make it possible for the vendor to deliver to the purchaser the goods on the appointed day, the vendor was not to be held liable in damages.

Contract—(Continued).

That it was obligatory upon the defendant to establish that the delay was attributable to circumstances for which he was not responsible.

The term 'shipment' includes not merely the loading of goods on board the ship but also the starting of the ship.

As soon as the contract has been broken, the obligation of the purchaser to take delivery of the goods vanishes; he is not bound to accept the goods when they are delivered late.

The right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties. **Kall Kanta Saha v. Ismail**, 20 C.L.J. 133.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—24 C. 8=23 I.A. 119, R.

- (3) *Contract with Company, terms of, in correspondence and Company's minutes, conflict between—Right of heir to enforce terms of sale.*

R by letter offered to sell to the appellant Company a patent for Rs. 10,000 paid in cash and Rs. 20,000 in paid up shares of the Company. The letter contained a provision that the Company would be entitled to retain and cancel those shares in the event of R, who was to serve as the Company's manager, by reason of death, resignation, etc., failing to complete 4 years' service. The Company in their minutes recorded resolutions which did not embody this condition and in express terms spoken of the transaction as a sale of the patent for Rs. 30,000:

Held, that the only contract between R and the Company was that contained in the minute and that if this minute incorporated the terms of the letter, it did so in so far only as the latter was not inconsistent with the express term of the minute.

That, on R's death within 4 years, R's widow was entitled to have fully paid up shares to the amount of Rs. 20,000 allotted to her. **The Perfect Pottery Company, Limited v. Mrs. Ida L. Rose**, 18 C.W.N. 1185=27 M.L.J. 74=10 N.L.R. 108=24 Ind. Cas. 506 (P.C.).

LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALLI.

- (4) *Pro-note executed for compounding a charge of grievous hurt—Legality.*

In this case a promissory note was executed as consideration for compounding a charge of grievous hurt to a person who had died previous to the complaint. *Held* that, as the offence could not have been compromised except with the consent of the person to whom grievous hurt was caused, the agreement to compound was prohibited by law, and the pro-note was not enforceable.

It was contended that, as the complainant would, also in law, be entitled to claim damages for the injury caused to the deceased, the claim to damages must also be taken to be at least

Contract—(Continued).

part of the consideration for the pro-note. *Held* that, as this case was not set up in the lower Court and no evidence was given in support of any such allegation, it was of no avail. **Mottal Reddy alias Ramasami Reddy v. Thanappa Reddy**, 37 M. 385.

SUNDARA AIYAR, J.

Reference:—8 W.R. 412, Cons.

- (5) *Hindu Law—Adoption—Promise to pay bribe for bringing about adoption—Legality—Public policy—Arrangements made for benefit of adopting widow, nature of.*

An agreement to pay a bribe to the promisee for bringing about the adoption of the promisor by the promisee's daughter is one against public policy and cannot be enforced.

No distinction can be made as between contracts to make payment in consideration of marriage and similar contracts in consideration of adoption.

Arrangements made for the benefit of an adopting widow stand on a very different footing. She is not bound in law to make any adoption. In the absence of any adoption, she would be entitled to the possession of her husband's property during her lifetime and absolutely to the usufruct thereof. Any arrangement therefore by which she retains any portions of that interest which she parts with by an act purely voluntary on her part might not be against public policy or against Hindu law. **Thuri Kothandarama Reddiar v. Thesu Reddiar**, 27 M.L.J. 416.

SANKARAN NAIR and SPENCER, JJ.

References:—24 M.L.J. 310; 32 M. 185; 29 M. 61; 27 M. 577=14 M.L.J. 310; 2 M. 91; 35 B. 169, R.

- (6) *Contract—Bilateral contract—Party repudiating his part of contract cannot enforce it.*

S, a creditor of a registered Company B, entered into a bilateral contract with B whereby B agreed to execute a mortgage in favour of S. for the sum due to him, and S, on the other hand, agreed to get his suit against B dismissed and also to allow B to raise money by means of a second mortgage which would have precedence over his mortgage. The deed containing the above agreement and mortgaging the entire property of B in favour of S was executed and registered. When B put the deed fit Court in order to get the suit pending against him dismissed, S denied its validity and repudiated it:

Held, that, under the circumstances, S could not enforce the deed as against the other creditors of B. **Sham Lal v. W.K. Porter**, 24 Ind. Cas. 53.

RAFIQUE and PIGGOTT, JJ.

- (7) *Contract—Consideration—Public policy—Sale of calf—Contract not to sell to another and not to castrate—Damages—Expenses of purificatory ceremony—Pre-emption.*

Contract—(Continued).

The plaintiffs sold a calf to the defendant, which was worth Rs. 30, for the sum of Rs. 14 on the conditions (1) that the defendant would not sell the calf to any one, and if he desired to do so, the plaintiffs would have a right of pre-emption; and (2) that the defendant would not castrate the calf, and if he did so, the plaintiffs would be entitled to Rs. 50 as damages and also to the expenses of a purificatory ceremony which they might have to perform for the purposes of atonement. The defendant castrated the animal:

Held, that the contract, being for consideration and not opposed to public policy, was enforceable, and the plaintiff was entitled to recover the damages and the expenses of the purificatory ceremony. **Surendra Nath Basu v. Towej Marjial**, 24 Ind. Cas. 86.

MOOKERJEE and BEACHCROFT, JJ.

- (8) *Estoppel—Rescission of contract—Misrepresentation—Chukain rights in Rungpore, nature of—Permanent element—Development into occupancy right—Transferability—Vendor and purchaser—Object of purchase communicated to vendor—Defeat of object—Silence on part of vendor—Misrepresentation.*

A party to a contract is not estopped from rescinding it if it was based on misrepresentation.

There is a permanent element in the *chukain* rights in Rungpore, which may develop into an occupancy right, and they are freely saleable even before they develop into occupancy rights.

If the vendor be informed by the purchaser of his object in buying a lease-hold property and the lease contains covenants which will defeat that object, mere silence of the vendor will in equity be equivalent to misrepresentation (a).

Therefore, where the defendant held out to the plaintiff that he had a *dar-chukain* right for sale, which he was willing to let the plaintiff purchase for the purpose of permanently settling his nephew on the land, when the defendant had in reality nothing but a lease-hold from year to year transferable only under the Transfer of Property Act, the defendant was bound to disclose to the plaintiff that the word *chukain* in his lease had no meaning, or at any rate, not the meaning which persons residing in the Rungpore District are entitled to attach to it. **Jogendra Nath Goswami v. Chandra Kumar Mazumdar**, 24 Ind. Cas. 193.

HOLMWOOD and CHAPMAN, JJ.

Reference:—(a) 3 Myl. and K. 282=40 Eng. Rep. 108, *Rel.*

- (9) *Contract—Breach—Clause providing exemption from liability in case of accident—Mill owner's failure to deliver goods—Breakdown of machinery—His negligence to take proper measures to prevent—No exemption—Liability to pay damages.*

Contract—(Continued).

Where, under a contract of which one clause was 'accidents to the machinery, strikes or sickness of mill hands or coolies always excepted,' the appellants sold a certain quantity of rice to the respondents and agreed to deliver the same within a particular time within which they failed to do so, and where, in answer to a suit for damages for breach of contract instituted by the respondents, the appellants pleaded that their machinery broke down and that they were therefore excused from liability, and where the Court found that the real cause of their failure appeared to have been their neglect to have their machinery attended to when it first became defective and their laxity at not working day and night from that time so as to perform all their contracts if possible, seeing that they had trouble with their machinery, *held* that the appellants should not be allowed to escape liability on the plea that it was an accident to their machinery that prevented them from performing their obligation.

It was the duty of the mill-owner to have and to keep his machinery in proper order, and he, having failed in his duty, has disabled himself from relying on the terms of the exception provided for by the contract (a). **Moo-sajee Ahmed & Co. v. Bun Swee Soon & Co.**, 7 L.B.R. 105.

HARTNOLL, OFFG. C.J., and YOUNG, J.

References:—(a) L.R. 12 A.C. 503 and L.R. 1 C.P. 611, *R.*

- (10) *Contract—Minor—Beneficiary but not party—Maternal uncle entering into contract on behalf of minor—Validity—Sale by father—Minor's right to impeach.* **Muniya Konan v. Perumal Konan**, 24 M.L.J. 352=13 M.L.T. 311=18 Ind. Cas. 963=37 M. 390. See Final Part, 1913, Col. 439.

(11) *Contract of marriage—Stipulation for damages in the event of breach—Enforceability of contract—Public policy.* **Devorayan Chetty v. Muthuraman Chetty**, 24 M.L.J. 310=18 Ind. Cas. 515=(1913) M.W.N. 200=37 M. 393. See Final Part, 1913, Col. 439.

(12) *Breach—Damages—Interest.* **Boddu Sanyasi Raju v. Kotra Ramamurthi**, (1913) M.W.N. 874=21 Ind. Cas. 543. See Final Part, 1913, Col. 439.

(13) *Breach—Sample—Warranty—Course open.* **P. Srirangam Chetty & Son v. M. Sabapathy Chetty & Co.**, (1913) M.W.N. 895=21 Ind. Cas. 573. See Final Part, 1913, Col. 440.

(14) *Contract that parties or their witnesses shall be heard or not as arbitrators chose—Validity—Parties' power to restrict or exclude evidence.* See **ARBITRATION**, No. 1, 7 & L.R. 113.

(15) *Contract providing for supply of goods by two shipments—Construction of contract—Purchaser's failure to take delivery or pay for goods in respect of the two shipments—Vendor bringing two separate suits for resale—*

Contract—(Concluded).

Damages one in respect of each shipment—Maintainability. See CIV. PRO. CODE (1908), No. 242, 41 C. 825.

(16) Presumption as to time being of the essence of contracts. See COMPROMISE, No. 1, (1914) M.W.N. 92.

(17) Application of rule of estoppel to employees and contracting parties. See DANDIDARI RIGHT, No. 1, 18 C.W.N. 1194.

(18) Joint family—Contract in the name of a member—Suit thereon without joining the other members. See HINDU LAW (JOINT FAMILY), No. 9, (1914) M.W.N. 684.

(19) Contract of indemnity—Breach of contract—Suit by third person against promisor and promisee—Decree against promisee whether binds promisor—Co-defendants—Applicability of doctrine of *res judicata*—Equitable estoppel. See INDEMNITY, No. 1, 37 M. 270.

(20) Void contract whether can be ratified. See LIMITATION ACT (1908), No. 140, 10 N.L. R. 133.

(21) Undertaking to prepare paper book—Enforcement of—Duty of vakil. See PAPER-BOOK, No. 1, 19 C.L.J. 432.

(22) Person not a party to a contract though entitled to benefit thereunder—No privity of contract—Right of suit. See RIGHT OF SUIT, No. 1, 26 M.L.J. 127.

(23) Agreement for purchase and sale of immoveable property—Condition for return of earnest money on non-approval of title by purchaser's solicitor—Condition when may be enforced. See SALE, No. 4, 18 C.W.N. 568.

(24) Contract for sale of immoveable property—Default of purchaser—Breach—Earnest money—Forfeiture—Question whether time is of the essence of contract—Second appeal. See SALE, No. 11, 27 M.L.J. 482.

(25) Damages for breach of contract—Suit maintainable on Small Cause side. See SMALL CAUSE SUIT, No. 2, (1914) M.W.N. 497.

(26) Agreement to grant permanent lease 'hereafter'—Whether vague and uncertain—Putting off execution of deed whether refusal to perform the contract—Allegation of new contract being substituted for old—No proof of new contract—Whether old contract may be enforced. See SPECIFIC PERFORMANCE, No. 10, 23 Ind. Cas. 360.

(27) Nature of Teji and Mundi contracts—Effect of delivering milling notice. See WAGERING CONTRACT, No. 1, 7 Bur. L.T. 54.

(28) Will—Disposition in consideration of protection—No contract—Revocation. See WILL, No. 13, (1914) M.W.N. 889.

(29) Breach of contract—Claim for damages—Whether an actionable claim—Assignment—Right of assignee to sue. See TRANSFER OF PROPERTY ACT, No. 9, 106 P.R. 1914.

Contract Act.

(1) S. 2—Offer—Acceptance—Lowest price telegraphed at request, whether offer to sell at that price—Invitation for offer—Completed contract—Specific performance.

In answer to a broker's telegram, "Have, likely purchaser your three properties, telegraph lowest price for each," the defendant, the owner of the properties, telegraphed his lowest price for each property and added "reply by to-morrow." Upon receipt of this telegram the broker accepted earnest money for one of the properties and wired back to the defendant informing him accordingly and also asking him to "forward title-deeds." The defendant refused to sell only one of the three properties and at the same time repudiated the broker's acceptance of the earnest money as "without authority."

Held, that, (1) the mere statement of the lowest price at which the defendant was willing to sell contained no implied contract to sell at that price;

(2) the words "reply by to-morrow" meant that the defendant wished to be informed whether the broker's purchaser was willing to buy and that if the reply was in the affirmative then the defendant would decide whether he would sell or not;

(3) as the defendant's telegram was not an offer, the broker's reply thereto could not be treated as an acceptance;

(4) even if the defendant's telegram were taken as an offer, it was an offer to sell the three properties collectively and not singly. **Hardandoss v. Rani Mohori Bibi**, 23 Ind. Cas. 322=7 Bur. L.T. 136.

HARTNOLL, O.C.J. and TWOMEY, J.

(2) S. 2—Desire or request—Recommendation.—Distinction—Effect of 'mere' recommendation.

A desire or request shows much more earnestness and personal anxiety than a mere recommendation. A mere recommendation by one party to another to lend money to a third party is not 'desire' on the part of the 1st party within the meaning of S. 2 of the Contract Act, and it does not render the 1st party liable to re-pay the loan. **Muthukaruppa Mudali v. Pl. Mu. Kathappudian**, 16 M.L.T. 194=27 M.L.J. 249=(1914) M.W.N. 706.

SADASIVA IYER and NAPIER, JJ.

References:—20 B. 755; 24 W.R. 445; 1 A. 309, R.

(3) S. 2 (d). See No. 48, *infra*.

(4) Ss. 9, 70—Medical fees—Implied contract—Reasonable amount.

In the absence of an express agreement for payment of fees, a medical man is entitled to a reasonable remuneration to be fixed by the Court. **Captain Hodgkinson Laak v. P. Gallagher**, U.B.R. (1914), 2nd Qr., p. 19=25 Ind. Cas. 777.

SHAW, J.C.

Contract Act—(Continued).

- (5) *S. 11—Contract by minor void—Fraud—Misrepresentation—Transfer by minor's creditor—Estoppel.*

Contracts by minors are void; the only ground, on which equity interferes to make a person of full age return money of property which he obtained during minority, is fraud.

Where a minor obtains money by misrepresenting his age, that amounts to fraud and he may be made to refund it. A minor, who mortgaged his property representing himself to be a major, is not estopped from subsequently pleading this minority (a).

*The same rule has also been adopted in India (b).

Per Sadasiva Aiyar, J.—

Quere.—Whether a future creditor can get rid of a voidable but real transfer under S. 53 of Act IV of 1882? *Vaikuntarama Pillai v. Athimoolam Chettiar*, '26 M.L.J. 612=23 Ind. Cas. 799.

WALLIS and SADASIVA AIYAR, JJ.

References:—(a) 25 T.L.R. 265; 53 S.J. 243; 18 Ch. D. 109; 29 W.R. 747; 50 L.J. Ch. 673; 45 L.T. 193; (1913) 2 K.B. 235; 82 L.J. K.B. 598; 108 L.T. 834; 20 Manson 129; 29 T.L.R. 352; 3 De. G. & J. 63; 27 L.J. Bk. 33; 4 Jur. (N.S.) 1257; 6 W.R. 640; 44 E.R. 1192, *F.* (b) 30 C. 599; 5 Bom. L.R. 421; 7 C.W.N. 441; 30 I.A. 114 (P.C.); (1902) 1 Oh. 1; 71 L.J. Ch. 83; 50 W.R. 179; 86 L.T. 35; 18 T.L.R. 135; 8 Ind. Cas. 888; 8 A.L.J. 1053, *F.*; 3 K. & J. 90 (100); 26 L.J. Ch. 179; 3 Jur. (N.S.) 80; 5 W.R. 132; 69 E.R. 1035; 112 R. R. 49, *D.*; 12 Ind. Cas. 568; 37 M. 38 (44); 10 M.L.T. 385; (1911) 2 M.W.N. 461; 21 M.L.J. 1077, *F.*

(6) *S. 13—Pro-note payable to 'so and so or order or bearer'—Pro-note void—Suit on original consideration. See ACT III OF 1905 (PAPER CURRENCY), No. 1, U.B.R. (1914), 1st Qr., p. 13.*

(7) *Ss. 14, 15, 16, 17—Pardahnashin lady—Mortgages executed of her house in favour of husband's creditor—Undue influence of husband—Document if fairly taken—Onus on whom.*

A Court should always be careful to see that deeds taken from *pardahnashin* ladies have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. The burden of establishing this rests on him who claims against the *pardahnashin* lady (a).

The undue influence which may affect a *pardahnashin* lady's understanding of a document may proceed from a third party (b).

A *pardahnashin* lady executed a deed of mortgage of her property in favour of a creditor of her husband for the benefit of the latter. The lady herself derived no direct benefit from the transaction. At the time when this document was executed, the lady was living with

Contract Act—(Continued).

her husband and she evidently acted under the influence of her husband in consenting to mortgaging her house for her husband's debt, because when a similar transaction was proposed before the lady, who was at that time living with her husband's father and brothers, repudiated that transaction under their advice. The creditor, who was a *mukhtear*, was present on the only occasion when the contents of the document were read and explained to her by no other than her husband who was an intended party:

Held, that, as it was not shown that any independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, had clearly put before the lady what were the nature and consequences of the act, and that as the advice, if advice was given, was that of the husband or the creditors not removed entirely or at all from the suspected atmosphere, the mortgage was not fairly taken and that the lady was not bound by the transaction as she was not a free agent (c). *Badiatannessa Bibi v. Ambica Charan Ghose*, 23 Ind. Cas. 401=18 C.W.N. 1133.

JENKINS, C.J., and D. CHATTERJEE, J.

References:—(a) 13 M.I.A. 419=14 W.R. 7=20 Eng. Rep. 607=2 Suth. P.C.J. 339=2 Sar. P.C.J. 579, *F.* (b) 18 Ind. Cas. 949=17 C.W.N. 541=(1913) M.W.N. 406=13 M.L.T. 406=11 A.L.J. 413=17 C.L.J. 479=15 Bom. L.R. 472=184 P.L.R. 1913=25 M.L.J. 104=40 C. 598 (P.C.)=40 I.A. 56, *Fol.* (c) (1911) A.C. 120=80 L.J.P.C. 75=103 L.T. 641=27 T.L.R. 117; (1911) 1 Ch. 723 (730)=80 L.J. Ch. 899=104 L.T. 517, *Rel.*

(8) *S. 15. See No. 7, supra.*

(9) *S. 16—Undue influence—Agriculturist and money lender—Balances struck from time to time—Compound interest.*

In accounts between money-lenders and agriculturists, when balances are struck or bonds executed from time to time, compound interest naturally comes into play, interest being calculated and added to principal each time that the accounts are settled, but this does not necessarily mean that any undue influence is exercised. *Qamar Din v. Harbhagat*, 48 P.L.R. 1914=22 Ind. Cas. 406=87 P.W.R. 1914.

JOHNSTONE and CHEVIS, JJ.

(10) *S. 16—Undue influence.*

Where plaintiff released the first appellant on the two appellants and two sureties entering into a bond for paying Rs. 2,000 in cash and Rs. 2,300 within 2 years with interest at 8 per cent. on the whole amount Rs. 4,800.

Held, that, though the first appellant might have been sent to prison, had no such arrangement as the above described one been made, and though the plaintiff was to that extent in a position to bring pressure to bear upon the

Contract Act—(Continued).

appellants and dominate their wills, the appellants must further show that the plaintiff used his dominating position to obtain an unfair advantage.

Held, on the facts, that the bargain being fair and reasonable, there was no undue influence. **Mr Mya v. Moosaji Ahmed & Co.**, Bur. L. T. 90=24 Ind. Cas. 67.

TWOMEY, J.

- (11) S. 16—*Undue influence—Unconscionable bargain not enforced—Compound interest at Rs. 30 per cent. per annum, reduced to simple interest at 18 per cent. per annum.*

Where a debtor, who was an expectant heir and a very inefficient clerk in a Court went on executing securities for a very high rate of interest (*viz.* Rs. 30 per cent. per annum), with the result that the sum originally advanced had swollen in the course of about 20 years to more than twenty-fold :

Held, that the irresistible presumption is that this was due to the creditor's undue influence within the terms of S. 16 of Act IX of 1872 and the bargain is unconscionable and not enforceable by a Court of justice which is not simply a blind and humble instrument of the creditor to plunder the debtor (a).

The Chief Court accordingly allowed on the principal amount originally advanced simple interest at 18 per cent. per annum, from the date of the loan to date of institution of the suit with further interest at 6 per cent. per annum, on the amount thus decreed from the date of institution to date of realization. **Nasir Din v. Ballu Mul**, 64 P.W.R. 1914=149 P. L.R. 1914.

REID, C.J., and KENSINGTON, J.

References :—(a) 115 P.R. 1908=185 P. W. R. 1908, F.

- (12) S. 16—*Scope of amended section—High rate of interest—Promissory note—Court's power to reduce the rate of interest—Grounds for reducing interest—Undue influence.* **U. Kesavulu Naidu v. Arithulai Ammal**, 36 M. 533=22 Ind. Cas. 769. See Final Part, 1913, Col. 448.

(13) S. 16—*Redemption suit—Interest—Agreement to pay interest when to be interfered with by Courts.* See MORTGAGE (REDEMPTION), No. 8, 73 P.L.R. 1914.

(14) S. 16—*Pressing necessity of borrower—Contract whether affected by undue influence.* See RELIGIOUS OFFICES, No. 1, 26 M.L.J. 315.

(15) S. 16—*Jurisdiction of Court of equity to refuse specific performance of contract not invalid or void under the Contract Act.* See SPECIFIC PERFORMANCE, No. 5, 18 C.W.N. 689.

(16) S. 16. See No. 7, *supra*.

(17) S. 17—*Ex parte decree obtained by fraud and misrepresentation—Setting aside ex parte decree.* See EX PARTE DECREE, No. 1, 75 P.L.E. 1914.

Contract Act—(Continued).

(18) S. 17—*Decree obtained by fraud—Effect.* See FRAUD, No. 5, 8 S.L.R. 3.

(19) S. 17. See No. 7, *supra*.

(20) S. 23—*Agreement to compound a non-compoundable offence—Entering into agreement after due deliberation does not make it lawful, if consideration or object is unlawful.*

Where certain promissory notes were executed before the withdrawal of a prosecution of the executant under S. 406, Penal Code, and were not handed over to the complainant till after the prosecution had been withdrawn, and the withdrawal thereof accepted by the Magistrate, and there was a distinct agreement that the promissory notes would not be handed over to the complainant unless the accused was discharged by the Magistrate.

Held, that (1) the consideration for the promissory notes was clearly the agreement to compound an offence which by law was not compoundable, and it was, therefore, unlawful within the meaning of S. 23 of the Contract Act ;

(2) the fact that the accused, during the course of his trial after going into the accounts and discussing the compromise to be made with the complainant for two or three days and after due deliberation, admitted his liability to the complainant in a certain sum and agreed to pay the same in cash and promissory notes, should not make the agreement between the parties as embodied in the promissory notes lawful, if the object or consideration of that agreement was wholly or in part the withdrawal of the prosecution for the offence which was in law non-compoundable. **Sheikh Ghulam Mohi-ud-din v. Deoki Nand**, 54 P.L.R. 1914=57 P.W.R. 1914=39 P.R. 1914=22 Ind. Cas. 393.

SHAH DIN and BEADON, JJ.

- (21) S. 23—*Zemindar's suit for ejectment of tenant—Compromise of—Tenant agreed to pay a certain sum of money—Whether opposed to public policy.*

In a suit for ejectment of a tenant by the Zemindar in which the tenant pleaded that he had a right to succeed as heir to the previous tenant, an agreement was come to by which the tenant agreed to pay a certain sum of money and the Zemindar agreed to withdraw the suit and acknowledged the defendant to have the status of an occupancy tenant. The latter accordingly executed in favour of the plaintiff a promissory note for the amount he had agreed to pay, and the plaintiff withdrew the suit. The present suit was brought on the basis of that promissory note.

Held, that the agreement amounted to nothing more than compromising a doubtful litigation and that the consideration for the promissory note was not unlawful or opposed to public policy. **Ram Kirpal v. Gaya Dat**, 12 A.L.J. 331.

PIGGOTT, J.

Contract Act—(Continued).

(22) S. 23—*Loan for bribe—Plea not raised before 1st Court cannot be ground of appeal.*

Held, that a suit is not maintainable for recovering money lent and used for an illegal object as bribe (a).

But where the defendant has failed to plead in the 1st Court that the money was borrowed for giving bribe, he is precluded from raising such a plea for the 1st time in appeal, and the appellate Court is not allowed to decide the case on that point. "**Attar Singh Ajab Singh v. Haku**, 84 P.W.R. 1914=185 P.L.R. 1914=24 Ind. Cas. 692.

. SHADI LAL, J.

Reference :—(a) 8 C. 24, F.

(23) S. 23—Agreements to stifle prosecution in respect of an offence of a public nature—Validity—Compromise in respect of offences of a public nature but involving civil liability to an injured party—Validity. See AGREEMENT, No. 1, 17 O.C. 213.

(24) S. 23. See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

(25) S. 23—Pro-note executed in consideration of giving evidence in executant's favour—Failure of consideration—Public policy. See PROMISSORY NOTE, No. 5, (1914) M.W.N. 322.

(26) Ss. 23, 30—Contract—Turf Club Sweep tickets—Confederacy buying tickets—One member of confederacy selling half his share—Public policy—Nature of transaction—Legal.

Eleven persons joined as the 'Bhatiana Confederacy' to buy jointly six tickets in the Calcutta Turf Club Sweep on the St. Leger of 1912. Arrangements were made by B the defendant No. 2. The confederacy drew a horse which won the 3rd prize in the Sweep. The money was duly paid to B who promptly distributed it to the various sharers, including G, the defendant No. 1. It appears that G, knowing that the confederacy had drawn a horse, had sold half his chance to the plaintiff. Hence the plaintiff demanded half of G's share from B, who declined to recognize the transfer and paid G. in full. G. declined to pay anything to the plaintiff, who sued both B. and G. for recovery of half the share of G.

Held, (1) that the agreement between the plaintiff and G. was in effect one to sell for a fixed amount a definite article of which the value was indeterminate at the time, and in this respect it did not differ from many other contracts of sale except perhaps that the margin of possible value was unusually large ;

(2) that the plaintiff was entitled to a decree against G. but B was not liable at all. **B.A. Gough v. H. S. Lenehan**, 258 P.L.R. 1914.

KENSINGTON, C.J., and CHEVIS, J.

(27) S. 25—Promise to pay barred-debt—Validity. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

Contract Act—(Continued).

(28) S. 25—Gift by father to son—Vandity. See HINDU LAW (GIFT), No. 2, 27 M.L.J. 272.

(29) S. 25 (3)—*Demand by creditor for money due—Debtor promising by means of a letter to send the balance—Effect.*

The defendant, a pleader, had dealings with the plaintiff's husband for many years, and in reply to a demand for money alleged to be due replied as follows :

"I am sorry to tell you that owing to a wedding in my house I am unable to send the balance at present. I shall send it by the third week of this month."

Plaintiff sued to recover the balance due. It was contended that a part of the claim was barred by limitation at the date of the letter and that it cannot be treated as evidence of an agreement under S. 25 of the Contract Act.

Held that, assuming that the debt or a portion thereof was barred, the letter contained an unconditional promise to pay whatever balance might be found to be due to the plaintiff, and that this was a valid agreement under S. 25 of the Contract Act. **Mrs. C. Simon v. M. G. Arogiasami Pillai**, 16 M.L.T. 122.

SANKARAN NAIR and SADASIVA AIYAR, JJ.

References :—23 M. 94 ; 33 M. 159, R.

(30) S. 25 (3)—*Promise to pay barred-debt—Promise in writing and signed by debtor—Knowledge of debt barred, if necessary.* **Bhowani Misser v. Peari Jha**, 18 C.L.J. 329=21 Ind. Cas 254. See Final Part, 1913, Col. 451.

(31) S. 25 (3)—'Promise to pay'—Barred-debt—Money due on balance—Limitation. See LIMITATION ACT (1908), No. 92, 19 C.L.J. 263.

(32) S. 26—*Agreement in restraint of marriage—Agreement to repay money spent for son-in-law's education in case he marries another woman during the lifetime of his present wife whose father was to advance the money.*

Where it was mutually agreed between the fathers of a newly married couple that the girl's father should advance money for the boy's education and the boy's father reimburse all such monies in case the boy took another wife during the lifetime of the girl, *held*, such a contract was void under S. 26 of the Contract Act as being in restraint of marriage, as the burden of reimbursing to the girl's father the money spent would exercise a restraining influence on the boy if he thought of marrying another woman.

Held, also that there is nothing in the section to restrain its operations to the case of first marriage only, as the section is perfectly general in its terms, and the Legislature well knew at the time of enacting the section that polygamy was practised by certain races in India. **U Ga Zan v. Hari Pru**, 7 Bur. L.T. 98=24 Ind. Cas. 777.

HARTNOLL, OFFG C.J., and TWOMBLY, J.

Contract Act—(Continued).

(33) S. 28—*Policy or Insurance—Covenant forbidding suit if not instituted within certain time—Forfeiture condition valid. The Baroda Spinning and Weaving Co. v. Satyanarayan Marine and Fire Insurance Co., 15 Bom. L.R. 948=38 B. 344=21 Ind. Cas. 694. See Final Part, 1913, Col. 452.*

(34) S. 30—*Grainpit actually purchased—Transfer of the pit not contemplated—Intention of the purchaser to resell it through the vendor—Whether gambling transaction.*

A grainpit was purchased by the defendants through the plaintiffs as their Commission Agents, and the probabilities to the knowledge of the plaintiffs were that the defendants would resell the contents of the grainpit through the plaintiffs, as their Commission Agents, getting the benefit of any rise in the prices or suffering loss of any fall. *Held*, that the agreement was not by way of wager within the meaning of S. 30 of the Contract Act. *Bisheshar Dayal v. Jwala Prasad, 12 A.L.J. 817=36 A. 426.*

RICHARDS, C.J., and BANERJI, J.

References:—(1895) A.C. 380; 33 A. 219, F.

(35) S. 30. See No 26, *supra*.

(36) S. 37. See ACT VIII OF 1885 (BENGAL TENANCY), No. 21, 20 C.L.J. 328.

(37) S. 38 (2) and (3)—*Sale of grain—Delivery to be made according to 'office terms' in Karachi—Due date falling on Sunday—When delivery to be completed—Time for sampling and analysis of goods.*

Where a dealer agrees to sell grain and to deliver the same according to 'office term,' that is, according to the practice obtaining among the European firms in Karachi, he is bound to have his samples drawn at such times on or before the due dates as to admit of reasonable opportunity for analysis and weighing within due dates, in order to enable the officers to ascertain that what has been tendered is of the proper quality and proper amount for delivery, in accordance with the contracts as provided in the 2nd and 3rd conditions of S. 38 of the Contract Act.

When the due date falls on a Sunday the custom is for the delivery to be completed on Saturday (a). *Firm of Motumal v. Firm of Ruttanji, 7 S.L.R. 141=24 Ind. Cas. 883.*

HAYWARD, A.J.C.

Reference:—(a) 15 B. 338, R.

(38) Ss. 38, 45—*Mortgage—Payment of debt by mortgagor to one of several co-mortgagees, whether valid discharge of debt.*

The payment of the mortgage-debt to one of several co-mortgagees, without the concurrence of the others, is not a valid discharge thereof. *Ramjit v. Kahemchand, 23 Ind. Cas. 8.*

RYVES and PIGGOTT, JJ.

(39) S. 39—*Contract, breach of—Responsibility of contracting parties—Delivery of goods—Cash payment on delivery of railway receipt—Credit allowed to purchaser—*

Contract Act—(Continued).

Sale of goods—Time not essence of contract—Acquiescence—Civ. Pro. Code, 1908, O. XLI, r. 4—Appeal by some of the unsuccessful plaintiffs—Common ground—Power of appellate Court to set aside whole decree.

Where the prayer in an appeal against a decree dismissing the suit filed by some of the plaintiffs is for reversal of the whole decree which proceeds on a ground common to all the plaintiffs, the appeal is not open to the objection that, the appeal not being filed by all the plaintiffs, the decree becomes final against the non-appealing plaintiffs. The appellate Court is competent to set aside the whole decree in view of O. XLI, r. 4 of the Civ. Pro. Code.

There was a condition regarding cash payment on delivery of railway receipts, but several deliveries were made without such payment, and the amounts due from the plaintiffs in respect of these deliveries were entered in an account which was finally made up on 14th April 1909 when a sum of about Rs. 2,000 was the balance due on the account from the plaintiffs to the defendants.

After the 14th April 1909 and up to second May 1909, there were further deliveries in respect of which cash payments were made on delivery of the railway receipt, and then arose a dispute about a consignment and further dealings between the parties stopped.

On the 14th April 1909 the plaintiffs made over to the defendants first halves of currency notes to the value of Rs. 2,000 but withheld the second halves of those notes. The plaintiffs alleged that the defendants stopped further consignments, for there was a rise in the prices and the defendants complained that since the second halves of the notes were withheld they were competent to stop further consignments as they were entitled to cash payments.

Held that, under the provisions of S. 39 of the Contract Act, the defendants were not justified in rescinding the contract on plaintiff's refusal to deliver the second halves of these notes, as it was clear from the correspondence between the parties that plaintiffs were ready and willing to take delivery of the last consignment on payment of the price of that consignment, and the defendants cancelled the contract not because plaintiffs would not pay the price of the consignment but because the plaintiffs refused to deliver the second halves of the currency notes due on the previous account.

That the account in respect of which the sum of Rs. 2,000 was due was not confined to dealings under the contract, but the failure by the plaintiffs to pay for the goods which had at first been delivered on credit was not a renunciation of the contract or such a refusal as excused performance of the contract on the part of the defendant. *Sundar Singh v. The Krishna Mills Company, 11 P.L.R. 1914=22 P.W.R. 1914=23 Ind. Cas. 91=63 P.R. 1914.*

JOHNSTONE and BEADON, JJ.

References:—(a) 36 C. 617; 37 C. 617; 38 C. 477; 4 C. 262; 9 A. 859, R.

Contract Act—(Continued).

(39-a) S. 39. See No. 52, *infra*.

(40) S. 43—*Landlord and tenant—Joint tenants—Joint and several liability of tenants—Suit against one tenant to pay the whole rent—Power to order other tenant to be added as a co-defendant—Whereabouts of other co-defendant not known—Discretion of Court—O. 1, r. 10, Civ. Pro. Code.*

Where 2 persons jointly leased a property from plaintiff, they are, in the absence of any agreement to the contrary, jointly and severally liable to pay the rent, and it is open to the plaintiff to sue any one or both of them (a).

Under O. 1, r. 10, Civ. Pro. Code, the Court has no doubt the power to order that the other tenant should be made a co-defendant, but the Court is not bound to do so, where there is no clue as to the other tenants' whereabouts and it would not be proper for the Court to insist that he should be made a party. *Livingstone v. Feroz Din*, 107 P.R. 1914.

SCOTT-SMITH, J.

References:—(a) 22 A. 307; 25 B. 378; 37 P. R. 1902, R.; 12 C.L.J. 642; 12 C.L.J. 591, D.

(41) Ss. 43, 44, 126 to 145—*Joint promisors—Suit by creditor against—Decree against one joint promisor—Another joint promisor exonerated on the ground that suit barred against him—Payment by former—Right to seek contribution from latter.*

Per Tyabji, J.—A joint promisor, whose liability to the promisee was kept alive beyond three years from the date of the promissory note, and who was consequently compelled to pay by a decree of the Court more than his proportion of the debt to the promisee, can sue another joint promisor for contribution, though the decree exonerated that other joint promisor from payment, on the ground that the debt as against him was barred by limitation.

The duty to contribute is clearly distinct from the duty to pay to the promisee. The first is to the promisor, the second is to the promisee. The right of each joint promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee. For, though the promisee's rights may have been released, the responsibility to the joint promisor is not annulled (S. 44, Contract Act) (a).

Though the joint promisor's right is analogous to the surety's right of indemnity under S. 145, there are distinctions between the two (b). *S.P. Abraham Servai v. Raphial Muthirian*, 16 M.L.T. 569.

OLDFIELD and TYABJI, JJ.

References:—(a) 33 M. 308; (1897) 2 Ir. Rep. 6, 12; (1885) 31 Ch. D. 100, R. (b) 26 M. 323 (326); (1910) M.W.N. 839; (1893) 2 Ch. 514 (529); 27 M. 243, R.

(41-a) Ss. 43, 70—*Joint tenancy—Payment of whole rent by one tenant—Liability of other tenant for contribution.* See CONTRIBUTION, No. 7, 20 C.L.J. 492.

Contract Act—(Continued).

(41-b) S. 44. See No. 41, *supra*.

(42) S. 45—*Partnership—Representative of deceased partner—Right to sue for recovery of debts due to partnership.*

When one of the partners in a firm dies, the surviving partners can sue for the recovery of debts due to the firm without making the legal representatives of the deceased partner parties to the suit. If the surviving partners refused to bring the suit, the only remedy of the legal representative of the deceased partner lies in a suit against the surviving partners for winding-up and for an account of the partnership and in an application in that suit for the appointment of a Receiver. The Receiver will bring suits for recovery of debts due to the firm.

English procedure and S. 45 of the Indian Contract Act compared with O. XXX, r. 4 of Civ. Pro. Code (of 1908). *Oodayappa Chetty Firm v. Ramaswamy Chetty*, 24 Ind. Cas. 268=7 Bur. L.T. 261.

HARTNOLL, OFFG. C.J. and TWOMEY, J.

References:—9 A. 486=A.W.N. (1887) 133; 17 B. 6; 18 C. 86; 21 B. 412, R.

(43) S. 45. See No. 39, *supra*.

(44) S. 55—*Contract to sell land—Time made essence of the contract under the agreement—Earnest money, forfeiture of, if contract not completed.* *Burjorji v. Jamshed*, 15 Bom. L. R. 405=20 Ind. Cas. 469=38 B. 77. See Final Part, 1913, Col. 454.

(45) S. 55. See No. 52, *infra*.

(46) S. 59. See CIV. PRO. CODE (1908), No. 411, 12 A.L.J. 645.

(47) S. 60—*Appropriation—Payment by debtor—No evidence as to which debt debtor intended the same—Creditor's option.* See EVIDENCE ACT, No. 24, 82 P.R. 1914.

(48) Ss. 62, 2 (d)—*Sale-deed, registered—Stipulation by vendee for benefit of vendor's creditor, if enforceable by latter—Creditor informed of arrangement by purchaser and purchaser acknowledged as debtor—Purchaser if trustee—Novation—Limitation Act (1908), Sch. 1, Art. 116—Consideration, definition of, in Contract Act and in English law—Justice, equity and good conscience, rule of, Courts in India to be guided by.* *Debnarain Dutt v. Ramsadhan Mondal*, 17 C.W.N. 1143=20 Ind. Cas. 630=18 C.L.J. 603=41 C. 137. See Final Part, 1913, Col. 455.

(49) S. 63—*No consideration necessary for agreement to forego portion of claim—S. 26, Madras Estates Land Act, does not exclude the operation of the general law as to consideration in Contract Act.*

A landlord agreed to accept half the usual *tirwa* for certain *Fasilis* but subsequently sued for the full amount. *Held*, he could not recover.

Under S. 63 of the Contract Act, no consideration is necessary for agreeing to forego a portion of rent payable (a).

Contract Act—(Continued).

S. 26 of the Madras Estates Land Act does not exclude the operation of the general law as to consideration embodied in the Contract Act. **P.B. Vedachala Mudaliar v. Sivaperumal Mudali**, 16 M.L.T. 184.

SESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

Reference:—(a) 19 M. 398, R.

(50) S. 63—*Time, extension of, if creates new contract—Delivery after expiry of extended time, acceptance of, if amounts to new contract—Contract varied by introduction of fresh terms, effect of—Plaint, statements in, when merely descriptive.* **Luchmi Narain Bhalradan v. Hoare Miller & Co.**, 17 C.W.N. 1098=21 Ind. Cas. 217=41 C. 35. See Final Part, 1913, Col. 456.

(51) S. 63—Applicability where parties stand in the position of decree holder and judgment-debtor. See CIV. PRO. CODE (1882), No. 24, 24 Ind. Cas. 391.

(52) Ss. 63, 55, 39—*Extension of time for performance of contract—Ss. 55 and 39—When contract put an end to.* **Muthaya Manigaran v. Lekku Reddiyar**, (1912) M.W.N. 436=11 M.L.T. 301=22 M.L.J. 413=14 Ind. Cas. 255=37 M. 412. See Final Part, 1912, Col. 426.

(53) S. 65—*Agreement discovered to be void—Payment of compensation—Bhagdari Act (Bom. Act V. of 1862)—Unrecognized subdivision of a bhag—Valatdan patta.*

On the 10th January 1902, the plaintiff passed a *Valatdan patta* (mortgage) of an unrecognised portion of a *bhag*; and the defendant was placed in possession of the property. The deed contained a personal covenant by the plaintiff to give compensation, in case the defendant's possession was obstructed. In 1910, the plaintiff sued to recover possession of the property after redeeming it under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The lower Courts held that the mortgage was void under the Bhagdari Act, 1862; and (following *Jijibhai v. Nagji*) (a), they held that the defendant ought not to be ordered to give up the lands without receiving back the money advanced by him. The plaintiff was ordered to recover possession on payment of Rs. 367 to the defendant. The plaintiff having appealed:

Held, that the order as to the payment of compensation to defendant was justified, first, because the agreement was discovered to be void within the meaning of S. 65 of the Contract Act long after the transaction, and, secondly, because there was the personal covenant in the agreement.

Per Shah, J.—“Neither under S. 65 of the Contract Act nor under the ruling in *Jijibhai v. Nagji* (a), the Court is bound to award compensation in all cases as a matter of course, where the document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case as to whether the agreement is discovered to be void or whether any person has received any advantage under such agreement as required by S. 65 or

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whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case.” **Haribhai Hanuji v. Nathubhai Batnaji**, 16 Bom. L.R. 62=38 B. 249=29 Ind. Cas. 602.

HEATON and SHAH, JJ.

Reference:—(a) 11 Bom. L.R. 693, R.

(54) S. 65—*Alienation of land by limited owner in discharge of debts—Declaration of invalidity of alienation beyond debtor's lifetime—Compensation—No right to claim.* See ACT XX OF 1881 (SIND ENCUMBERED ESTATES), No. 1, 8 S.L.R. 86.

(55) S. 69—“*Interested in payment of money which another is bound by law to pay,*” meaning of—*Decree for rent against Hindu widow—Sale of property in execution—Cancellation of sale on deposit by reversioner—Suit by reversioner against widow for recovery of amount paid—Reversioner, if entitled to decree.*

A landlord, in execution of a decree against a Hindu widow for arrears of rent of a tenure left by her husband, sold a property other than the tenure in default, which was purchased by a stranger to the proceedings. One A who was the reversionary heir to the husband of the widow, deposited the amount requisite for the cancellation of the sale, under S. 310-A of the Civ. Pro. Code of 1882, and the sale was set aside. He brought this suit against the widow for the recovery of the amount paid by him:

Held, that A made the deposit as a person interested in the payment of the money which the judgment-debtor, the widow, was bound by law to pay, and that he was entitled to recover, under S. 69, Contract Act, the money except the portion which represented the damage payable to the execution purchaser (a).

The words “interested in the payment of money which another is bound by law to pay” in S. 69, Contract Act, may include the apprehension of any kind of loss or inconvenience, and not merely the actual detriment capable of assessment in money (b). **Pankhabati Chaudhurani v. Nonihal Singh**, 21 Ind. Cas. 207=19 C.L.J. 72=18 C.W.N. 773.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 6 Ind. Cas. 810=12 C.B. 566=38 C. 1=14 C.W.N. 945, R. (b) 1 O.B. 594=68 R.R. 778=14 L.J.C.P. 204=9 Jur. 452=135 Eng. Rep. 673, R.

(56) Ss. 69, 70—*Interested in payment—Bound by law to pay—Enjoyment of benefit of non-gratuitous payment made lawfully—Patni put up to sale in execution of rent-decree against some of the putnidars—Daro-sat talukdar, bona fide believing his interest to be in jeopardy, making payment of decretal amount and averting sale—Suit by him against judgment debtors for recovery of amount.*

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A *patni* was put up to sale in execution of a decree against some of the *putnidars*. The tenure was first put up for sale subject to incumbrances but, as the bids were too low, it was advertised for sale free of incumbrances. Upon this, the plaintiff, a one-anna sharer in a *darosatlaluk* under the *patni* being under a *bona fide* apprehension that his interest was in danger, paid the decretal amount and prevented the sale of the *patni*. He then sued the judgment debtors for the amount paid by him :

Held, (1) that the plaintiff had an interest in making the payment within the meaning of S. 69 of the Contract Act, and the defendants were bound by law to pay the money ; that the case, therefore, came within S. 69 ;

(2) that it also came within S. 70, as the payment was not made gratuitously and was made lawfully, because the payment was accepted by the Court, and the defendants enjoyed its benefit and that, therefore, the plaintiff was entitled to recover. **Khettra Nath Roy v. Mahomed Uzir Muktear**, 21 Ind. Cas. 102=19 C.L.J. 525.

BEACHCROFT and MULLICK, JJ.

References :—6 Ind. Cas. 810=38 C. 1=14 C.W.N. 945=12 C.L.J. 566 ; 2 C.L.J. 311, R.

(57) Ss. 69, 70—*Rent decree against tenant for certain mouza—Subsequent purchase of mouza by stranger—Payment of decretal amount by the stranger—Liability of tenant for such amount.*

A landlord obtained a rent decree in respect of a certain *mouza*. After the decree the *mouza* was bought by the plaintiff who paid the decretal amount in satisfaction of the landlord's claim when he advertised the *mouza* for sale in execution of his decree. The plaintiff brought a suit against the tenant for the amount so paid :

Held, that the plaintiff was entitled to recover under S. 70 of the Contract Act, though not under S. 69. **Mahatha Harsankar Sahai v. Bandhu Sahu**, 22 Ind. Cas. 720.

STEPHEN and MULLICK, JJ.

References :—6 Ind. Cas. 810=38 C. 1=14 C.W.N. 945=12 C.L.J. 566, R.

(58) Ss. 69, 70—*Money spent under orders of Municipal Board by landlord—Liability of tenants—Provincial Small Cause Courts Act, Art. 13—Small Cause Court suit.*

The plaintiff who was the owner of a *com-hish* consisted of several houses, was ordered by the Municipal Board to keep it clean. He employed 2 sweepers and *bishti* to keep it clean and then sued the tenants for the recovery of the money so spent.

Held, that Ss. 69 and 70 of the Contract Act did not apply and the tenants were not liable to pay.

Held, also that the suit was not one for recovery of dues within the meaning of Art. 13 of the Small Cause Courts Act and was cognisable by the Court of Small Causes. **Nobin Chander Bose v. Gedda Berhai**, 12 A.L.J. 931.

CHAMIER, J.

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(59) Ss. 69, 70—*Contribution—Suit for contribution, meaning of—Test of contribution—Mutuality—Provincial Small Cause Courts Act, Sch. II, Art. 41—Rent decree by co-sharer landlord—Sale under decree—Passing of entire tenancy—Satisfaction of decree by person likely to be affected by sale—Suit for money paid.*

"Contribution" signifies payment by each of the parties interested of his share in any common liability. Consequently, an action for contribution is a suit brought by one of such parties, who has discharged the liability common to them all, to compel the others to make good their shares. Mutuality is thus the test of contribution (a).

Therefore, where the plaintiffs deny that they were to any extent liable to satisfy the judgment-debt which they satisfied and which was recoverable from the defendants alone, it is not a case of satisfaction of a joint liability. The suit of the plaintiffs for recovery of money paid by them for the benefit of the defendants is maintainable in law, but it is not a suit for contribution which is covered by Art. 41 of Sch. II to the Provincial Small Cause Courts Act and is cognizable by the Small Cause Court.

A sale of the right, title and interest of the judgment-debtors in execution of a decree for rent obtained by a co-sharer landlord may, in certain circumstances, pass the entire tenancy (b).

Therefore a party liable to be affected by such a sale would be entitled to satisfy the decree to protect himself from the apprehended injury to his rights and he would be entitled to be reimbursed under Ss. 69 and 70 of the Contract Act (c). **Satya Bhushan Bandopadhyaya v. Krishnakali Bandopadhyaya**, 24 Ind. Cas. 259.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 17 Ind. Cas. 45=16 C.L.J. 148 at p. 151 ; 13 Ind. Cas. 144=16 C.L.J. 156, Rel. (b) 26 C. 677. R. (c) 21 Ind. Cas. 207=19 C.L.J. 72=18 C.W.N. 778, Rel.

(60) Ss. 69, 70—*Contribution—Rent decree against plaintiff and defendant No. 2—Transfer by defendant No. 2 of his share to defendant No. 1—Payment of decretal amount by plaintiff—Liability of defendant No. 1 to contribute.* **Prosonno Kumar Basu v. Jamaluddin Mahomed**, 15 Ind. Cas. 55=18 C.W.N. 327. See Final Part, 1912, Col. 428.

(61) Ss. 69, 70—*Pecuniary interest in the shape of detriment or inconvenience—Liberal interpretation—Decision of a suit not on a preliminary point—Power of appellate Court to remand.* **Muthurakku Maniagan v. Rakkappa Maalagan**, (1913) M.W.N. 1047=14 M.L.T. 291=26 M.L.J. 66=22 Ind. Cas. 9. See Final Part, 1913, Col. 458.

(62) Ss. 69 and 70—*Voluntary payment—Construction of gift deed—Separate registration and assessment—Payment of assessment by donor for benefit of donee—Liability of donee*

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—*Madras Act, I of 1876. Sri Sri Gajapathi Kristna Chendra Deo v. Srinivasa Charlu*, 14 M.L.T. 20=25 M.L.J. 493=20 Ind. Cas. 445=(1914) M.W.N. 99. See Final Part, 1913, Col. 459.

(63) Ss. 69, 70—Decree for rent in favour of co-sharer landlord—Defendants and not plaintiff liable—Payment by plaintiff—Plaintiff's interest affected—Rights of plaintiff. See CONTRIBUTION, No. 3, 20 C.L.J. 196.

(64) Ss. 69, 70—Application for execution by assignee of rent decree—Payment of decretal amount by one of the co-sharers—Suit for contribution. See CONTRIBUTION, No. 4, 20 C.L.J. 200.

(65) S. 70—*Water-tax paid to Government by landlord—Not entitled to recover from tenant.*

S. 70 of the Contract Act does not enable a landlord who paid water-tax to recover the same from the tenant who is alleged to have unauthorisedly taken the water. *The District Board of Tanjore v. Muna Mavanna Ramalinga Thevan*, (1914) M.W.N. 66=22 Ind. Cas. 84.

OLDFIELD, J.

Reference:—33 M. 15, D.

(66) S. 70—*Scope—Person doing a thing primarily for his own benefit—Others also benefited thereby—Liability of others to contribute—Intention—Question of fact—Meaning of 'enjoying the benefit'—English and Indian Law.*

Per Spencer, J.—If a person does a thing primarily for his own benefit and is benefited thereby, it must always be a question whether he did not intend to do it gratuitously as regards others who happen to be benefited by the same act.

A person can be said to enjoy a benefit under S. 70, Contract Act, only by accepting the benefit when he has the option of declining or accepting.

The scope of S. 70, Contract Act, explained, and the decisions bearing thereon reviewed.

Per Sankaran Nair, J.—A person should not be made liable to pay for a benefit conferred on him without his knowledge or consent and without giving him an option of declining to accept the benefit. *Rajah of Pittapuram v. The Secretary of State*, 16 M.L.T. 375.

SANKARAN NAIR and SPENCER, JJ.

References:—33 M. 15, F.; 14 M.L.T. 20=25 M.L.J. 493, Diss.; 16 C.L.J. 156; 32 C. 87; 38 C. 1; 12 C. 213; 21 C. 496; 21 Ind. Cas. 102; 22 Ind. Cas. 720; 18 M. 88; 30 A. 273; 1 Sm. L.C. 160, R.

(67) S. 70—Some co-sharers suing trespassers—Costs of suit—Non-liability of other co-sharers to pay their share. See CONTRIBUTION, No. 6, 61 P.R. 1914.

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(68) S. 70. See Nos. 4, 41-a, 56, 57, 58, 59, 60, 61, 62, 63, 64, *supra*.

(69) S. 72. See ACT II OF 1886 (INCOME-TAX); No. 1, 19 C.W.N. 138.

(70) S. 73—*Betrothal contract, breach of—Damages, elements to be considered in assessing.*

In assessing general damages in the case of a breach of a betrothal contract, the Court will not take into consideration the amount which the plaintiff may have to pay if he wishes to secure another woman as his wife. But something must be awarded for the annoyance which the breach of the contract has caused him and also for possible loss of reputation and injury to feelings. *Budhu Mal v. Mansha Ram*, 86 P.L.R. 1914=42 P.W.R. 1914=22 Ind. Cas. 644.

RATTIGAN and BEADON, JJ.

(71) S. 73—Interest on arrears of rent reserved by the lease whether claimable. See ACT XXII OF 1885 (ODDH RENT), No. 9, 21 Ind. Cas. 82.

(72) S. 73, ill. (m)—*Damages, for breach of warranty—Vendee's previous contract with third person—No notice of this to vendor of goods—Vendor's liability.*

Where A entered into a contract with B in respect of unascertained goods, and afterwards entered into another contract with C, C not having been informed of the previous contract with B:

Held, that, in a suit brought by A against C for damages sustained by A on account of the breach of warranty of quality, the proper basis for their calculation is the difference between the value of the goods as supplied and the market-value of the goods of the guaranteed quality on the date of breach, and not the special damages which A might have incurred through the breach committed by him of his own previous contract with B of which C had no knowledge;

(2) that ill. (m) of S. 73 of the Contract Act did not apply, as in the illustration the sale was of ascertained goods and not of unascertained goods as in this case and also the contract between A and B was made on the same occasion as that between B and C, and the costs of damages in both was to be the same. *C. W. Simson v. Koka Jagannadha Row Naidu*, 23 Ind. Cas. 949.

SADASIYA IYER and SPENCER, JJ.

(73) S. 74—*Interest—Rate of—When penal.*

Where no interest is stipulated for, until there is default in paying the instalments as they fall due, and in case of default interest is to be calculated not on the amount actually due, but on the whole of the original advance, notwithstanding that some of it may have been discharged, the stipulation is in the nature

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of a penalty and is void. *Subramania Iyer v. Subramania Chettai*, (1914) M.W.N. 154 = 22 Ind. Cas. 411.

TYABJI, J.

Reference:—(1911) 2 M.W.N. 367, R.

- (74) S. 74—*Bond—Condition—25 per cent. more to be paid on default in payment on fixed day—Penalty.*

Where a bond provides that principal and interest shall be paid on a particular date, that on default in payment on that date 25 per cent. of the principal and interest shall be added to the total amount, and that interest at 12½ per cent. per annum shall be charged on the consolidated amount till its realization, the provision is penal and, therefore, unenforceable. *Chellagali Chinnigadu v. Kappala Venkatarayudu*, 23 Ind. Cas. 542.

SADASIVA AIYAR and SPENCER, JJ.

- (75) S. 74—*Forfeiture of deposit—Loss on resale—Recovery—Enforceability.* *Yellore Taluk Board v. Gopalasami Naidu*, (1913) M.W.N. 1025 = 14 M.L.T. 551 = 21 Ind. Cas. 769. See Final Part, 1913, Col. 461.

- (76) S. 74—*Compound interest—Stipulation for—Not penal.* See EVIDENCE ACT, No. 24, 82 P.R. 1914.

- (77) S. 90, ill (e). See DELIVERY ORDER, No. 1, 7 Bur. L.T. 93.

- (78) Ss. 91, 93—*Goods consigned to buyer by Railway—Suit for balance of account—Cause of action—Jurisdiction.*

Where a buyer and seller reside in different places, the cause of action for a suit by the seller for balance of accounts due from the buyer arises where the goods are consigned to the Railway. *Gogi Padmarajappa v. Mad-duru Venkatasubbiah*, 24 Ind. Cas. 423 = (1914) M.W.N. 803.

AYLING, J.

Reference:—1 M.H.C.R. 200, D.

- (79) S. 93. See No. 78, *supra*.

- (80) Ss. 99, 102, 103—*Stoppage in transit—Commission agent—His right to stoppage in transit—Sub-buyer—When entitled to right—Person acquiring Railway receipt in Sind—Not protected—Railway receipt—Not a document of title—S. 137, Transfer of Property Act—Non-applicability in Sind.*

A commission agent, who buys on his own credit for another, is a quasi-vendor and in the position of a vendor for the purpose of stoppage in transit (a).

The right of stoppage given to a seller by S. 99 of the Contract Act, exists when the goods are in transit to any one who derives his title from the buyer except a sub-buyer or pledgee (as described in Ss. 102 and 103) to whom a document of title had been assigned (b).

A Railway receipt is not a document of title (c) and S. 102 of the Contract Act has no application to the case of a person who acquired only

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a Railway receipt, by his purchase from the original buyer. The receipt merely gave the right to take possession of the goods on arrival, unless anything should happen in the meanwhile.

No equity arises in favour of people who act without due care and caution. S. 137 of the Transfer of Property Act does not apply to Sind. Therefore an assignment of a Railway receipt in Sind does not amount to an assignment of a document of title (d). *Firm of Kaluram Bhuduram v. Firm of Bhuduram Paramanand*, 7 S.L.R. 163 = 24 Ind. Cas. 798.

BOYD, A.J.C.

References:—(a) 3 East. 98 and 14 Bom. L.R. 352, R. (b) 5 Ch. D. 35; L.R. 13 Ch. D. 62; 84 B. 640, R. (c) 14 B. 57; L.J. 46 Ch. 418, R. (d) 15 Bom. L.R. 890, D.

- (81) S. 102. See No. 80, *supra*.

- (82) Ss. 102, 103—*Railway receipt a document of title within the meaning of S. 103, Contract Act—Assignment of a railway receipt by endorsement—Right of an unpaid vendor—Transfer of Property Act, Ss. 4 and 137.* *Amarchand v. Ramdas*, 15 Bom. L.R. 890 = 21 Ind. Cas. 848 = 38 B. 255. See Final Part, 1913, Col. 463.

- (83) S. 103. See Nos. 80 and 82, *supra*.

- (84) S. 104—*Stoppage in transit—Telegrams not to deliver—Sufficient notice under the section—No particular form laid down by the section.*

Where a vendor sent two telegrams 'do not deliver,' and 'deliver to a third man,' and in a subsequent letter stated that the delivery ought to be made to a third party but made no mention of his claim as that of an unpaid vendor.

Held that the intention of the telegrams was to stop delivery on behalf of the unpaid vendors owing to the insolvency of the purchasers, and that the telegrams were sufficient notice under S. 104 of the Contract Act.

No particular form of notice is prescribed by the section and the intention of the telegrams is a question of fact. *Rajhumal Shivandas v. Michumal Hotchand*, 8 S.L.R. 65.

HAYWARD, J.C., and BOYD, A.J.C.

- (85) S. 107—*After giving notice under the section, whether seller bound to follow the procedure of section—Seller obtaining higher price by selling later than date of breach.*

The words of S. 107 of the Contract Act are permissive and not compulsory. Therefore, a seller of goods, who gives notice of his intention to re-sell the goods in pursuance of the provisions of S. 107, is not bound to carry out such intention and can change his mind if he likes.

If, on the date of the breach of a contract to buy goods, the price of goods is lower than at a later date when the seller sells them and realizes a higher price, he is bound in claiming damages from the buyer to account for the

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highest price obtained by him. **A. K. A. S. Jamal v. Moola Dawood Son & Company, 7 L.B.R. 252=25 Ind. Cas. 799.**

HARTNOLL, OFFG. C.J., and YOUNG, J.

(86) Ss. 108, 178—Ostensible owner—True owner—Rights of. See **LIMITATION ACT (1909), No. 79, 15 M.L.T. 221.**

(87) Ss. 113, 118—*Commission agent—Contract to sell goods of particular kind—Failure to deliver goods according to order—Implied warranty—Buyer's right not to accept—Commission agent—Ordinary seller—Comparison of their rights and liabilities.*

Where the defendant, a merchant in Madras, bought from the plaintiff, a commission agent in Rangoon, unascertained rice under the denomination of 'small mills,' and where the rice tendered by the plaintiff was proved not to have been 'small mills.'

Held that there was a breach of warranty which would entitle the defendant to refuse acceptance under S. 118, Contract Act.

The Commission agent differs from the ordinary seller in what he stands to gain by the transaction; instead of getting a profit on the price of rice he gets a payment by way of Commission. But in other respects, he is, as regards the buyer, in the same position as an ordinary seller (*al.*). **V. P. Govindasawmy Pillai v. K. V. K. Koolayappa Rowthar, 7 L.B.R. 110.**

HARTNOLL, OFFG. C.J., and TWOMEY, J

Reference:—(a) 5 E and I A. 395, R.

(88) S. 118. See No. 87, *supra*.

(88 a) Ss. 126 to 134. See No. 41, *supra*.

(89) Ss. 134, 137—*Principal and surety—Suit against both—Non service of summons on principal—Striking out his name—Surety's liability not affected if the suit be still in time against principal—Civ. Pro. Code (1908), O. IX, r. 5, O. XXIII, r. 1.*

The plaintiff sued on a promissory note, dated the 25th October 1912, which was signed by defendant No. 1 as principal and defendant No. 2 as surety. As summons on defendant No. 1 could not be served, his name was struck out and the suit proceeded against the defendant No. 2 alone. The lower Court dismissed the suit on the ground that the surety was discharged, for the plaintiff had discharged the principal debtor by his own act. The plaintiff having applied to the High Court under extraordinary jurisdiction:

Held, reversing the decree and restoring the suit, (1) that the striking off of the defendant No. 1's name was a procedure under O. IX, r. 5, rather than O. XXIII, r. 1 of the Civ. Pro. Code;

(2) that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name was struck off and the suit dismissed against him

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under O. IX, r. 5, did not discharge the surety, provided the suit was still in time against the principal. **Nathabhai Tricamlal v. Ranchodlal Ramji, 16 Bom. L.R. 696.**

PEAMAN and HEATON, JJ.

(89-a) S. 135. See No. 41, *supra*.

(89-b) S. 136. See No. 41, *supra*.

(90) S. 137. See Nos. 41 and 89, *supra*.

(90-a) Ss. 138 to 145. See No. 41, *supra*.

(91) Ss. 151, 152—*Railway Company—Loss of goods by fire—Liability of Company. See RAILWAY, No. 1, 16 Bom. L.R. 467.*

(92) S. 152. See No. 91, *supra*.

(93) Ss. 172, 176. See **ADMINISTRATOR, No. 1, 18 C.W.N. 631.**

(94) S. 176. See No. 93, *supra*.

(95) S. 178. See No. 86, *supra*.

(96) Ss. 192, 226 230—*Principal and agent—Sub-agent—Written contract with agent—Exclusive credit given to agent—Parol evidence to prove contract on behalf of principal—Admissibility—Privy of contract with principal—Absence of—Effect—Suit by principal—Maintainability—Defence of set-off or other equities when available—Dubashes—Their position and nature explained.*

The defendants' family had been dubashes of the firm of Messrs. A. & Co. at Masulipatam for many years and continued to be so till the firm's failure in 1906. Under the conditions laid down in the agreement which governed the relations between the defendants and the firm, the defendants were prohibited from transacting business as dubashes or agents for any other firm except A. & Co., and the defendants had also to keep Rs. 50,000 on fixed deposit in the firm's bank as security for the liabilities they might incur as the firm's dubashes. Messrs. A. & Co. transferred the concerns, in respect of which the defendants were operating, to the plaintiffs in the present suit, but continued to act as Managing Agents of these concerns. Therefore the defendants continued to transact business on the same terms as before and without any change in the wording of the terms of the agreement between themselves and the firm. In the present suit, the plaintiffs sued as principals to recover from the defendants (the firm's dubashes) the amount of the defendants' indebtedness at the date of A. & Co.'s failure on the contracts entered into with A. & Co. in respect of the concerns transferred to the plaintiffs by A. & Co., which contracts it was alleged were made by A. & Co. on behalf of the plaintiffs.

Held (per Wallis, O.C.J.), that, on the facts of the above case, the defendants were sub-agents of A. & Co. who were the agents of the plaintiffs, that under S. 192, Contract Act, and the decisions thereon there was no privity of contract between the defendants and the plaintiffs, and that the present suit should on this ground be dismissed.

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The position of dubashes explained and discussed (a).

Messrs. A. & Co. having entered into the contracts with the defendants in writing in their own name and without mentioning their agency, they could sue, and be sued upon by them (b).

Under the English Law, where an exclusive credit is given to the agent, the principal cannot be treated as in any way a party to the contract, although he may have authorised it or may be entitled to the benefit of it (c). Under the Indian Contract Act, the principal's right to enforce a contract entered into by his agent rests on S. 226. A principal might contract himself out of his right to sue on the contract under S. 226 on the principle *unique licet remuntiari juri prosee introducto*, there being no provision against contracting out. It would be necessary to prove such an agreement unless the relation of the defendants to the firm was that of sub-agents, in which case there would clearly be no privity of contract between the plaintiffs and defendants (*vide* S. 192, Contract Act).

If, however, the plaintiffs could sue upon the contracts, then the provisions of S. 232, Contract Act, would not apply, because defendants knew of the relations between the plaintiffs and the Company; and in these circumstances the defendants were not entitled, in a suit by the plaintiff company as principals, to rely on any defence resting on the rights and obligations subsisting between A. & Co. and the defendants, whether the defence be set-off or any other equity.

Per *Seshagiri Aiyar, J.*—As the plaintiffs knew that A. & Co. and the defendants were independent contracting parties, they can have no right of action.

This principle of S. 231 of the Contract Act is this. As against the agent transacting business in his own name, the principal can claim the full benefit of the contract; as against the party contracting with the agent, the principal is bound by the equities subsisting between the agent and the contracting party. Even as against the agent, the principal must take the benefit with the burden. He cannot both appropriate and reprobate with reference to the ordinary incidents arising out of the contract (d).

Parol evidence is admissible to prove whether one of the contracting parties was acting for himself or on behalf of a principal; for such a question is not one relating to the terms of a contract under S. 92 of the Evidence Act (e). (*Wallis, J., contra*).

There is nothing in S. 230 of the Contract Act which makes a departure from the rule of English law. There is no authority for the position that only in the cases mentioned in the section, presumption as to the nature of the contracting party arises. In the present case, the principal's name is not disclosed and the

Contract Act—(Continued).

person signs himself. The presumption is therefore strong that the contract was with A. & Co. as principals. *The South Indian Industrials, Limited, formerly known as the Arbuthnot's Industrials v. Munsai Rama Jogi*, 27 M.L.J. 501.

SIR JOHN WALLIS, O.C.J., and SESHAGIRI AIYAR, J.

References:—(2) 18 C. 573; Bowl. 534; L.R. 7 Q. B. D. 374; 10 A. C. 627, R. (b) 8 M. & W. 334, R. (c) (1891) 1 Q. B. 370 (372); 19 Q. B. D. 110; 22 Q. B. D. 722, R. (d) 34 B. 292; 9 H.L. C. 391; (1891) 1 Q. B. 370; L.R. 4 Ch. D. 133; L.R. 9 C. P. 38; 18 C.B.N.S.—31 L.J.C.P. 101; 7 Term. Rep. 359—101 E. R. 1019, R. (e) 5 C. 71; 31 M. 45; 15 East. 272—104 E.R. 847; L.R. 6 Q. B. 36; 7 E. & Bl. 942—27 L.J.R.Q. B. 405—119 E.R. 1497, R.

(97) S. 226. See No. 96, *supra*.

(98) S. 230—Principal and agent—Non-disclosure of principal's name—Agent, whether personally liable.

The defendant as manager of the Banaili Raj got some work done by the plaintiffs. The name of the Raja was not disclosed to the plaintiff:

Held, that the defendant was not personally liable to the plaintiff for the work done by him for the Raj. *Gulzar Ahmad v. Sheva Shankar Sahai*, 24 Ind. Cas 415.

RICHARDS, C.J., and TUDBALL, J.

(99) S. 230. See No. 96, *supra*.

(100) Ss. 230 236—Undisclosed principal—Contract on his behalf by person purporting to act as agent—No undisclosed principal in existence—Right of agent to claim performance—Whether exists. *Ramji Das v. Janki Das*, 39 C. 802—17 Ind. Cas. 973—18 C.W.N. 263. See Final Part, 1912, Col. 435.

(101) S. 236. See No. 100, *supra*.

(102) S. 237—Articles of Association not valid—Power to borrow conferred on the managing agents—Ratification by the share-holders—Effect—Estoppel. See ACT VI OF 1882 (COMPANIES), No. 5, 12 A.L.J. 763.

(103) S. 253 (7)—Sale of business by some partners—Effect—Dissolution of the firm. See CIV. PRO. CODE (1908), No. 263, 8 S.L.R. 69.

(104) S. 253 (10)—Hindu Law—Joint family partnership—Death of one of the partners—Effect upon dissolution of partnership—Agreement between survivors to continue the partnership—Liability of surety—Suit for dissolution and accounts—Art. 106, Limitation Act (1908).

The principle of law embodied in S. 253 (10) of the Contract Act is based on the ground that partners cannot be expected to acquiesce in new partners being forced upon them. In the event of one partner dying, they may well object to the executors or administrators of a deceased partner coming into the business. But this principle can obviously not apply when all that happens is that one of the existing partners becomes, by operation of law entitled, on the

Contract Act—(Continued).

death of his co-parcener, to a larger share in the partnership than he previously possessed in his individual right.

In this case, plaintiffs trading under the name of B.L.H. alleged that, by a written agreement dated 1-1-1901, a contract of partnership was entered into between (1) M.K. (defendant No. 4) of the one part, and (2) plaintiffs' firm and the firm of G.R.J.D. represented by defendants 1, 2 and 3 of the second part; that, under the terms of the said agreement, the two said firms were to supply the capital for the business of the partnership and that defendant No. 4 was to act as manager, the profits being shared equally by the two parties. The agreement was to remain in force for 3 years from the date of starting work. By a bond dated 27-3-1901, G.M., the father of the 4th defendant, undertook to stand security for all losses suffered by the two firms to the extent of 4th defendant's share. The said surety died before suit and defendants Nos. 4, 5 and 6 represented his estate.

Plaintiffs in their plaint presented on 22-12-1910 alleged that the partnership was carried on up to the end of 1907 and was dissolved on 1-1-1908 except in so far as the carrying on of the business was necessary for winding up purposes. They further stated that the representatives of the firm of G.R.J.D. had settled matters with themselves and were merely *pro forma* defendants in the present suit.

Plaintiffs claimed a settlement of accounts from the late Manager M. K. and prayed, (a) that the partnership be wound up and a decree passed for any sums found to be due to them after settlement of accounts; and (b) that, in the event of the Court finding that the partnership had not been dissolved prior to suit, it should now be dissolved and accounts made up and decree passed in accordance therewith. Defendants 4, 5 and 6 contended that the claim was barred under Art. 106, Limitation Act, inasmuch as the partnership had been dissolved more than 3 years before suit, and that the agreement by G.M. to stand surety determined on the lapse of the period of 3 years from the date of the partnership agreement (i.e., from 1-1-1901 to 1-1-1904), and further that the partnership was dissolved by the death of M.L., one of the partners in the firm of G.R.J.D. who died in July 1907.

Held, that the partnership was one between (a) M.K. of the one part and (b) the 2 firms of G.R.J.D. and B.L.H. of the second part, and not between the five individuals who signed the deed in their personal capacities.

Held also that the firm of G.R.J.D. was constituted of 3 partners, viz., M.L. P.L. and H.M.; that M.L. and P.L. constituted a joint Hindu family so far as their property was concerned, and when M.L. died in July 1907, P.L. at once became his heir by the rule of survivorship and represented his estate for all purposes. Thus the death of M.L. in no way affected the partnership up to that moment

Contract Act—(Concluded).

existing between him, his co-parcener P.L. and H.M. *Held*, therefore, that the death of M.L. did not dissolve the partnership firm of G.R.J.D. and, as a result, did not dissolve the partnership existing between M.K. and the 2 firms of G.R.J.D. and B.L.H.

Held, also that the provisions of Art. 106, Limitation Act, would not bar the present claim, for, when a partnership is determined by death and the surviving partners continue to carry on the business, the statute of limitation is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement (a).

Held, also that the surety bond of the kind executed by G. M. must be construed strictly, and the liability of the surety cannot be extended beyond the period for which he was undertaking liability, simply by showing that the partnership, which he was led to believe was to terminate within 3 years, was, in fact, by mutual agreement of the partners, to which he was no party, continued beyond that period. **Maharaj Kishen v. Hargobind and Basheshar Lal**, 101 P.R. 1914.

JOHNSTONE and RATTIGAN, JJ.

References:—(a) (1895) 2 Ch. 474; 25 M. 26 (31), R.

Contribution.

(1) *Co-heir—Liability—Contributions—Expenses incurred by co-heir in litigation about joint property—Expenses in shrad of widow of common ancestor—Equitable set-off—Time-barred debt.*

A co-heir is not bound to bear his proportion of the expenses incurred by carrying on litigation in respect of the common property (a).

The right of set-off exists not only in cases of mutual debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit (b).

A time-barred debt may be claimed by way of equitable set-off (c).

The plaintiff sued for recovery of his share of a certain sum of money belonging to the estate of R, of whom the plaintiff and the defendant were the reversionary heirs. The defendant claimed a set-off in respect of the amount expended by him towards the *shrad* of R's widow:

Held, that, the plaintiff was liable to contribute his share of the reasonable expenses for the *shrad*, and that the defendant was entitled to the set-off claimed in this suit. **Ramdhar Singh v. Parmanund Singh**, 21 Ind. Cas. 716.

CHATTERJEE and WALMSLEY, JJ.

References:—(a) 21 I.A. 26=21 C. 496 (P.C.); 30 M. 526=2 M.L.T. 468=17 M.L.J. 439, *Rel.* (b) 2 M.H.C.R. 296, *F.* (c) 32 C. 576=2 C.L.J. 78, *Rel.*

Contribution—(Continued).

- (2) *Contribution amongst joint tort-feasors—Decree against plaintiffs and defendants for mesne profits—Tort not wilful—Plea that plaintiffs sole wrong doers to be specially pleaded and made a special issue.*

**Held*, that, on the facts of the case, the plaintiffs and defendants against whom, as zemindars of estate A, a decree for possession and mesne profits had been passed in favour of zemindars of estate N, were not wilful tort-feasors—even if the strict law of *Merryweather v. Nizam* were applicable in India—and *prima facie* the plaintiffs who paid the whole of the decretal amount in a proceeding under S. 310 A, Civ. Pro. Code, were entitled to contribution as against the defendants.

In such a suit for contribution, a plea that the plaintiffs were the only wrong-doers, in the sense that they alone were in possession of the land in respect of which mesne profits were awarded, is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue (b). *Bishun Charan Roy Chauduri v. Bepin Chandra Roy Chauduri*, 18 C.W.N. 622.

JENKINS, C.J., and RAY, J.

References :—(a) (1799) 8 T.R. 186, R. (b) (1787) 1 Cox, 318, R.

- (3) *Contribution, suit for, what is—Rent, decree for, in favour of co-sharer landlord—Defendants and not plaintiffs liable—Payment by plaintiff—Plaintiff's interest affected—Contract Act, Ss. 69, 70—Provincial Small Cause Courts Act, Sch. II, Art. 41—Second Appeal—Civ. Pro. Code (1908), Ss. 102, 115—Revision—Error of law—Jurisdiction.*

Contribution signifies payment by each of the parties interested of his share in any common liability. Hence an action for contribution is a suit brought by one of such parties, who has discharged the liability common to them all, to compel the others to make good their shares. Mutuality is thus the test of contribution.

The plaintiffs purchased the interest of the first defendant in a certain tenancy in November, 1907. Some out of the entire body of landlords sued the defendants for rent due on account of the years 1311—1313 (1904—1906) and obtained a decree. When the landlords were about to bring the properties in the tenancy to sale in execution of their decree, the plaintiff deposited in Court the amount sufficient to satisfy the decree. The plaintiffs then brought a suit for declaration that, as the defendants were liable to pay the judgment-debt they were entitled under equity to recover the same from them.

Held, that no second appeal lay under S. 102 of the Code of Civil Procedure, the value of the suit being less than Rs. 500, and as the suit was not for the contribution but for recovery of money paid by the plaintiffs for the benefit of

Contribution—(Continued).

the defendants, Art. 41, Sch. II of the Provincial Small Cause Courts Act had no application.

The fact that the decree had been obtained by co-sharer landlords did not necessarily lead to the inference that the sale of the right, title and interest of the judgment-debtor would not have affected the interest of the plaintiffs, the party liable to be affected would be entitled to satisfy the decree to protect himself from the apprehended injury to his right, he would also be entitled, if he made the payment, to be reimbursed under S. 69 or S. 70, Contract Act.

A decision, erroneous in law but not affecting the jurisdiction of the Court, is not open to revision by the High Court. *Satya Bhusan Banerjee v. Krishnakali Banerjee*, 20 C.L.J. 196 = 18 C.W.N. 1308.

MOOKERJEE and BEACHCROFT, JJ.

References :—11 C. 6 = 11 I.A. 237; 16 C. 749 = 16 I.A. 104, R.

- (4) *Contribution, suit for—Assignee of rent decree, application for execution by—Payment of decretal amount by one of the co-sharers—Contract Act, Ss. 69, 70—Bengal Tenancy Act, S. 148 (h)—Second appeal—Civ. Pro. Code (1908), S. 102—Provincial Small Cause Courts Act, Sch. II, Art. 41.*

The defendants along with the plaintiffs were liable to satisfy the judgment-debt under a decree held by the fourth defendant, the landlord. That decree was assigned to the third defendant. The third defendant took out execution of the decree. Under compulsion of legal process, the plaintiffs satisfied that decree.

Held, that the case governed by both Ss. 69 and 70, Contract Act, and the defendants, the co-sharers, were liable to be called upon by the plaintiffs to contribute.

A suit by some of several persons, bound by a common liability, who have discharged the joint obligation, to compel their co-sharers to make good their shares, falls within the scope of Art. 41 of the second schedule to the Provincial Small Cause Courts Act. *Rajani Kanta Ghose v. Rama Nath Roy*, 20 C.L.J. 200.

MOOKERJEE and BEACHCROFT, JJ.

- (5) *Contribution right of—Principle—Contribution, who can claim—Co debtor, who paid more than his share of debt, if can be sued—Pleading—Plaintiff, what to prove—Landlords collecting separately their shares of rent, if can jointly sue the tenants.*

The right of contribution has its foundation in and is controlled by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between parties jointly liable *ex contractu*. Every joint holder, who has been compelled to pay more than his share of the common debt, has the right of contribution from each of his co-debtors. The principle is that one who has discharged a

Contribution—(Continued).

common liability can recover from his co-obligors only for the excess that he has paid over his share, and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation; hence, it follows as a corollary that no contribution can be claimed against a person who has paid more than his share of the debt. It is not necessary that the entire debt should have been satisfied by the plaintiff, but he must establish that he has paid more than his share of the joint liability. In a suit so framed, the liabilities of the different parties, plaintiffs and defendants, must be separately ascertained; and a joint decree cannot be made in favour of the plaintiff against the defendants.

When the judgment-debts satisfied are closely connected and arise out of the same or similar transactions, in a suit by one of the judgment-debtors for contribution, one of the co-debtors can plead that he had discharged a similar liability which would otherwise have fallen upon the claimant.

The fact that the landlords collect their rent in their respective shares separately does not stand in the way of a suit by all the landlords for a joint decree against all the tenants (a).

X, Y and Z are co-sharer landlords, each of whom collects his share of rent separately. X obtains a decree for rent against A, B and C; similar decrees are obtained by Y and Z against the same set of tenants. A satisfies the decrees of X, B, that of Y, and C, that of Z. In a suit for contribution brought by A against B and C, in respect of payment made by him to satisfy the decree of X, it is open to B and C to plead non-liability on the ground that they have discharged a liability which would otherwise have fallen upon A under the decrees obtained by Y and Z. *Matungoi Debi v. Brojeswar Banerjee*, 20 C.L.J. 205.

MOOKERJEE and BEACHROFT, JJ.

References:—(a) 35 C. 331=35 I.A. 73=7 C.L.J. 139, R.

(6) *Contribution—Co-sharers—Former suit by some co-sharers against trespassers—Suit against other co-sharers for their share of the costs of prior suit—Absence of contract—Non-liability—S. 70, Contract Act—Applicability.*

Plaintiffs, who were co-sharers, in a joint *khata* with the defendants, instituted a suit against two trespassers and recovered possession of the *khata* from them. The defendants claimed partition and the plaintiff now brought this suit for a declaration that the defendants were not entitled to partition until they paid their share of the expenses of the former litigation against the trespassers.

Held that, in the absence of any contract, the defendants were not liable for any portion of the costs of the former litigation (a).

Held also that S. 70 of the Contract Act was not applicable to cases like the present one (b).

Contribution—(Concluded).

Dulla Singh v. Khazana, 61 P.R. 1914=267 P.L.R. 1914.

SHAH DIN and CHEVIS, JJ.

References:—(a) 21 C. 496 (P.C.); 30 M. 526, R.; 118 P.R. 1886; 70 P.R. 1900, *Cited*. (b) 11 A. 234, R.

(7) *Joint tenancy—Payment of the whole rent by one tenant—Liability, joint and several Contribution, suit for, if lies—Contract Act, Ss. 43, 70.*

Where the defendants held a tenancy jointly with the plaintiff, and the plaintiff paid the whole rent due upon the holding:

Held, that a suit for contribution lay, and the plaintiff was entitled to a decree against the defendants according to their shares. *Nirdosh Munda v. Jakaria Munda*, 20 C.L.J. 492.

MULLICK, J.

(8) *Contribution, doctrine of—Plea that at the time of contribution the right of original creditor had become time-barred, maintainability of—Alteration of position under the joint contract, effect of. Sardha Baksh Singh v. Durga Baksh Singh*, 16 O.C. 285=22 Ind. Cas. 263. See Final Part, 1913, Col. 465.

(9) One of several under-proprietors satisfying joint decree for arrears of rent Suit for contribution—Jurisdiction. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 18, 24 Ind. Cas. 28.

(10) Suit for contribution, meaning of—Test of contribution—Jurisdiction of Small Cause Court. See CONTRACT ACT, No. 59, 24 Ind. Cas. 259.

(11) Suit by creditors against joint promisors—Decree against one joint promisor—Another joint promisor exonerated on the ground that suit barred against him—Payment by former—Right to seek contribution from latter. See CONTRACT ACT, No. 41, 16 M.L.T. 569.

Conversion.

Specific moveable property—Person entrusted for inspection for sale—Pledge by—True owner suing to recover from pawnee—Suit instituted within 3 years from the date when owner became aware of pawnee's possession—No bar. See LIMITATION ACT (1908), No. 79, 16 M.L. T. 221.

Converts.

Hindu married woman of Palli caste—Conversion to Mahomedanism—Second marriage with Mahomedan during the subsistence of first marriage—Legality—Applicability of Hindu or Mahomedan Law—Recognition of paternity and acknowledgment—Effect—Conflict between persons of different religions—Law applicable—Doctrine of Factum valet—Applicability—Legitimacy of offspring.

A Hindu married woman of the Palli caste became a convert to Mahomedanism and married a Mahomedan during the subsistence

Converts—(Continued).

of the first marriage. *Held*, the second marriage is illegal and the children born of such a union are illegitimate.

Per Spencer, J.—If the marriage was invalid and the parties knew it, no acknowledgment could make legitimate the offspring of a union which had its inception in illegitimacy.

The Mohammedan and Hindu Laws being personal laws are attached to the followers of each religion wherever they may be living.

Where Fatima *alias* Unnamalai (Hindu) was married to Muniya Gownden (Hindu) in Pondicherry, but her marriage to Jaila Rowther (Mohammedan) was performed in British territory, and the marriage to Jaila has come before the British Courts, the law to be administered is that prevailing in British India.

Assuming that there is a custom among Pallis or Vannians of allowing a woman to marry again during the lifetime of her first husband, such a custom is contrary to public policy and appears to be condemned by the community, and therefore the Courts will refuse to recognise it.

A mere recognition of paternity is not equivalent to a recognition of legitimacy; and acknowledgment cannot make legitimate the offspring of *zina* (fornication or adultery).

Where a conflict occurs between persons belonging to different religions, the Courts must apply the rules of justice, equity and good conscience.

In considering whether the woman's first marriage was subsisting or not at the time of her second marriage with Jaila Rowther, the principles of Hindu law must be applied; but in testing the validity of her second marriage with Jaila Rowther the principles of Muhammadan Law must be applied. According to Hindu Law, her Hindu marriage was not dissolved by her apostasy. According to Muhammadan Law, the marriage of a man with the wife of another man is not permitted so long as the first marriage is subsisting. Such a union will not be merely invalid (*fasid*) but altogether void (*batal*) and illegal.

Per Sadasiva Aiyar, J.—If there is a custom among any community of allowing a woman to marry again during the lifetime of her first husband, without any defined rules by which the marriage with her first husband is dissolved before a second marriage is contracted, such a custom is contrary to public policy and morality, and cannot be recognised by the Courts.

As regards the doctrine of *factum valet*, neither in the Hindu nor the Muhammadan Law, does it ever excuse the violation of a legal rule so as to make acts performed in such violation legally valid. That doctrine only means that a precept, which merely belong to the domain of ecclesiastical admonitory precept, has not "in the domain of Vyavahara" or secular law the same force as a positive and a clear rule of the Vyavahara law has. *Badamsa*

Converts—(Concluded).

Rowther v. Fatima Bi, 15 M.L.T. 107 = (1914) M.W.N. 278 = 26 M.L.J. 260 = 22 Ind. Cas. 697.

SADASIVA AIYAR and SPENCER, JJ.

References:—21 C. 666; 34 B. 111; 8 M. 169; 9 M. 466; 18 C. 264; 30 M. 550; 32 C. 871; 4 B. 330; 23 M. 171; 15 A. 396; 42 P.R. 198, R.

Co-operative Societies Act.

Sep ACT II OF 1912.

Co-owners.

(1) *Practice—Code of Civil Procedure* (1908)
—*Suit by one of many joint owners for possession—Other co-owners pro forma defendants—Form of the decree.*

In a suit for ejectment brought by one of the many joint owners of the property against a trespasser, in which the remaining owners have been made defendants on the ground that they would not join as plaintiffs, the decree should not be for joint possession in favour of all the co-owners, but ought simply to be one in favour of the plaintiff giving him possession on behalf of himself and other co-sharers and not adversely to the latter. *Sheo Dial v. Parbatia*, 12 A.L.J. 23 = 22 Ind. Cas. 841.

PIGGOTT, J.

(2) *Presumption that co owner's possession is on behalf of all owners—Possession by biggest adult share holder, character of—Trustee for minor co-owners—Reason for rule.*

In a case in which the question arises as to whether the possession of one co-owner has been adverse to that of another, the fundamental rule is that the entry of possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but would presumably be held to be for the benefit of all (a).

The reason for this rule is that the possession of one co-owner is in itself rightful and does not imply hostility as would be the possession of a mere stranger. The law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful, and this is upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears.

There is a presumption that the biggest adult shareholder of a property is the trustee for the others, if, as a fact, he holds entire possession of the property during their minority. *Jajneswar Saha v. Satish Chandra Saha*, 28 Ind. Cas. 552.

HOLMWOOD and CHAPMAN, JJ.

Reference:—(a) 35 C. 961 = 12 C.W.N. 127 = 6 O.L.J. 735, Rel.

(3) *Injunction, temporary—One co-owner building upon joint property to the prejudice of other co-owners—Suit for partition—*

Co-owners—(Concluded).

Substantial question in controversy—Maintenance of status quo—High Court, interference by, for prevention of injustice—Charter Act (24 and 25 Vict., C. 104), S. 15.

Where a co-owner in a piece of land begins to build upon it a house to the prejudice of the other co-owner's right and the latter sues for his only remedy—partition, a temporary injunction should be granted, if there is a substantial question in issue, to maintain the status quo to the necessary extent. **Hemanta Kumar Roy v. The Barangar Jute Factory**, 24 Ind. Cas. 313=20 C.L.J. 441.

MOOKERJEE and BEACHCROFT, JJ.

*References:—*18 Eq. 544=43 L.J. Ch. 777=31 L.T. 219=33 W.R. 147; 27 Ch. D. 43=52 L.T. 9=33 W.R. 243; (1911) 1 K.B. 455=80 L.J. K.B. 155=104 L.T. 446=18 Manson 139, Rel.; 21 Ind. Cas. 861=19 C.L.J. 47=18 C.W.N. 176, R.

(4) *Temporary injunction—Co-owner building on joint land in his exclusive possession—Other co-owners if may apply for injunction—Question to be considered on such interlocutory application—Defendant building after notice of suit—Courts power to order demolition—Revision by High Court—Charter Act (24 & 25, Vict., c. 104), S. 15* **Israil v. Samser Rahmah**, 18 C.W.N. 176=19 C.L.J. 47=21 Ind. Cas. 861=41 C. 436. See Final Part, 1913, Col. 467.

Copies.

Duty of person applying for copies of judgment and decree—Application through agent or through Post Office—Calculation of time spent in obtaining copies—Extension of time—Discretion of Court—Revision. See **LIMITATION ACT (1908)**, No. 32, 10 N.L.R. 139.

Copyright.

Indian Copyright Act (III of 1914)—Copyright Act (1 and 2 Geo. V, c. 46)—Law Reports, copyright in—Reports of judgment, copyright in—Selection of judgments, copyright in—Judgments obtained by expenditure of time, labour or money by one, if may be reproduced by another—Extracts from judgments and facts taken from record, copyright in—Common source of information, reference to—Injunction, perpetual—Pirated matter, direction for delivery and destruction—Damages, assessment of.

It is generally true that, in the reports of judgments, the reporter has no copyright, but it cannot be said that in the selection of cases and in the arrangement of the reporting, the reporter has not the protection of law. One is entitled to report such judgments as he obtains by expenditure of his time, labour, money, but when he fails to exert his own energies, he cannot be allowed to avail himself of other people's industry. Nor will he be allowed to take quotations from judgments or facts obtained by another from the records of a case.

Copyright—(Concluded).

The principle is, that, whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copyright and entitled to protection. **Jogesh Chandra Cnauthuri v. Mohim Chandra Rai**, 18 C.W.N. 1078.

IMAM, J.

*Reference:—*2 Beav. 6 (8), F.

Copyright Act.

See **ACT III OF 1914.**

Copyright Act (1 & 2 Geo. V, c. 46).

See **COPYRIGHT**, No. 1, 18 C.W.N. 1078.

Corporation.

Suit by—Plaint signed by principal officer who is also am-muktear, if sufficient. See **CIV. PRO. CODE (1908)**, No. 392, 22 Ind. Cas. 674.

Co sharers.

(1) *Adverse possession by co-sharer—What must be shown.*

When two persons are joint owners of a house, the possession of one is the possession of both. The mere fact that one co-sharer ceases to reside in the house and allows the portion he had formerly occupied to fall into ruins does not mean that the other co-sharer is in adverse possession of the whole house. The co-sharer who claims title by adverse possession must do something to indicate that he disputes his co-sharer's title to the house. **Chander Singh v. Tundi**, 21 Ind. Cas. 88.

LYLE, J.

(2) *Co-sharer, suit by, for joint possession of land and injunction—Injury or likelihood thereof not alleged in plaint—Hostile title not set up by defence—Decree for joint possession if should be given—Ouster, meaning of—Common Law action for ejectment and equity suit for injunction, distinction between, if should be introduced in this country—Principle of equity, justice and good conscience.*

The plaintiffs and the defendant were co-sharers in a mehal. Each co-sharer was in sole occupation of some lands appertaining to the mehal as *khamar* lands and the defendant was in such possession of some lands. On the defendant commencing some building on portions of the land, the plaintiffs brought a suit for recovery of joint possession of the land in dispute on declaration of their proprietary right to their share in it, for demolition of the building raised, for an injunction restraining the defendant from building on the land. The defendant did not claim any exclusive title to the land and the plaintiffs did not allege that they had sustained or were likely to sustain any substantial injury by reason of the sole occupation of the land or building thereon by the defendant.

Co-sharers—(Continued).

Held, that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers, nor does it entitle the latter to a decree for joint possession.

Ouster means 'dispossession' of one co-sharer by another where a hostile title is set up by the latter and when the occupation of the latter is not consistent with joint ownership.

Held, that, there being no assertion of hostile title in the present case, there was no ouster of the plaintiffs by the defendant.

That the distinction between a common law action for ejectment and an equity suit for an injunction should not be introduced in this country, and questions of joint possession and injunction should be decided on the principles of justice, equity and good conscience.

That, in the present case, the mere fact that the lapsed in suit adjoined the dwelling-house of the plaintiffs irrespective of any injury would not be a sufficient ground, consistent with the principles of justice, equity and good conscience, to give joint possession or order the demolition of the buildings already erected or restrain the defendant from building on it. **Sreemutty Basanta Kumari Dassya v. Mohesh Chandra Shaha**, 18 C.W.N. 328=21 Ind. Cas. 621.

CHATTERJEE and WALMSLEY, J.J.

- (3) *Landlord and tenant—Bengal Tenancy Act (VIII of 1885), S. 105-A—Letting out by one co-sharer—Jungle and waste land—Land reformed—Acquiescence.*

Where one of the co-sharers granted an *amalanamah* for the purpose of reclamation and improvement of jungle and waste land, which belonged to all the co-sharers, to A, who remained in possession for more than ten years without any objection by other co-sharers and reclaimed the land :

Held, that the principle of the decision in *Watson v. Ramchand* (a), would apply and A became the tenant of all the co-sharers (b). **Dakhyayani Debi v. Mana Raut**, 19 C.L.J. 113=22 Ind. Cas. 666.

MOOKERJEE and BEACHCROFT, J.J.

References :—(a) 18 C. 10, *Appl.* (b) 7 C. 414, D.

- (4) *Adverse possession by co-sharer—Overt act—Retention of names by Revenue authorities after, does not prevent limitation.*

Possession of one co-sharer is ordinarily possession of all the co-sharers; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone, and this adverse possession so begun cannot be stopped by the other co-sharers merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers within limitation actually and effectively to assert their rights and to break up the usurper's exclusive possession.

Co-sharers—(Continued).

The mere retention by the Revenue authorities of the names of those co-sharers as such, after the sforesaid overt act has been done, does not prevent limitation from running against them, nor does even a decree in their favour, not accompanied by actual effective assertion of right and taking of possession of those rights, help them. **Akbar v. Tabu**, 105 P.L.R. 1914=61 P.W.R. 1914=45 P.R. 1914=22 Ind. Cas. 805.

JOHNSTONE and CHEVIS, J.J.

References :—4 Ind. Cas. 912=120 P.R. 1908=18 P.L.R. 1909; 29 B. 300=7 Bom. L.R. 252, F.

- (5) *Co-sharer, sole occupation by, of joint land—Ouster—Suit for joint possession—Justice, equity and good conscience—Status quo when maintained.*

Where it is found that a portion of the joint land was marshy and was jointly possessed by all the co-owners, although they had other lands in separate possession, and that when the marsh silted up one of the co-owners occupied the silted up land to the exclusion of others :

Held in a suit by one of the co-owners for joint possession, that there was ouster and plaintiff was entitled to recover joint possession without bringing a suit for partition.

Where parties are contented with joint possession of a portion of the joint land and separate possession of the rest, from the point of view of justice, equity and good conscience, the *status quo* ought to be restored and the party dissatisfied relegated to a suit for partition. **Kumud Lal Ray v. Jogendra Mohan Ray**, 18 C.W.N. 609=22 Ind. Cas. 683.

CARNDUFF and RICHARDSON, J.J.

- (6) *Suit for recovery of possession of land by proprietor of undivided half share—Nature of decree that plaintiff may be entitled to—Proprietor of undivided half share if can eject any one on the land from the whole of it.*

The plaintiff brought a suit for recovery of possession of a plot of land to the extent of an eight annas share, the plaintiff being the proprietor to the extent of eight annas and defendants Nos. 5 and 6 proprietors to the extent of the other eight annas. Defendants Nos. 1 to 3 were tenants on the land recognized by defendants Nos. 5 and 6. The plaintiff asked for joint possession with defendants Nos. 1 to 3, if joint possession with defendants Nos. 5 and 6 could not be granted.

Held, that all that the plaintiff could ask for was joint possession of an eight annas share. He could not in this suit ask the Court to decide who was entitled to possession of the other eight annas share of the land with which he had no concern.

That a person entitled to an undivided half share of the land cannot sue to eject anybody from the whole of it and the defendants Nos. 1 to 3 who had been recognised as tenants

Co-sharers—(Concluded).

by the co-sharer landlords could not be ejected by the plaintiff from the whole of the land.

That the plaintiff was entitled to a decree against all the defendants for recovery of joint possession of an eight annas share of the disputed property and he was entitled to enforce the right by a suit for partition, if he was not satisfied with the delivery of possession of an undivided half share. *Gajadhar Ahir v. Munshi Bhikari Lal*, 18 O.W.N. 1011.

COXE and CHATTERJEE, JJ.

- (7) *Penal Code, S. 447—Criminal trespass—Co-sharer building on the common land without permission of the other co-sharers—Permission asked for and refused.*

Where one of the co-sharers asked the permission of the other co-sharer to build upon the common land and the permission was refused and he built in spite of the refusal, held he could not be convicted of the offence of criminal trespass within the meaning of S. 447, Penal Code. The mere fact that a co-sharer asked the permission of the other co-sharer to his appropriating to his own use a portion of the common waste land, would not necessarily imply that the co-sharer, whose consent was asked for, was admitted to be the sole owner of the land in question. *Ram Sarup v. King-Emperor*, 12 A.L.J. 790.

PIGGOTT, J.

References :—2 A. 165; 26 B. 558, R.

- (8) Co-sharer when entitled to mesne profits from another co-sharer—Ouster necessary—What amounts to ouster. See *MESNE PROFITS*, No. 1, 23 Ind. Cas. 122.

- (9) Non-transferable occupancy holding—Purchase by co-sharer landlord—Effect. See *OCCUPANCY*, No. 1, 19 C.L.J. 400.

- (10) What constitutes adverse possession of a co-sharer as against another co-sharer. See *PARTITION*, No. 2, 20 C.L.J. 32.

Costs.

- (1) *Partition suit—Costs discretionary with Court—Party failing in his contention mulcted in costs—Discretion reasonably exercised.*

In a suit for partition, the Court has a discretion to award costs against a party who vexatiously raises a contention and fails in it. *Shanmugam Pillai v. Mirakani Rowther*, 21 Ind. Cas. 746.

SADASIVA IYER and SPENCER, JJ.

- (2) *Letters Patent—Costs, appeal as to, only from Original Side—Order regarding costs, incidental to judgment—Limitation—Time occupied in review not deducted—Reasonable cause for non-presentation within time, what is—When appellate Court should interfere with First Court's order as to costs.*

Held, an appeal may be preferred only as regards costs, when the order as to costs is

Costs—(Continued).

made as incidental to a "judgment" by a single Judge sitting on the Original Side of the High Court (a).

The time occupied in connection with the presentation of the review petition cannot be deducted from the period of limitation prescribed for the presentation of the appeal (b).

Where, however, in consequence of the filing of the review petition, the trial Judge made an order that the decree should be recalled, and where the appeal was in fact presented a day or two after the review petition was dismissed, held, there was reasonable cause for non-presentation of the appeal within the prescribed period of limitation.

As a rule, an appellate Court will not interfere with an exercise of discretion of a lower Court in the matter of awarding costs, unless it has proceeded on a manifestly wrong ground, such as the application of an erroneous principle or misapprehension of the facts (c).

Where, however, it is not clear how the trial Judge intended his order as to costs to be worked out when he used the words "the costs must follow the event," and the learned Judge himself had doubted the correctness of the decree as drawn up, and lastly where it appears that the order as interpreted is not the order which should have been made.

Held, the appellate Court is at liberty to interfere with the order regarding costs. *Numberumal Chettiar v. Krishnajeel*, 26 M.L.J. 356 = (1914) M.W.N. 310 = 15 M.L.T. 263 = 22 Ind. Cas. 919.

WHITE, C.J., and OLDFIELD, J.

References :—(a) 17 M.L.J. 559 (F.B.), D.; 5 A.C. 582, R. (b) 14 M. 81; 15 C. 242; 18 B. 94, R. (c) 1 K.B. 658; 2 Bom. L.R. 254; (1889) 2 Ch. 472, R.

- (3) *Petition by husband for dissolution of marriage—Security for wife's costs—S. 4, Act X of 1865 (Succession).*

In this case the husband petitioned for dissolution of marriage and the wife applied for security being furnished for her costs. Both parties were of Indian domicile and were subject to S. 4 of the Indian Succession Act. The wife had no property of her own.

Held that the Court must exercise its discretion in deciding applications of this nature and that this was a fit case in which an order for security should be passed, as otherwise the withholding of such an order might be equivalent to shutting out the wife's defence altogether. *Bateman v. Bateman and Niachi*, 41 C. 963.

CHITTY, J.

References :—6 O.W.N. 414; 5 C. 357; 23 C. 616 (N); 23 C. 918; 14 C. 580; 19 B. 293, R.

- (4) *Probate case—Costs—Decree that costs should come out of estate—Execution of decree—Manner of execution.*

Costs—(Continued).

Where a decree in a contested probate case directs that the costs of both parties should be paid out of the estate, and that joint letters of administration should issue to both the parties:

Held, that this does not entitle one of the joint administrators to execute the decree against the other, and that the proper course to follow is to sell or mortgage a sufficient portion of the estate in order to pay off the costs paid by the parties. **Hari Padu Mandal v. Karunomoyee Dasi**, 24 Ind. Cas. 214.

MOOKERJEE and BEACHCROFT, JJ.

(5) *Limitation—Agreement to pay costs of suit—Termination of suit—Starting point for computing period of limitation—Construction of agreement.* **Sivasubramania Mudaliar v. A. R. A. R. S. M. Somasundaram Chettiar**, 25 M.L.J. 422=21 Ind. Cas. 442. See Final Part, 1913, Col. 471.

(6) *Decree for costs—Decree amended in favour of persons other than applicants by Court acting ex proprio motu.* See AMENDMENT, No. 5, 20 C.L.J. 18.

(7) *High Court's power to order a party to furnish security for costs—Failure to furnish security—Effect of dismissal of appeal—Appeal to His Majesty in Council whether lies.* See CIV. PRO. CODE (1908), No. 146, 12 A.L.J. 451.

(8) *Order of adjournment on payment of costs—Revision whether lies.* See CIV. PRO. CODE (1908), No. 178, 12 A.L.J. 460.

(9) *Successful plaintiff relying upon invalid and dishonest pleas—Not entitled to costs.* See CIV. PRO. CODE (1908), No. 385, 15 M.L. T. 206.

(10) *Decree in apparent conformity with judgment—True intention of Court as to costs awarded to successful party, whether against one or more defendants, as gathered from whole judgment, if may be given effect to by way of amendment.* See CIV. PRO. CODE (1908), No. 221, 18 C.W.N. 772.

(11) *Mortgage decree for principal and costs—Splitting up of decree—Appropriation of payment.* See CIV. PRO. CODE (1908), No. 411, 12 A.L.J. 645.

(12) *Mortgage decree—Costs of suit become part of mortgage debt.* See CIV. PRO. CODE (1908), No. 408, 24 Ind. Cas. 63.

(13) *Meaning of "costs would abide the plaintiff"—Litigation caused by language of will—Costs to be borne by testator's estate.* See CIV. PRO. CODE (1908), No. 63, 24 Ind. Cas. 96.

(14) *Surety for costs of Privy Council appeal—Decree for costs if may be executed against properties charged by surety.* See CIV. PRO. CODE (1882), No. 64, 19 C.W.N. 178.

(15) *Decree for sale of mortgaged property—Costs awarded to judgment-debtor—Set-off.* See CIV. PRO. CODE (1908), No. 322, 24 Ind. Cas. 376.

(16) *Rejection of plaint at an early stage of the trials—Costs.* See COURT FEES ACT, No. 28, 35 P.R. 1914.

Costs—(Concluded).

(17) *Collusive suit by son to contest father's alienation—Heavy costs to be awarded to successful alienee.* See CUSTOMS (PUNJAB—ALIENATION), No. 1, 7 P.W.R. 1914.

(18) *Wrongful intervention in execution proceedings—Suit for damages—Maintainability—Award of costs whether sufficient compensation.* See DAMAGES, No. 2, 7 S.L.R. 104.

(19) *Taxation of costs—Counsel's fees when instructed by party or by vakil.* See HIGH COURT RULES (MADRAS), No. 1, 26 M.L.J. 567.

(20) *Order as to costs—Whether a "judgment"—Test for awarding costs.* See LETTERS PATENT (MADRAS), No. 4, 22 Ind. Cas. 551.

(21) *Costs against person obstructing Receiver.* See RECEIVER, No. 3, 22 Ind. Cas. 417.

(22) *Agreement for sale—Condition for return of earnest money on non-approval of title by purchaser's solicitor—Duty of solicitor—Solicitor when entitled to costs.* See SALE, No. 4, 18 C.W.N. 568.

(23) *Court-fee paid on portion of claim withdrawn whether allowable as costs.* See UNDER-PROPRIETARY RIGHTS, No. 2, 23 Ind. Cas. 291.

(24) *Withdrawal of suit with liberty to bring fresh suit on payment of costs—Proper order to be passed in such a case—Non-payment of costs—Subsequent suit whether barred.* See WITHDRAWAL OF SUIT, No. 2, 19 C.L.J. 529.

(25) *Order allowing withdrawal of suit with liberty to bring fresh suit—No order as to payment of costs of defending—Irregularity—Revision.* See WITHDRAWAL OF SUIT, No. 3, 41 C. 632.

Counsel's Fees.

Taxation of costs—Counsel's fees when instructed by party or by vakil. See HIGH COURT RULES (MADRAS), No. 1, 26 M.L.J. 567.

Court.

(1) *Inherent powers of, when may be exercised.* See CIV. PRO. CODE (1908), No. 217, 27 M.L.J. 605.

(2) *Inherent power of Court when may be invoked.* See CIV. PRO. CODE (1908), No. 80, 20 C.L.J. 483.

(3) *'Inherent power' of Court, meaning of.* See CIV. PRO. CODE (1908), No. 213, 16 M.L. T. 430.

(4) *Presumption in favour of proceedings of Courts.* See CIV. PRO. CODE (1908), No. 258, (1914) M.W.N. 63.

Courts Act (Punjab).

See PUNJAB ACT XVIII OF 1884.

Court-fees.

(1) *Suit for injunction—Under valuation—Arbitrary valuation—Plaint, return of, Civ. Pro. Code, 1908, S. 115—Refusing to exercise jurisdiction.*

Court-fees—(Continued).

A suit can be entertained only by the Court in which it is instituted, and the Court refuses to exercise jurisdiction when it returns the plaint for presentation to another Court.

Where the substantial relief claimed is an injunction to restrain the defendants from interfering with the plaintiff in the management of the property, the suit is for an injunction and the Court-fee to be paid on the plaint is according to the amount at which the relief sought is valued in the plaint. It is not open to the plaintiff in a suit of this description to put an arbitrary value on the relief which he seeks. *Mohendra v. Dinabandhu*, 19 C.L.J. 15=21 Ind. Cas. 771.

MOOKERJEE and BEACHOROT, JJ.

- (2) *Court-fee — Deficiency — Extension of time to make it good—Judicial discretion—Appellate Court not to interfere.*

The Court of first instance allowed time to the plaintiff to make good the deficiency in Court-fee, and there was nothing to show that the Court did not exercise a judicial discretion, *held* that the appellate Court was not justified in dismissing the suit solely on the ground that full Court-fee was not paid when the plaint was filed. *Ramlal v. Khundat-un-nisa* 12 A.L.J. 709=23 Ind. Cas. 408.

RICHARDS, C.J., and BANERJI, J.

- (3) *Civ. Pro. Code (1908), O. VII. r. 11 — Plaint presented on insufficient Court-fee stamp — Court requiring payment in certain time—Non-payment — Dismissal of suit—Appellate Court cannot give option to plaintiff to limit his claim to the extent of Court-fees paid—Practice.*

The plaintiffs, having brought a suit on an insufficient Court-fee stamp, were given a month's time within which to pay the deficiency. The plaintiffs failed to pay and asked for further time which was not given and the suit was dismissed. The District Judge on appeal was of opinion that the discretion in not giving more time was rightly exercised by the lower Court; but set aside the order of dismissal of the suit on the ground that the order should have been in the form of rejection of plaint under O. VII, r. 11 of the Civ. Pro. Code, and directed that the plaintiffs should be given an option to abandon part of their claim and retain only that part for which they had paid a sufficient Court-fee stamp. If the plaintiffs, in making the option, paid the deficient Court-fees, the same was to be accepted, and the suit tried on merits. On appeal:—

Held, reversing the order and dismissing the suit, that there was no law or authority to show that the plaintiffs, who had not properly valued their claim or paid a sufficient Court-fee, were entitled at the last moment to an option such as was allowed to them by the District Judge. *Yalli Ise Amanji v. Mahmud Adam Asmal*, 16 Bom. L.R. 763.

SCOTT, C.J., and HAYWARD, J.

Court-fees—(Concluded).

- (4) *Appeal from final decree—Code of Civil Procedure, 1908, O. XXXIV, r. 5—Advalorem Court-fee. Bajrang Lal v. Mahabir Kuar*, 11 A.L.J. 801=35 A. 476=21 Ind. Cas. 498 (F.B.). See Final Part, 1913, Col. 475.

- (5) *Suit filed with insufficient Court-fee—No mistake—Court not to give time to file deficit Court-fee—Extension of period of limitation. See BEN. ACT XI OF 1859 (BENGAL REVENUE SALE LAW), No. 7, 24 Ind. Cas. 276.*

- (6) *Court's discretion in granting time to deposit deficit Court-fee—Mistake—Limitation. See ACT XI OF 1859 (BENGAL REVENUE SALE LAW), No. 6, 18 C.W.N. 1071.*

- (7) *Pauper—Appeal—Court-fee—Payment after expiry of period of limitation—Misleading by practice of Court—Failure of officers of Court to inform counsel—Refund not to be allowed. See APPEAL (GENERAL), No. 2, 7 L.B.R. 90.*

- (8) *Mortgage suit—Appeal against order absolute—Memorandum filed with 8 annas Court-fee instead of ad valorem—Extension of time by Court to pay deficit Court-fee—Payment of deficit Court-fee within time—Limitation—Appeal whether filed in time—Mistaken apprehension. See APPEAL (GENERAL), No. 3, 21 Ind. Cas. 866.*

- (9) *Practice of Madras High Court—Admission Court excusing delay in payment of Court fees—Order subject to objection. See APPEAL (GENERAL), No. 10, 23 Ind. Cas. 946.*

- (10) *Suit by claimant under S. 283, Civ. Pro. Code (1882)—Court-fees. See CIV. PRO. CODE (1882), No. 33, (1914) M.W.N. 910.*

- (11) *Suit for possession of colony land—Valuation—Court-fee—Jurisdiction—Suit improperly valued—Procedure. See CIV. PRO. CODE, (1908) No. 269, 194 P.L.R. 1914.*

- (12) *Set-off whether can be claimed by garnishee—Payment of Court fee whether necessary. See CIV. PRO. CODE (1882), No. 27, 16 Bom. L.R. 520.*

- (13) *Instalment decree—Appeal—Court-fee how to be calculated. See CIV. PRO. CODE (1908), No. 40, 226 P.L.R. 1914.*

- (14) *Appeal out of time when proper Court-fee is paid—Delay if could be excused—Discretion of Court. See CIV. PRO. CODE (1908), No. 212, 27 M.L.J. 677.*

- (15) *Claim for mesne profits—Valuation—Court-fee. See MESNE PROFITS, No. 4, 24 Ind. Cas. 232.*

- (16) *Properties other than mortgaged, liability of, for the decretal amount—Realization of mortgage money—Appeal—Court-fee. See MORTGAGE (GENERAL), No. 15, 17 O.C. 90.*

Court Fees Act.

- (1) *Court Fees Act (VII of 1870), as amended by Act (XI of 1899), S. 19-H, cl. 4—Probate and Administration Act (V of 1881), S. 98—Succession Act (X of 1865), S. 277—Application by Collector for valuation of estate—Period of limitation—Inventory to be filed by executor*

Court Fees Act—(Continued).

or administrator. *nature of.* **Rajkumari Boubaneshwari Kumar v. The Collector of Gaya**, 18 C.W.N. 153 = (1914) M.W.N. 13 = 26 M.L.J. 56 = 19 C.L.J. 186 = 12 A.L.J. 69 = 15 M.L.T. 87 = 16 Bom. L.R. 95 = 21 Ind. Cas. 975 (P.C.). See Final Part, 1913, Col. 482.

- (2) S. 7, cl. 4—*Suit for declaration and injunction—Consequential relief prayed for—Ad valorem Court-fee—Fictitious value—Whether plaintiff entitled to put.*

A prior mortgagee brought a suit on his mortgage without impleading the subsequent mortgagee and obtained a final decree for Rs. 6,818. Later on the subsequent mortgagee brought a suit and prayed for the following reliefs:—(1) for declaration that the prior mortgagee has no right to bring to sale the property comprised in the subsequent mortgage in execution of his decree; (2) for injunction prohibiting the prior mortgagee from taking out execution of his final decree against the aforesaid property. For purposes of jurisdiction relief (1) was valued at Rs. 6,818 and Rs. 10 were paid as Court-fee; relief (2) was valued at Rs. 100 and a Court-fee of Rs. 7-8 was paid thereon.

Held that the suit was one to obtain a declaratory decree where consequential relief was prayed for and an *ad valorem* Court-fee according to the amount at which the relief sought was valued, was payable on the plaint and the memorandum of appeal.

Per Tudball, J.—It is of considerable doubt as to whether under S. 7, cl. 4 of the Court Fees Act, a plaintiff is entitled to put on his relief a fictitious value and not the correct and proper value which is known to him.

Per Richards, C.J.—The proper meaning to be attached to the latter words of S. 7 (cl. 4). Court Fees Act, is that the plaintiff shall truly state the amount at which he values the relief sought; he is not entitled to put in a fictitious value when the relief is capable of valuation. **Jageshra v. Durga Prasad Singh**, 12 A.L.J. 844 = 36 A. 500 = 24 Ind. Cas. 679.

RICHARDS, C.J., and TUDBALL, J.

(3) S. 7 (iv) (c)—*Valuation—Suit for declaration and injunction falling under S. 7, (iv) (c) of Act VII of 1870—Plaintiff's discretion to fix arbitrary value for purposes of Court-fee—Jurisdictional value both as regards land and other suits—Ss. 3, 4, 8 and 9 of Act VII of 1877 and the rules framed thereunder—Interpretation of fiscal and other enactments.* **Baru v. Lachhman**, 111 P.R. 1913 = 228 P.W.R. 1913 = 23 P.L.R. 1914 = 22 Ind. Cas. 503 (F.B.). See Final Part, 1913, Col. 478.

(4) S. 7, IV (c), V (a)—*Suit for declaration and consequential relief—Valuation—S. 8, Act VII of 1887 (Suits Valuation)—Duty of Court in matters of Court-fee.* **Hurihar Prasad Singh v. Shyam Lal Singh**, 40 C. 615 = 21 Ind. Cas. 404. See Final Parts 1913, Col. 478.

(5) S. 7 (iv) (c), Sch. II, Art. 17, cls. 3, 6—*Consequential relief, interpretation of—*

Court Fees Act—(Continued).

Suit for declaration that plaintiff was member of Committee of Management—Consequential relief not warranted by averments in plaint—Suit incapable of valuation—Cognisance of plaintiff's valuation of relief sought, when acceptable—Madras City Civil Courts Act (VII of 1892), Ss. 3, 9—Suits Valuation Act, S. 8.

For the purposes of the Court-Fees and Suits Valuation Acts, the expression 'consequential relief' means a substantial and immediate remedy in accordance with the title which the Court has been asked to declare.

Where the plaintiff prayed for a declaration that he was a duly appointed member of the Committee of Management of a certain charitable institution and also prayed for possession as consequential relief, but no title to possession of the properties of the charity was alleged and no prayer was or could be inserted in the plaint for a declaration that the plaintiff was entitled to such possession:

Held, (a) that a prayer for possession, being unwarranted by the averments in the plaint, could not be 'relief consequential' upon a declaratory decree;

(b) that the suit was in fact a suit for declaration merely, and fell within Art. 17, cl. (iii), or cl. (vi) of the second schedule of the Court Fees Act;

(c) that in either case a fixed Court-fee of Rs. 10 was chargeable under the Act, and S. 8 of the Suits Valuation Act did not apply;

(d) that the declaration in the suit only related to an office and not to property, and was incapable of valuation and was not excepted from the provisions of S. 3 of the Madras City Civil Courts Act.

For the purposes of jurisdiction, the Court is bound to accept the plaintiff's statement of the value of the relief sought by him only in cases where the statement depends upon facts which constitute the cause of action alleged in the plaint, and the Court cannot verify it without trying the whole case. But, where the statement is obviously a fictitious averment made for the purpose of ousting the jurisdiction of a Court and its falsity is apparent from the averments of the plaint and the documents recited therein, the Court will not permit itself to be made a party to the plaintiff's fraud, but should inquire whether it has jurisdiction. **Muraz Hyder Ali Sahib v. Syed Hussain Raza Sahib**, 24 Ind. Cas. 316.

BAKEWELL, J.

(6) S. 7 (iv) (e)—*Suit for establishing right as occupancy raiyat and for recovering possession thereof—Valuation—Jurisdiction.* See ACT XII OF 1887 (BENGAL, N. W. P. AND ASSAM CIVIL COURTS), No. 4, 23 Ind. Cas. 364.

(7) S. 7 (iv) (f)—*Suit asking Court to administer the estate of a deceased person and give plaintiff his share therein—Nature of suit—*

Court Fees Act—(Continued).

Whether 'suit for accounts'—Valuation for purposes of jurisdiction—S. 8, Suits Valuation Act—O. XX, r. 13, Civ. Pro. Code.

A suit asking the Court to administer the estate of a deceased person, and *inter alia* to give plaintiff his share in it is a suit of the kind dealt within O. XX, r. 13 (1), Civ. Pro. Code, and is a suit 'for accounts' within the meaning of the phrase in S. 7 (iv) (f), Court-fees Act; and the stamp has to be paid *ad valorem* on the amount at which the relief sought is valued in the plaint.

The valuation of the suit for purposes of jurisdiction is also the same. *Shuja-ud-din v. Mussammat Ashaibi*, 100 P.R. 1914.

JOHNSTONE and SCOTT-SMITH, JJ.

References:—51 P. R. 1897 (F.B.); 68 P. R. 1881; 10 C. 274 (F.B.), R.

(9) S. 7, cl. (v)—*Leasehold land, possession of, suit for—Jurisdiction to try the suit—Value of the relief, sought whether determines jurisdiction.*

S. 7, cl. (v) of the Court Fees Act, does not apply to a suit for recovery of possession of land of which the plaintiffs claim to be tenants, brought against the admitted landlords and persons who also claim to be tenants of the same; and the value of the relief sought, as stated in the plaint, determines the jurisdiction of the Court to try the suit. *Ram Ekbal Singh v. Baldeo Singh*, 19 C.L.J. 413.

STEPHEN and MULLICK, JJ.

References:—32 C. 268; 15 A. 63, F.

(9) S. 7, cl. (v), sub-cl. (a), (c) and (d)—*Ghatwali Mahals, part of—Ejectment, suit for—Land forming part of an estate paying revenue to Government.*

A plaintiff cannot avail himself of sub-cl. (a) of cl. (v) of S. 7 of the Court-Fees Act unless he brings his case strictly within its terms, and for that purpose the determining factor is the land in suit and not a larger property in which it may be included.

Before a party can successfully rely upon sub-cl. (c) of cl. (v) of S. 7 of the Court Fees Act, he must establish that the land in suit pays no revenue permanently or temporarily settled thereon, or has been partially exempted from such payment or is charged with a fixed payment in lieu of such revenue.

The property in suit which consisted of five Ghatwali Mahals was included in an aggregate of fifty-two Ghatwali Mahals for which a sum of Rs. 16, 183 was annually payable as Sadar Jama. No apportionment of this sum was made with reference to the several tenures. It appeared from the Collector's Register that a sum of Rs. 22,494 was collected by Government from the fifty-two Ghatwali Mahals out of which the Government retained a sum of Rs. 16,183 on account of Sadar Jama and paid the balance to the zamindar within whose estate the Ghatwali land was originally comprised.

Court Fees Act—(Continued).

The collections from the five Ghatwali Mahals in suit amounted to Rs. 3,148-12-8.

Held, that sub-cl. (d) and not sub-cl. (a) or (c) of cl. (v) of S. 7 of the Court-fees Act was applicable and the value of the subject-matter was the market value of the land.

That the sum of Rs. 3,148-12-8 was not revenue payable in respect of those five Ghatwali Mahals.

That even if the disputed land was deemed part of a revenue paying estate, it was not recorded in the Collector's Register as separately assessed with revenue within the meaning of sub-cl. (a) of cl. (v) of S. 7 of the Court-fees Act. *Chandra Narayan Singh v. Asutosh Deo*, 19 C.L.J. 342=18 C.W.N. 659=23 Ind. Cas. 89=41 C. 812.

MOOKERJEE and BEACHCROFT, JJ.

(10) S. 7 (v) (e)—*Suit for land forming a garden and two houses—Valuation for purposes of Court-fee and jurisdiction.*

In a suit for land forming a garden and two houses, the valuation of Court fee is governed by S. 7 (e), Court Fees Act, and is not to be arrived at, either for Court-fee or in ascertaining jurisdiction, by the artificial 90 times *Jama* rule notwithstanding that the land is assessed to land revenue. *Mussammat Bhag Bhari v. Jawahir Singh*, 71 P.R. 1914=241 P.L.R. 1914=155 P.W.R. 1914.

JOHNSTONE and CHEVIS, JJ.

References:—100 P.L.R. 1914; C.A. 929 of 1910, R.

(11) S. 7 (ix)—*Sch. I, Art. 1—Suit for redemption or foreclosure—Court fee payable on appeal—Amount decreed up to the date of the decree—Future interest not to be taken into consideration.* *Raghubir Prasad v. Shankar Baksh Singh*, 11 A.L.J. 1016=21 Ind. Cas. 723=36 A. 40 (F. B.). See Final Part, 1913, Col. 480.

(12) S. 7 (cl. xi)—*Suit falling under—Valuation for purposes of Court fees and jurisdiction.* See ACT VII OF 1887 (SUITS VALUATION), No. 2, 26 M.L.J. 573.

(13) S. 7, cl. xi (cc)—*Landlord and tenant—Suit for recovery of immoveable property from tenant—Valuation for purposes of Court-fee—Appeal.* See ACT II OF 1901 (AGRA TENANCY), No. 21, 12 A.L.J. 933.

(14) S. 7, cl. xi (cc)—*Suit under—Title—Whether can be decided in such suit.* See MORTGAGE (GENERAL), No. 38, 27 M.L.J. 475.

(15) S. 12—*Order rejecting plaint—Appeal.* See CIV. PRO. CODE (1908), No. 271, 80 P.R. 1914.

(16) S. 19-H, cl. 4—*Inventory—Nature of—Six months run from the date of a true and full inventory.*

Under S. 19-H, cl. (4) of the Court Fees Act, the period of six months runs from the lodging

Court Fees Act—(Continued).

of the inventory required by S. 98 of the Probate and Administration Act or S. 277 of the Indian Succession Act. It does not run from the lodging of an inventory which does not satisfy the requirements of the statute, but which might have satisfied a District Judge.

No inventory satisfies this statutory requirement which omits the essential of this detail namely, that its contents shall include "a full and true estimate, of all the property in possession." **Bhubaneswari Kumar v. The Collector of Gaya**, (1914) M.W.N. 13=26 M. L.J. 56=19 O.L.J. 136=12 A.L.J. 69=15 M. L.T. 37=16 Bom. L.R. 95=21 Ind. Cas. 975=11 C. 556 (P.C.).

LORD SHAW, LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

(17) *Sch. I, No. 1—Subject-matter in dispute in appeal—Plea of defendant that she was in possession in lieu of dower—Plea incidental—Court-fee not payable on amount of dower.*

In a suit for possession of property the defendant pleaded, first, that the plaintiff has no title, and secondly, that the plaintiff could not get possession without payment to the defendant of Rs. 80,000, the amount of dower due to her. The Court of first instance decreed the suit for possession, holding that the plaintiff was not bound to pay the dower, whatever the amount might be. The defendant appealed, paying Court-fees on the value of the property. On a reference by the Taxing Officer as to whether she was liable to pay Court-fees on Rs. 80,000 as well, *held*, that the subject-matter in dispute in the appeal was the property of which possession was sought, and that the Court-fee paid was sufficient. **Haldri Begam v. Gulzar Bano**, 12 A.L.J. 481=36 A. 322.

TUDBALL, J.

(18) *Sch. I, Art. 1—Suit for redemption—Appeal therefrom—Subject matter in dispute. See MORTGAGE (REDEMPTION), No. 7, (1914) M.W.N. 231.*

(18-a) *Sch. I, Art. II and Sch. III—Court-fee—Probate, application for Court-fee, assessment of—Court Fees Act, interpretation of. In the goods of Harriett Tevlot Kerr, deceased*, 18 O.L.J. 308=18 C.W.N. 121=21 Ind. Cas. 502. See Final Part, 1913, Col. 482.

(19) *Art. I-D, Sch. II—Revision in a suit tried under the Provincial Small Cause Courts Act, 1887, whether a revision under S. 84 of N.W.F.P. Law and Justice Regulation (VII of 1901) or under S. 25 of Small Cause Courts Act—Court-fees.*

Held, that, as under S. 84 of the N.W.F.P. Law and Justice Regulation no application can be admitted for revision of a small cause under the value of Rs. 1,000 on a question of law or custom, such application, when admitted, must be held to have been admitted under S. 25 of the Provincial Small Cause Courts Act and not under S. 84 of the N.W.F.P. Law and Justice

Court Fees Act—(Continued).

Reg. VII of 1901. The application is then withdrawn from the operation of S. 85 of the said Regulation and the Court-fees leviable are Rs. 2 only under Art. I-D, Sch. 2 of the Court Fees Act. **Dharam Singh v. Duni Chand**, 3 P.W.R. 1914 (N.W.F.P.).

DOBBS, J. C.

(20 and 21) *Sch. II, Art. 6—Bond given for production of attached moveables—One given in pursuance of an order made under the Code of Civil Procedure—Stamp Act, 1899, Sch. I, Art. 15—Proper stamp—Court fee stamp of eight annas—No ad valorem duty—Rules under S. 269, Civ. Pro. Code, 1882—Absence of alteration by rules under S. 128 (2) (b), Civ. Pro. Code, 1908—Whether former rules repealed by new Code—S. 157, Civ. Pro. Code, 1908—Consistent with this Code—Meaning and effect. Reference under the Stamp Act, 24 M.L.J. 637=20 Ind. Cas. 775=37M. 17 (F.B.). See Final Part, 1913, Col. 483.*

(22) *Art. 17 (1)—Suit under O. XXI, r. 63, Civ. Pro. Code, 1908 (=S. 289, Civ. Pro. Code, 1882)—Proper Court-fee—Finding of fact in such suit—Evidence to be recorded afresh—Evidence in summary proceeding—Value of—Relevancy—Evidence Act, Ss. 33, 145.*

The proper Court-fee payable on the plaint in a suit brought under S. 283, Civ. Pro. Code (1882), is that prescribed by sub-S. 1 of Art. 17 of Sch. II of the Court Fees Act, namely Rs. 10 for a suit to alter or set aside a summary decision or order of a Civil Court not established by *Letters Patent* (a).

In such suits, a Judge is bound to find the facts upon the evidence tendered and taken in the regular suit and not upon any evidence taken in the summary case.

The evidence taken in the summary case may be admissible upon the conditions and for the purposes described in the Evidence Act, (*Vide* Ss. 33, 145 of the Evidence Act). **Nga Seik v. Nga Fu**, U.B.R. (1913), 3rd Qr. 181=22 Ind. Cas. 676.

SAUNDERS, J. C.

References :—(a) 35 C. 202, *Rel.*; U.B.R. (1897—1901), Vol. II, 355, R.

(23) *Sch. II, Art. 17 (iii)—Suit for cancellation of release deed and any other relief to which plaintiff may be entitled—Court-fee—Requisite Court-fee not paid within time—Duty of Court—Dismissal of suit or rejection of plaint—Costs.*

In a suit for cancellation of a release deed (*faraghkhati*) and for any other relief to which plaintiff might be entitled, the plaintiff is bound to stamp his plaint *ad valorem* with reference to the amount, whatever it may be, at which he elects to value his relief. Art. 17 (iii), Sch. II, Court Fees Act, does not apply to such a case (a).

Where plaintiff fails to pay the required Court-fee as ordered by the Court, the suit

Court Fees Act—(Concluded).

should not be dismissed, but the plaint should be rejected under O. 7, r. 11 (b), Civ. Pro. Code.

Where the rejection took effect at an early stage in the trial, there is no justification for allowing, excessive costs to the defendant, especially where the parties had been endeavouring up to that stage of the trial to come to terms by private arrangement. **Nanak Chand v. Jiwan Mal**, 35 P.R. 1914 = 237 P.L.R. 1914.

KENSINGTON and BEADON, JJ.

References:—(a) 23 M. 490; 29 B. 207; 109 P.R. 1893, F; 30 O. 788, D.

(24) Sch. II, Art. 17 (vi)—Order refusing grant of letters of administration with will annexed—Decree—Appeal—Court-fee. See ACT X OF 1865 (SUCCESSION), No. 15, 22 Ind. Cas. 98.

Court of Wards.

(1) Minor female—Property under superintendence of Court of Wards—Husband not competent to apply for guardianship of minor's person. See ACT VIII OF 1890 (GUARDIAN AND WARDS), No. 20, 7 S.L.R. 199.

(2) Grant of land under management of the, for hundred years for planting a grove—Legality. See ACT III OF 1899 (U.P. COURT OF WARDS), No. 1, 17 O.C. 291.

Court of Wards Act (Bengal).

See BEN. ACT IX OF 1879.

See BOM. ACT I OF 1905.

See MAD. ACT I OF 1902.

See N.W.P. ACT III OF 1899.

Creditor.

Creditor whether a person interested in opposing grant of probate or letters. See ACT V OF 1881 (PROBATE AND ADMINISTRATION) No. 14, 7 Bur. L.T. 245.

Crim. Pro. Code.

(1) S. 107, notice under, if a public document—Proof necessary for admission of such document in evidence. See EVIDENCE ACT, No. 44, 18 C.W.N. 644.

(2) S. 107—Nature of application under. See MALICIOUS PROSECUTION, No 1, 20 C. L.J. 518.

(3) S. 195—Application under—Dismissal for default—Legality—Restoration—Revision whether lies. See CIV. PRO. CODE (1908), No. 176, 15 Cr.L.J. 71.

(4) S. 195—Sanction to prosecute—Discretion of Court how to be exercised—Proceeding under cl. 10, Letters Patent—Sanction by whom to be granted. See SANCTION TO PROSECUTE, No. 3, 41 C. 446.

(5) S. 195—Enquiry by Registrar of Presidency Small Cause Courts as to proper service of summons in judicial proceedings—Sanction to prosecute for false personation in service of summons. See SANCTION TO PROSECUTE, No. 7, 18 C.W.N. 1328.

Crim. Pro. Code—(Concluded).

(6) S. 195 (6)—Sanction granted to prosecute—Extension of time for instituting complaint—Power of High Court. See SANCTION TO PROSECUTE, No. 2, (1914) M.W.N. 347.

(7) S. 476—'Court'—Successor in office.

The expression 'Court' in S. 476, Crim. Pro. Code, includes the successor in office of the officer who decided the civil case. **Muhammad Ibrahim v. King-Emperor**, 12 A.L.J. 1003.

RICHARDS, C.J. and TUDBALL, J.

References:—37 C. 642; 34 A. 393, R.

(8) S. 476—Proceedings in execution of decree whether judicial proceedings. See EXECUTION OF DECREE, No. 16, 17 O.C. 809.

(9) S. 476—Order for prosecution—Failure to make preliminary enquiry—Legality—Revision—Time for taking action under S. 476. See SANCTION TO PROSECUTE, No. 6, 7 S.L.R. 187.

(10) S. 488—Order for maintenance of an illegitimate son—Declaratory suit, maintainability of, where paternity of the illegitimate son is denied. See DECLARATORY SUIT, No. 6, 17 O.C. 331.

Criminal Proceedings.

(1) Application asking a Munsiff to take criminal action himself against a person—No sanction asked for prosecution—Refusal by Munsiff—Appeal. See APPEAL (GENERAL), No. 7, 12 A.L.J. 684.

(2) Prosecution found to be false—Civil action for damages brought against the prosecutor—Judgment of the criminal proceedings whether admissible in civil action. See LIMITATION ACT (1909), No 8, 12 A.L.J. 837.

Cross-decrees.

What are. See CIV. PRO. CODE (1908), No. 320, (1914) M.W.N. 85.

Cross-examination.

The ethics of cross-examination—Counsel acting under instructions—Suggestion of dishonest act—Duty of counsel to substantiate the charge or to withdraw—Both sides expressly inviting opinion of Court on the subject—Jurisdiction of Court to pronounce its opinion.

Where counsel acting under instructions imputed a dishonest act to a witness, which counsel did not substantiate, their Lordships of the High Court, having been expressly asked by counsel on both sides to make some statement on the subject, expressed their opinion that, in all the circumstances and having regard to the character of the litigation and the parties to the suit, the imputation complained of ought to have been withdrawn. **In re Messrs. Crompton & Co. v. Secretary of State for India in Council**, 26 M.L.J. 549.

WHITE, C.J., and OLDFIELD, J.

Cross-objections.

Partition suit—Cross-objections by one respondent against another—Practice. See CIV. PRO. CODE (1908), No. 447, 12 A.L.J. 892.

Crown.

Prerogative right of the Crown whether it can be extinguished by limitation—Right to minerals in Shrotriam village. See SHROTRIAM GRANT, No. 1, 15 M.L.T. 277.

Crown Grants Act.

See ACT XV OF 1895.

Custom (General).

(1) *Kalighat palas—Transferability—Custom—Reason, parity of—Valid custom, essentials of—Origin of custom known—Custom, existence of, proof of—Immemorial existence of custom, presumption of—Burden of proof—Unreasonable custom, effect of—Custom, when void for unreasonableness—Custom, unreasonable, when ascertained—Custom contravening rule—Public policy—Palas of Kalighat temple, incidents of—Partition, what is—Bequest, right of—Custom upheld by Court—Intangible property, mortgage of—Foreclosure—Pledge—Estoppel.*

The custom of transfer of palas of the Kalighat shrine is confined to co-shebaits or to the members of families to whom a shebait can bestow his daughter in marriage.

A custom cannot be enlarged by parity of reasoning (a).

A custom to be valid must have four essential attributes; first, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin; and, fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain, and the persons whom it is alleged to affect (b).

A custom originating within time of memory, even though existing in fact, is void at law.

The proof of the existence of custom need not be carried back by direct evidence to 1793 when the first Regulations were passed by the Indian Legislature, much less to 1773, when the Supreme Court was established. What is "living memory" under the Hindu Law discussed.

• Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom.

If the existence of custom has been proved for a long period, the onus lies on the person seeking to disprove the custom to demonstrate its impossibility.

If a custom be against reason, it has no force in law; the reason here referred to is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law.

Custom (General)—(Continued).

A custom is said to be void for being unreasonable when the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times (c).

The period for ascertaining whether a particular custom is reasonable or not, is the time of its possible inception.

Simply because a custom contravenes the rule that a religious office is inalienable, it cannot be said to be against public policy, as customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim.

One of the mortgagors has a turn of worship or *pala*; he is entitled in this character to collect the offerings made to the Goddess on the day on which his turn falls; he applies a portion of the income for the worship of the Goddess and appropriates the remainder for his personal use, notwithstanding the injunction to the contrary. He transfers his turn of worship to a person who, in certain contingencies, might, in his own right, have been a *shebait* and might have held a *pala*. The transferee, as holder of the *pala*, is under precisely the same obligation to the endowment as the transferor himself. A custom which recognizes and validates a transfer to members of a limited circle under these circumstances is not detrimental to the endowment or to the public.

A *pala* of the Kalighat temple is heritable, divisible and bequeathable. The heir may be a male or a female.

Though probably religious offices were originally indivisible, they are now deemed partible. This involves the attribute of transferability as amongst the members of the family.

Cases on the subject referred to.

Partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer.

The exercise of a right to make a bequest implies an assertion of a right to make a transfer *inter vivos*.

Every case where a custom has been upheld by the Courts is an example of a reasonable custom.

Foreclosure is a remedy of the mortgages which is not confined to mortgages of land; it is equally applicable to mortgages of chattels.

A pledgee of a moveable property is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale but not a foreclosure.

A mortgagee of intangible property, such as a turn of worship, is entitled to foreclose the mortgagor quite as much as a mortgagee of chattels.

Per Mookerjee, J.—As no man is allowed to dispute a title which he himself has granted,

Custom (General)—(Continued).

the mortgagor cannot set up against his mortgagee the title of a third person. This rule is applicable where the mortgagor is a trustee, acting in a public capacity and not for his own benefit. But this principle is inapplicable where the mortgage is void as contrary to statute. The dictum of Banerjee, J., to the contrary in *Mallika v. Ratanmani* (d) not followed in this point. *Mahamaya Devi v. Haridas Halder*, 20 O.L.J. 183 = 19 C.W.N. 208.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) (1708) 11 Modern 148 (161); 37 O. 322 (326) = 11 C.L.J. 209, R. (b) (1838) 9 Ad. and El. 406, R. (c) (1861) 9 H.L.C. 692 (710), R. (d) 1 C.W.N. 493, *Not F.*

- (2) *Custom of village, proof of—*Ikrar-i-malika-n-e-deh dictated by landlords alone, how far proof of custom recorded therein—Admissibility of evidence—Instances, citation of, in proof of custom if indispensable—Trees, transferability of.

The entries in *Ikrar-i-malika-n-e-deh* recording a village custom as stated by the landlord is, in the absence of fraud or grievous error, binding upon persons whose interests are affected by reason of those entries, even though the said entries were not prepared in the presence of, and were not attested by such persons (a).

Statements in *Ikrar-i-malika-n-e-deh* and kindred documents regarding a custom are admissible in evidence to prove the custom.

It is not an indispensable condition to cite instances in proof of an alleged custom. *Sanal Pershad v. Balak Ram*, 23 Ind. Cas. 962.

LINDSAY, J.C.

References :—(a) Select Cases (Jwala Prasad) Appendix, p. VII, F.

(3) *Custom, essentials of, and how to be proved—Custom, existence or non-existence of, a question of fact—*Wajib-ul-arz of villages other than one in suit, admissibility of, to prove family custom existing in latter—"Family," meaning of, in "family custom"—Second appellate Court, when can go into evidence. *Lalman v. Nand Lal*, 20 Ind. Cas. 894 = 17 O.C. 1. See Final Part, 1913, Col 488.

(4) Validity of custom when to be tried. See CIV. PRO. CODE (1908), No. 197, 20 O.L.J. 426.

(5) *Thakur families in Oudh—Custom of excluding daughters and their sons from inheritance—*Oral evidence of witnesses outside the family, weight of, in proof of family custom—Decision in previous suit against existence of custom for want of evidence, effect of, on subsequent suit involving issue of same custom. See HINDU LAW (EXCLUSION FROM INHERITANCE), No. 1, 22 Ind. Cas. 188.

(6) *Darbhangha Raj—*Babuana and Sohag grants—Kulachar or family custom—Exclusion of females and daughter's sons—Custom of exclusion if applies to partitioned share of grant—Effect of isolated departure from established custom—Statements of deceased persons as to

Custom (General)—(Concluded).

existence of custom if admissible when made after controversy arisen. See HINDU LAW (SUCCESSION), No. 6, 18 C.W.N. 1249.

(7) *Moplahs of North Malabar—Whether governed by Marumakkathayam Law or Mahomedan Law—Custom—Proof—Validity of custom—*Courts whether can take judicial notice of custom—Value of previous decisions on the enforceability of custom—S 16, Madras Civil Courts Act—Scope. See MOPLAHS, No. 1, 16 M.L.T. 17.

(8) Single instance of claim for pre-emption whether sufficient to establish custom. See PRE-EMPTION, No. 9, 17 O.C. 105.

(9) Custom if may override logic. See WILL, No. 4, 18 C.W.N. 554.

Customs—Punjab.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—ALIENATION.
- 4.—ALLUVION AND DILUVION.
- 5.—DOWER.
- 6.—GIFT.
- 7.—INHERITANCE AND SUCCESSION.
- 8.—MAINTENANCE.
- 9.—MARRIAGE.
- 10.—PRE-EMPTION.
- 11.—WILL.

—1.—General.

(1) *Second appeal—Question of custom—Absence of certificate—Person occupying along with last holder—No adverse possession.*

Held, following 4 P.W.R. 1914, that a question of custom cannot be taken up in a second appeal without the required certificate.

Held, also, that, where the donee's line of descent having become extinct the land reverts to the line of the donor, the possession of any person occupying the land along with the last holder does not become adverse during the lifetime of the latter. *Ilaia v. Nizam-ud-din*, 94 P.W.R. 1914 = 193 P.L.R. 1914 = 24 Ind. Cas. 623.

JOHNSTONE, J.

(2) Validity or existence of custom in question—Second appeal—Certificate when necessary. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 11, 207 P.L.R. 1914.

(3) No appeal or revision on question of custom without a certificate granting permission to appeal. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 3, 4 P.W.R. 1914.

(4) Instances of custom not forthcoming—Proof of custom—Oral testimony when sufficient. See CUSTOMS—PUNJAB—ALIENATION, No. 10, 24 P.R. 1914.

(5) Tribes once following personal law adopting a rule of custom—Burden of proof—Not necessary that it should follow all the rules. See CUSTOMS (PUNJAB—GIFT), No. 3, 206 P.L.R. 1914.

Customs—Punjab—(Continued).**—1.—General—(Concluded).**

(6) Persons governed by customs of agriculturists can fall back on their personal law where no custom against it is in existence. See CUSTOMS (PUNJAB—WILL), No. 1, 10 P. W.R. 1914.

(7) Right of a proprietor to eject a non-proprietor from *mianas* built by the latter on land which was *shamilat* when the *mianas* were built but which subsequently fell to plaintiff. See EJECTMENT, No. 4, 1 P.W.R. 1914 (N.W. F.P.).

—2.—Adoption.

- (1) *Custom—Adoption—Succession—Right to property in natural family—Bains Jats of Garhshankar tahsil, Hoshiarpur district—Burden of proof—Riwaj-i-am, Entry in—Weight in absence of instances.*

Found, that the custom among Bains Jats of Garhshankar tahsil of the Hoshiarpur district was against succession by an adopted son in his natural family.

Though an entry of custom in a *Riwaj-i-am* has not the same evidential value as an entry in a village *Wajib-ul-ars* and is of little or no value unless supported by instances, yet circumstances alter cases and a record of custom in which the customs of one part of a district is carefully differentiated from that of the rest of the district has some weight. *Milkhi v. Ram Das*, 133 P.L.R. 1914=55 P.R. 1914=148 P. W.R. 1914=24 Ind. Cas. 477.

JOHNSTONE and SHAH DIN, JJ.

- (2) *Bajwa Jats, Nikodar tahsil, Jullandhur District—Adoption of sister's son—Validity.*

The adoption of a sister's son is not valid among Bajwa Jats of the Nikodar tahsil, Jullandhur District. *Natha Singh v. Mangal*, 90 P.R. 1914.

JOHNSTONE and RATTIGAN, JJ.

Reference:—50 P.R. 1893 (F.B.), R.

- (3) *Property received by the appointed heir from the appointer—Whether ancestral qua appointee's sons—Right of sons to question alienation of such property by appointee.*

Property, whether ancestral or self-acquired, of the appointer, received by the appointed heir, cannot be regarded as ancestral *qua* the latter's sons. And the sons of an appointee, whether born before or after the appointment of their father, are incompetent to contest an alienation by the latter of the property received from the appointer. *Mehra v. Mangal Singh*, 99 P.R. 1914.

CHEVIS and SHADI LAL, JJ.

References:—25 P.R. 1901; 66 P.R. 1908; 111 P.R. 1893; 12 P.R. 1892 (F.B.); 50 P.R. 1893 (F.B.) at p. 231; 25 W.R. 225, R.; 9 P.R. 1893; 51 P.R. 1906, D.

- (4) *Registered deed of adoption—No continuous treatment as son—Subsequent repudiation*

Customs—Punjab—(Continued).**—2.—Adoption—(Concluded).**

—Adoption not satisfactorily proved. Ghulam Haider v. Gulam Nabi, 342 P.L.R. 1913=227 P.W.R. 1913=21 Ind. Cas. 648. See Final Part, 1913, Col. 492.

(5) *Adoption—Daughter's son—Awans of Sialkot District—Burden of proof. Muhammad Ali v. Jamita and Ismail*, 267 P.L.R. 1913=20 Ind. Cas. 197=225 P.W.R. 1913=9 P.R. 1914. See Final Part, 1913, Col. 494.

(6) *Adopted son dying without lineal descendants—Succession—Ancestral property—Self-acquired property—Reversion to heirs of adoptive father.* See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 3, 22 P. L.R. 1914.

—3.—Alienation.

- (1) *Alienation—Custom—Family of Pirzadas of Hansi—Alienation by father—Incompetency of son to contest father's alienation—Burden of proving custom prohibiting alienation of landed property—Antecedent debt—Wajib-ul-ars to hold good for one settlement—Costs of the suit.*

The families, descended from Diwan Kalandar Bakhsh, the 1st *Sujjada Nashin* of the *Jama Masjid*, Hansi, who are called Pirzadas or Sheiks and who live at Hansi, are not governed by an agricultural custom in matters of alienation; and among them a son cannot contest the alienation of ancestral immoveable property by his father on the ground of there being no necessity or consideration.

The burden of proving that a family follows agricultural custom as regards alienation of the landed property lies on the person asserting such a custom.

It does not necessarily follow that, because a family has departed from its personal law in one respect, for instance, incompetency of daughters to inherit their father's property, it has adopted agricultural customs in all other respects.

A *Wajib-ul-ars* holds good only for a particular settlement. A recital in an old *Wajib-ul-ars* not repeated in later *Wajib-ul-ars* and unsupported by any instances can carry no weight.

An alienee, who is not himself an antecedent creditor, is in no way bound to enquire into the nature of an antecedent debt; it is sufficient for him to satisfy himself that the debt really existed.

In case of collusive suit brought by a son to contest alienation of his father, heavy costs should be allowed to a successful alienee against the plaintiff. *Muhammad Islam v. Hari Lal*, 7 P.W.R. 1914=16 P.L.R. 1914=21 Ind. Cas. 944.

KENSINGTON and CHEVIS, JJ.

- (2) *Alienation by childless proprietor—Contest by collaterals in eighth degree—General custom of Punjab does not recognise right of*

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

all collaterals to challenge alienations—Alienation to co-sharer—Gift—Palli Jats of Shakargarh tahsil, Gurdaspur district.

Among Palli Jats of the Shakargarh tahsil, Gurdaspur district, the onus lies on the collaterals in the eighth degree, who challenge an alienation, to prove that they have a right to control alienations.

The general custom of the Punjab does not recognize the right of all collaterals, however remotely related, to challenge alienations, and in the case of very distant collaterals, the onus of proving a right to control rests on the persons who challenge the alienations. The more distant the relationship is the greater must be the presumption against the right to control.

Where the collaterals have a right to control the alienors, they are entitled to claim that their rights shall not be prejudiced at all events by an alienation to a co-heir. It is only in the case of a gift made to a collateral for services rendered that an exception in this respect is made. **Pal Singh v. Ganga Singh**, 40 P.L.R. 1914=29 P.W.R. 1914=22 Ind. Cas 319=37 P.R. 1914.

RATTIGAN and CHEVIS, JJ.

- (3) *Alienation by father—Awans of Talagang tahsil, Attock district—Powers of father are restricted—Instance—Uncontested alienations.*

Held, that an Awan of the Talagang tahsil, who has sons living, has not unlimited powers of dealing with ancestral property.

In the absence of information as to uncontested alienations, the instance cannot be considered of practical value in dealing with a question of the kind involved in the case. **Muhammad Khan v. Dalel**, 42 P.L.R. 1914=117 P.W.R. 1914=23 Ind. Cas. 934.

RATTIGAN and SCOTT-SMITH, JJ.

- (4) *Khatri traders of Mauza Khairabad, Jullundur district—Ancestral land—Alienation—Law applicable—Hindu Law or Custom—Presumption—Test.*

Held, that the Khatri traders of Mauza Khairabad are not governed by agricultural custom in the matter of alienation of ancestral land. The mere fact that they have owned the land in dispute for six or seven generations does not create any presumption in favour of their being governed by agricultural custom in matters of alienation. The primary test is whether agriculture is followed as a chief means of livelihood or not. **Hakikat Rai v. Ram Saran Das**, 16 P.R. 1914=180 P.L.R. 1914=23 Ind. Cas. 154.

AGNEW and SHADI LAL, JJ.

References:—1 P.R. 1910; 59 P.R. 1908; 88 P.R. 1910; 43 P.R. 1911, R.

- (5) *Alienation—Necessity not proved as regards a trivial portion of consideration money—Sale not to be set aside.*

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

A sale cannot be set aside merely because as regards a trivial portion of the sale money necessity has not been proved. **Ram Karan v. Hakan**, 79 P.L.R. 1914=51 P.W.R. 1914=22 Ind. Cas. 544.

JOHNSTONE and CHEVIS, JJ.

- (6) *Custom—Sahgal Shaiks of Jullundur city—Inheritance—Alienation—Presumption—Gift—Delivery of possession Memorandum of an already completed oral gift—Registration, whether necessary.*

The Sahgal Shaiks of Jullundur city are not an agricultural tribe, and there is no presumption whatever that they follow general custom. The mere fact that they do not follow Muhammadan Law in matters of inheritance is no proof that they follow the general agricultural custom in matters of alienation.

The real test of an oral gift is the giving of possession.

Mutation effected after the death of the donor does not negative possession, where the donor and donee, being husband and wife, were on good terms. The placing of rents and profits at the disposal of the wife is sufficient to prove delivery of possession.

A document which clearly professes to be merely a memorandum (*yad dasht*) of a gift which has already been completed does not require registration. **Rahim Baksh v. Mus-sammat Budhan**, 92 P.L.R. 1914=22 Ind. Cas. 712=74 P.R. 1914=141 P.W.R. 1914.

JOHNSTONE and CHEVIS, JJ.

- (7) *Alienation by widow—Right of alienor's daughter to contest—Dhillon Jats of Amballa District.*

The plaintiff contested alienations made by her mother, step-mother and grand-mother. There were no collaterals and in their absence she had succeeded to the estate. Her right to contest the alienations was questioned and it was contended for her that, since the succession had come down to her, she must necessarily be regarded as having the right to contest the alienations.

Held, that the right to succeed did not carry with it in all cases the right to contest alienations, and the burden lay on the plaintiff to prove that she was by custom entitled to contest the alienation. **Gobind Ram v. Rani Suraj Kaur alias Mubarak Mahal**, 131 P.L.R. 1914=114 P.W.R. 1914=24 Ind. Cas. 470.

SHAH DIN and CHEVIS, JJ.

- (8) *Alienation of ancestral land by sonless proprietor—Suit by reversioners—Acquiescence—Facts constituting acquiescence.*

G made gift of his ancestral property to W his step-son, and alleged to be his adopted son. The reversioners of G, thirty years after the gift, sued for possession of the property:

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

Held that the plaintiffs' family as a whole had recognized W's position as the adopted son of G, and that the plaintiffs acquiesced in the gift, as

(a) though the plaintiffs were not bound to bring a declaratory suit, the fact that they took no steps for a number of years to avoid the sale was a point against them;

(b) the members of each branch of the family had cultivated land as tenants of the defendant;

(c) in partition of *shamilat* land, the defendant obtained a portion as co-sharer without protest on the part of the plaintiffs;

(d) four of the plaintiffs had actually exchanged land with the defendant. **Khazana v. Waryama**, 22 Ind. Cas. 607 = 105 P.W.R. 1914 = 205 P.L.R. 1914.

RATTIGAN and BEADON, JJ.

(9) *Brahmans of mauza Dheriala Saigan, tahsil Gujar Khan, District Rawalpindi—Alienation of ancestral land—Matters relating to—Governed by custom—Applicability of Hindu law.*

The Brahman proprietors of *mauza Dheriala Saigan, tahsil Gujar Khan, District Rawalpindi* are, in matters of alienation of ancestral landed property, governed by custom and not by Hindu Law (a).

Therefore an alienation of ancestral land must be held invalid, unless it is shown to have been made for consideration and legal necessity. **Jai Ram v. Sardar Singh**, 23 P.R. 1914 = 195 P.L.R. 1914.

SHAH DIN, J.

References:—(a) 63 P.R. 1910, F.; 94 P.R. 1907; 125 P.R. 1908; 56 P.R. 1909; 87 P.R. 1909; 34 P.R. 1911; 1 P.R. 1910; 13 Ind. Cas. 709; 23 P.R. 1909, R.

(10) *Brahmans of mauza Dangoh Khurd, Una Tahsil, Hoshiarpur District—Alienation of ancestral land—Matters affecting—Applicability of Hindu Law—Custom applicable—Proof of custom—Oral testimony—When sufficient.*

A childless Brahman proprietor of *mauza Dangoh Khurd* in *Una Tahsil* of the *Hoshiarpur District* is, in matters of alienation of ancestral land, governed by agricultural custom and not by Hindu Law.

A rule of custom may be established and held to be of binding force even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence, in its favour (a). **Ram Lal v. Gopi**, 24 P.R. 1914 = 58 P.W.R. 1914 = 196 P.L.R. 1914.

SHAH DIN, J.

References:—(a) 55 P.R. 1903 (F.B.); 110 P.R. 1906 (F.B.), F.; 34 P.R. 1911, R.

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

(11) *Alienation—Rohtak District—Onus of proof.*

In the *Rohtak District*, there is no custom empowering an agricultural proprietor to deal with his ancestral property as he likes.

The onus of proving so exceptional a custom lies on those who affirm it. **Budal alias Badlu v. Kirpa**, 148 P.L.R. 1914 = 23 Ind. Cas. 211 = 76 P.R. 1914 = 131 P.W.R. 1914.

KENSINGTON, C.J., and RATTIGAN, J.

(12) *Sale of ancestral holding to stranger by a sonless awan and a widow—Objection by their reversioners four degrees removed—Necessity, question of fact—Second appeal—S. 40 of Act XVIII of 1884 as amended by Punjab Acts I and IV of 1912.*

Held, that, although *Awans* of *Tahsil Talagang* in the *Jhelum District* have extensive powers of alienating their ancestral immoveable property to their relatives such as daughters, sisters and their sons, they have limited powers like other agriculturists when the alienation of the property is in the favour of a stranger whether *awan* or not (a).

Held, also, that necessity is almost always a question of fact and should rarely be treated as a question of law for purposes of second appeal. **Sher Muhammed v. Ali Muhammad**, 60 P.W.R. 1914 = 151 P.L.R. 1914.

KENSINGTON, J.

References:—(a) 46 P.R. 1900; 3 P.R. 1906 = 27 P.W.R. 1906; 15 P.R. 1907 = 35 P.W.R. 1907, D.

(13) *Custom—Transfer of reversionary rights by some reversioners to another reversioner, validity of—Acquiescence—Waiver—Assignment—Relinquishment—Reversioner suing for pre-emption, whether debarred from contesting validity of alienation—Necessity—Reversioner only bound to pay amount paid by original vendee for necessity—Immaterial what pre-emptor might have paid in respect of alienation—Died of relinquishment by some reversioners in favour of others—Tantamount to assignment—Valid.*

All that was decided in 66 P.R. 1897 (F.B.) was that, among agriculturists governed by customary law, a reversioner of a deceased male proprietor, whose widow is in possession of his estate, cannot transfer his reversionary rights to a stranger, so as to engraft the latter into the family and to enable him to contest any alienations made by the widow to the prejudice of her husband's reversioners. The Full Bench ruling is no authority for the proposition that one reversioner of a deceased male proprietor is legally incapable of transferring his rights of succession to another reversioner.

By bringing a suit for pre-emption in respect of an alienation by a widow, a reversioner must be taken to have admitted that the alienation

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

was legally valid, and his sons are bound by their father's recognition of the validity of the alienation.

Although a pre-emptor might have paid a larger amount before obtaining possession of the land alienated by a widow, a reversioner in a suit challenging the validity of the alienation cannot be called upon to pay to the said pre-emptor more than that was advanced by the original vendee to the widow for a necessary purpose.

Where some of the reversioners of a male proprietor executed a deed of relinquishment of their shares in favour of the other reversioners in consideration of the latter having undergone much trouble and expense in connection with a declaratory suit which they had successfully fought in respect of an alienation by the widow of the said male proprietor.

Held, that the deed was in effect and must be treated as a deed of assignment of reversionary rights, and since the assignment was made by some of the reversioners in favour of the remaining reversioners, it was a perfectly valid assignment. *Gujar v. Auliya*, 184 P.L.R. 1914 = 119 P.W.R. 1914 = 78 P.R. 1914 = 23 Ind. Cas. 835.

SHAH DIN and CHEVIS, JJ.

(14) *Sale by Punjab agriculturists of ancestral land—Part of consideration for necessity—Form of decree—Rs. 500 trivial in a sale for about Rs. 50,000—Expenses of stamp and registration—Sale of a part in order to redeem several mortgages.*

In the usual declaratory suit brought by a reversioner of the Punjab agriculturist, if a sale is found to be partly for necessity, the decree should declare that the alienation would affect the reversionary rights only to that extent, but the transaction cannot be split so that its one part may be declared binding while the other not.

A sale for about Rs. 50,000 (fifty thousand) cannot be set aside simply on the ground of there being no particular necessity for a sum of Rs. 500 (five hundred).

Where an alienation is otherwise valid, the amount required for registration and stamp is a necessary expenditure.

Where a vendor is in hopeless difficulty and is forced to a sale for redeeming the numerous mortgages (not apparently challengeable) already existing in order to get back a part of the land for his livelihood, it is a prudent act on his part and cannot be attacked by his reversioners. *Shauk Muhammad v. Fazal Hussain*, 92 P.W.R. 1914 = 192 P.L.R. 1914 = 24 Ind. Cas. 689.

SHAH DIN and CHEVIS, JJ.

(15) *Second appeal—Finding that consideration has passed—Necessity, proved by circumstantial evidence—S. 40 of Act*

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

XVIII of 1884 as amended by Acts I and IV of 1912—*Alienation when may be presumed to be for necessity.*

Held, that a concurrent finding as to receipt of consideration cannot be interfered with on second appeal.

Held, also that, where an alienor has a large family to support and there is no allegation that he is a man of bad character or wasteful or extravagant or has any cause to waste the property, the presumption is that the alienation has been made for necessity, particularly when it has been made at a period immediately following a severe famine and has not been attacked for about eleven years. *Amar Das v. Sukh Dial*, 86 P.W.R. 1914 = 186 P.L.R. 1914.

SCOTT SMITH and SHADI LAL, JJ.

(16) *Alienation—Recent bonds in favour of person other than alienee—Proof of necessity—Second appeal—Question of necessity.*

Held, that, in case of recent bonds, e.g., four years old, the proof of necessity to be given by the alienee cannot be dispensed with even if they are not executed in his favour.

In second appeal the Chief Court went into the question of necessity and *held* that the materials on the record and the reasons given by the lower appellate Court were insufficient to support its finding, which was accordingly set aside. *Khoju v. Chuhru*, 88 P.W.R. 1914 = 188 P.L.R. 1914 = 24 Ind. Cas. 682.

JOHNSTONE, J.

(17) *Alienation—Awans of Tallagang tahsil—Powers of proprietor having sons to deal with ancestral property as he pleases—Distinction between case of sonless proprietor and proprietor having sons.*

Among Awans of the Tallagang tahsil, a proprietor, with sons, has not an unlimited power to deal with the ancestral property as he pleases.

Custom recognizes a clear distinction between cases where an alienation is by a proprietor who has sons and cases where it is by a sonless proprietor, and even those tribes, who concede very extensive rights to proprietors in present possession, differentiate between the powers of a proprietor who has, and a proprietor who has not sons living at the time of alienation. *Lal Khan v. Nura*, 72 P.R. 1914 = 233 P.L.R. 1914.

RATTIGAN and SCOTT SMITH, JJ.

References:—81 P.R. 1894; 8 P.R. 1906; 88 P.R. 1911; 114 P.R. 1913; 5 P.R. 1914, R.

(18) *Money advanced to agriculturist for trade—Whether an antecedent debt justifying subsequent sale. See ACT XVIII OF 1884 (PUNJAB COURTS), No 11, 207 P.L.R. 1914.*

(19) *Alienation of colony land by father—Suit for possession by son—Valuation of suit—Court-fee—Jurisdiction—Suit improperly valued—Procedure. See CIV. PRO. CODE (1908), No. 269, 194 P.L.R. 1914.*

Customs—Punjab—(Continued).**—3.—Alienation—(Concluded).**

(20) Heirless estate—No collaterals—Extent of widow's right of alienation—Right of patti-dars to succeed. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 4, 8 P.R. 1914.

(21) See CUSTOMS (PUNJAB—WILL), No. 1, 10 P.W.R. 1914.

(22) Mutation—Burden of proof as to property being ancestral. See DECLARATORY SUIT, No. 4, 217 P.L.R. 1914.

(23) Unregistered deed of exchange executed by a sonless land-owner—Decree thereon on the admission of his widow—Right of his reversioners to object. See EXCHANGE, No. 1, 74 P.W.R. 1914.

—4.—Alluvion and Diluvion.

Village Girote, Tahsil Khushab, Shahpur district—Land of malik qabza submerged—Right of the ala maliks on re-appearance.

Held, that a local custom or usage has been proved to exist in the village of Girote, Tahsil Khushab, whereby a *malik qabza* whose land is submerged loses all his proprietary rights in that land, and on its re-appearance it becomes the property of the Baloch proprietors. **Sardar Muhammad Chiragh Khan v. Amir Chand**, 18 P.R. 1914 = 38 P.W.R. 1914 = 110 P.L.R. 1914 = 23 Ind. Cas. 276.

SHAH DIN and AGNEW, JJ.

References:—98 P.R. 1894 (F.B.); 33 P.R. 1903; 15 P.R. 1904; 19 P.R. 1876; 59 P.R. 1877 (F.B.); 96 P.R. 1879; 1 P.R. 1880; 152 P.R. 1883; 97 P.R. 1902; 80 P.R. 1905; 8 P.R. (Rev.) 1901; 4 P.R. (Rev.) 1912, R.

—5.—Dower.

Dower—Fictitious dower fixed at marriage—Khattars of Attock District—Customary dower—Mehr-ul-misl—Reasonable sum—Unsecured dower-debt—Ancestral property not liable. **Gauhar Khanum v. Nawab Khan**, 304 P.L.R. 1913 = 20 Ind. Cas. 777 = 199 P.W.R. 1913 = 19 P.R. 1914. See Final Part, 1913, Col. 503.

—6.—Gift.

(1) *Hoshiarpur District—Arains—Gift in favour of some reversionary heirs to the exclusion of others—Invalidity.*

Among Arains of the Hoshiarpur District, no gift can be made by a childless proprietor in favour of one reversionary heir to the exclusion of the others. **Miran Baksh v. Nathu**, 11 P.R. 1914 = 121 P.L.R. 1914 = 22 Ind. Cas. 944.

BEADON and SCOTT-SMITH, JJ.

(2) *Gift—Donee's lineal descendants in female line present—Property cannot revert to donor's line—Alienation of gifted property by widow—Right of donor's descendants to contest.*

Where the descendants of a donor brought a suit to contest an alienation of the gifted

Customs—Punjab—(Continued).**—6.—Gift—(Continued).**

property made by the widow in favour of her son-in-law and it was found that the donee had lineal descendants in the female line alone.

Held, that as, on the death or re-marriage of the widow holding the gifted property as a life-estate, the property would descend to the donee's lineal descendants in the female line, the descendants of the donor had no *locus standi* to contest the alienation of the property by the widow. **Musammatt Sukhan v. Narain Singh**, 99 P.L.R. 1914 = 22 Ind. Cas. 792 = 138 P.W.R. 1914.

JOHNSTONE and SHAH DIN, JJ.

(3) *Pathans of Jullundur District—Gift by sonless proprietor to his niece—Tribe once following personal law adopting a rule of custom—Not necessary that it should follow all the rules—Burden of proving power of interference by distant collaterals with gift to niece—Collateral succession of widows—Presumption.*

In the case of a tribe that undoubtedly did once follow its personal law, it is for the party asserting that it now follows custom, to prove the point. In such a case proof that the tribe has adopted this or that rule of custom followed by (for instance) the *Jats*, is no warrant for holding that it must follow all the other rules governing *Jats*. There may, of course, be rules of custom so intimately and indissolubly connected with each other that the adoption of one necessarily implies adoption of the other, but in such a case, the *raison d'être* of the two rules would be alike. In an exogamous tribe a rule preventing alienation to a daughter or a sister or a niece has the same motive behind it as a rule prohibiting transfers direct to an outsider, while in a tribe like the *Pathans* the adoption of the former rule would imply a different motive from that which compelled the adoption of the latter rule.

In the case of *Pathans* there is a certain initial presumption against the right of a 6th degree collateral to prevent gifts even of ancestral land by a sonless proprietor to a niece, the daughter of a brother with whom the donor has always been joint.

Among the dominant tribes of the Jullundur Doab there is a presumption in favour of the collateral succession of widows. **Musammatt Sultan Bibi v. Ghulam Haidar Khan**, 206 P.L.R. 1914 = 24 Ind. Cas. 358.

JOHNSTONE and RATTIGAN, JJ.

(4) *Gift of land in equal shares to three persons whether creates joint tenancy—Suit by remote collaterals for declaration against validity of gift—Suit dismissed—Death of donee without lineal descendants—Reversion to agnatic heirs of donor—Suit for possession by the collaterals—Maintainability—Adverse possession.*

About the year 1865, D. made a gift of the whole of his property in equal third shares to

Customs—Punjab—(Continued).**—6.—Gift—(Continued).**

(1) J. his daughter, (2) L.D. (the son of J.) and (3) K. (the son of his daughter K.B. who had died prior to the date of the gift). These gifts were unsuccessfully challenged by D.'s collaterals, their suit being dismissed on the ground that they were too remotely related to the donor to contest his action. D. died in 1870, and L.D. in 1877. The latter left no issue and the third share gifted to him passed on his death to his mother J.

Upon the death of J, the collaterals of D. brought the present suit in which they claimed to recover the lands gifted to J. and L.D. from one M.B. who was then in possession. The ground upon which the claim was based was that the gift to J. and her son enured only for the benefit of the donees and their lineal descendants, and that, as neither L.D. nor J. had left any such issue surviving, the property reverted to the agnatic heirs of the donors under the customary law.

Held, the plaintiffs were justified in preferring their present claim and the decision in the previous declaratory suit did not debar them from suing for the land gifted to J. and L.D. on death without descendants, as the facts were now entirely different.

Held, also that the possession of J. as the mother of L.D., was clearly permissive and in no sense adverse to plaintiffs.

Held further, that the gift by D. did not create a joint tenancy with remainder to the survivor or her issue, and the present suit was not therefore barred by reason of one of the donees K, being alive.

Joint tenancy is an estate of a highly technical nature and is probably unknown to the personal law of the parties (a). **Nabi Bakhsh v. Mussammat Mehr Bibi**, 89 P.R. 1914.

JOHNSTONE and RATTIGAN, JJ.

Reference :—(a) 23 C. 670 (679) (P.C.), R.

(5) *Custom—Swathis of Hazara—Power of alienation by gift by a sonless father in favour of his daughters and their descendants.*

A sonless weaver of Haddo Bandi in Hazara had gifted rather more than one-quarter of his ancestral immoveable property to his eldest daughter and to the son of his second daughter. The male reversioners objected. Both parties agreed to be bound by Swathi custom.

Held, after enquiry that a sonless Swathi proprietor cannot alienate by gift to the prejudice of his male heirs more than 1-16th of his ancestral immoveable property. **Juma v. Barkat-Ul-Lah**, 5 P.W.R. 1914 (N.W.F.P.)

DOBBS, J.C.

(6) *Brahmans of Tahsil Gujar Khan, Rawalpindi—Hindu Law or custom—Gift of ancestral land to daughter's son—Daughter and her husband living with the donor and serving him*

Customs—Punjab—(Continued).**—6.—Gift—(Concluded).**

—*Gift valid.* **Tahl Das v. Malik Singh**, 236 P.L.R. 1913=19 Ind. Cas. 855=198 P.W.R. 1913=2 P.R. 1914. See Final Part, 1913, Col. 804.

(7) *Childless Mahomedan Jats of the Kathia tribe in the Shahpur Dt.—Gift of ancestral property to sister's son—Validity—Code of Tribal custom and wajib-ul-arz conflicting—Conflicting entries in the wajib-ul-arz—Effect.* **Muhammad v. Islam**, 95 P.R. 1913=343 P.L.R. 1913=230 P.W.R. 1913=21 Ind. Cas. 631. See Final Part, 1913, Col. 505.

(8) *Sonless Arain of Tahsil and District Guzerat—Gift to daughter and her husband—Whether can be impeached by reversioner.* **Ghulam Muhammad v. Daswandhi**, 104 P.R. 1913=21 Ind. Cas. 845=272 P.L.R. 1914. See Final Part, 1913, Col. 506.

(9) *Awans of Lamma in the Hoshiarpore District—Validity of gift—Burden of proof.* **Nathu v. Fattu**, 101 P.R. 1913=15 P.W.R. 1914=8 P.L.R. 1914=21 Ind. Cas. 722. See Final Part, 1913, Col. 506.

(10) *Donee's line becoming extinct—Land reverting to donor's line—Person occupying along with last holder—No adverse possession.* See CUSTOMS (PUNJAB—GENERAL), No. 1, 94 P.W.R. 1914.

(11) *Gift made to collateral for services rendered whether can be challenged.* See CUSTOMS (PUNJAB—ALIENATION), No. 2, 40 P.L.R. 1914.

(12) *Sonless proprietor in the Daudzai ilaqua—Death-bed disposition by gift—Validity.* See CUSTOMS (PUNJAB—WILL), No. 2, 2 P.W.R. 1914 (N.W.F.P.).

(13) *Gil Jat of Dasuya tahsil, Hoshiarpur District—Gift of ancestral land to daughter's son—Validity.* See LIMITATION ACT (1908), No. 130, 29 P.R. 1914.

—7.—Inheritance and Succession.

(1) *Onus probandi—Succession—Daughter or collaterals of more than seventh degree—Collaterals to prove preference.*

The onus lies on collaterals more distantly related than the fifth, or at any rate, the seventh degree, to show that they are entitled to succeed in preference to a daughter of the deceased. **Jiwan Singh v. Musammat Har Kaur**, 51 P.L.R. 1914=34 P.W.R. 1914=41 P.R. 1914=22 Ind. Cas. 415.

RATTIGAN and BEADON, JJ.

References :—5 P.R. 1908=99 P.L.R. 1908=29 P.W.R. 1908; 86 P.R. 1908=146 P.W.R. 1908, F.

(2) *Usmani Sheikh of Gurgaon District—Daughter of last male-holder whether excluded by collaterals of eighth degree.*

Held that, among the Usmani Sheikhs of the Gurgaon District, a daughter of the last male holder is not excluded by his collaterals in the

Customs—Punjab—(Continued).**—7.—Inheritance and Succession—(Ctd.).**

eighth degree. **Mussammat Gosio Begam v. Umed Ali**, 21 P.R. 1914=187 P.L.R. 1914 23 Ind. Cas. 541.

• **KENSINGTON and SHAH DIN, JJ.**

- (3) *Adopted son dying without lineal descendants—Succession—Ancestral property—Self-acquired property—Reversion to heirs of adoptive father.*

According to general agricultural custom, there is a distinction about succession of property left by an adopted son who has died without lineal descendants. The property over which the adoptive father had unrestricted power goes to the heirs of the adopted son, and that over which the adoptive father had limited power goes to the heirs of the father, such heirs have no claim to self acquired property left by the adopted son. **Jot Ram v. Hardwar and Daya Ram**, 22 P.L.R. 1914=27 P.R. 1914=23 Ind. Cas. 527.

REID, C.J., and BEADON, J.

References:—12 P.R. 1892; 117 P.R. 1906=77 P.L.R. 1907; 88 P.R. 1906=149 P.L.R. 1906; 94 P.R. 1913=287 P.L.R. 1913; 63 P.R. 1912=21 Sup. Vol. 1912, R.

- (4) *Jullundur tahsil—Widow—Heirless estate—No collaterals—Will in favour of brother by widow—Validity of alienation—Right of pattidars to succeed—Custom—Proof of—Onus—Extent of widow's right in the absence of collaterals.*

S, the last male proprietor of suit land, died leaving a widow H. After her death, G, her brother's son, claiming under a will executed by her in his favour, entered into possession of the land. A and others, the proprietors of the patti, sued for possession of the land on the ground that H had no power to alienate the land, and that in the absence of collaterals they were entitled to succeed.

Held that the onus of proving a right of succession by custom lay on the plaintiffs who were the pattidars (a).

The entry in the *Wajib ul-ara* of the Jullundur Tahsil, according to which a widow is not allowed to make a gift to any of her paternal relations, is one inserted for the benefit of the collaterals, and has no effect where there are no collaterals and consequently where there is none competent to challenge an alienation by a widow.

The entry in the *Riwaj i-am* cannot have been intended to the case of a village or patti where the proprietors are of different tribes, and in the absence of any instance it cannot be held that the entry in question is sufficient proof of a custom entitling the proprietors of the patti to succeed to S's land.

Where there are no collaterals, the widow is to all intents and purposes an absolute owner.

Customs—Punjab—(Continued).**—7.—Inheritance and Succession—(Ctd.).**

Alla Ditta v. Gauhra, 9 P.R. 1914=139 P.L.R. 1914=23 Ind. Cas. 127.

RATTIGAN and SCOTT-SMITH, JJ.

References:—(a) 137 P.R. 1908; 102 P.R. 1906; 18 P.R. 1910; 2 P.R. (Rev), 1911, R.

- (5) *Inheritance—Bairagis of Kothi Nagar in Kulu—Widow excludes Guru.*

Among the *Bairagis* of Kothi Nagar in Kulu, the widow excludes the *Guru*, provided she remains a widow and is chaste. **Dial Das v. Mussammat Dhanum**, 17 P.L.R. 1914=18 P.W.R. 1914=21 Ind. Cas. 932=36 P.R. 1914.

JOHNSTONE and SHAH DIN, JJ.

- (6) *Succession—Daughter—Collaterals—Female descendants—Muhammadian Jats of Sanawan Tahsil, Muzaffargarh District—Self-acquired property—Ancestral property.*

In the Muzaffargarh District, the rights of females are very generally recognized, especially among Muhammadan Jats and Pathans (a).

The word *aulad*, when used with regard to succession in a tribe which recognizes females as heirs, must be taken to include female as well as male heirs (b).

Found, that in accordance with custom as stated in the *Riwaj-i-am*, which preferred female descendants to collaterals, the daughter's grandson of the deceased succeeded to the self-acquired property left by him to the exclusion of his collaterals. **Sultan v. Ali Muhammad**, 56 P.L.R. 1914=23 Ind. Cas. 535.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 44 P.R. 1909=67 P.L.R. 1909, R. (b) 19 P.R. 1906=70 P.L.R. 1906, R.

- (7) *Succession—Collaterals of the fourth degree—Daughter—Presumption in favour of collaterals—Daughter-in-law not entitled to life-estate—Maintenance.*

The collaterals in the fourth degree of a deceased sonless proprietor would presumably have a preferential right to succeed to his property; and it would be for the daughter of the deceased and her sons to prove affirmatively a special custom entitling them to succeed in preference to the collaterals.

The daughter-in law of a deceased proprietor cannot as such claim a life-estate in his property upon his death. She is only entitled to maintenance. **Mussammat Nup Das v. Ram Dhan**, 85 P.L.R. 1914=44 P.W.R. 1914=22 Ind. Cas. 646.

RATTIGAN and BEADON, JJ.

- (8) *Appointed heir—Right to succeed collaterally in his natural family or in the adoptive father's family—General rule—Custom among Jats of Tehsil Jagraon, Ludhiana District.*

The general rule, no doubt, is that an appointed heir does not succeed collaterally—in

Customs—Punjab—(Continued).**—7.—Inheritance and Succession—(Ctd.).**

the family of the person who appointed him such heir, and the reason for this rule is presumably the other rule, also of almost universal applicability throughout the province, that a person who has been appointed heir in one family does not lose his right of succession collaterally in the family of his natural father. It may well be, therefore, that in cases where custom does not recognise the latter rule, that is to say, where the appointed heir loses all right of collateral succession in his own natural family, that custom would recognise his right to collateral succession in the family of the person who appointed him heir (a).

Held that, by custom among the Jats of Tehsil Jagraon, Ludhiana District, an appointed heir is not entitled to succeed collaterally in his adoptive father's family. **Mutsaddi Singh v. Naraina**, 40 P.R. 1914=71 P.W.R. 1914=177 P.L.R. 1914=24 Ind. Cas. 894.

RATTIGAN and BEADON, J.J.

Reference :—(a) 103 P.R. 1909, R.

(9) *Awans of Tahsil and District Mianwali—Succession—Sister and collateral in fifth degree—Land mutated in sister's favour—Acquiescence by collateral—Silence for more than four years taken together with certain acts and omissions.*

The land of an Awan of Tahsil and District Mianwali was mutated by the Collector in favour of his sister. The reversioners of the deceased in the fifth degree who were entitled to the property (a) kept silence for more than four years; (b) at the time of mutation in her favour of the share of the deceased in joint plots of land, appeared before the Attesting Officer as co-sharers and admitted the correctness of the new entries; (c) made an application jointly with the sister of the deceased for appraisal of the produce of certain land held by their tenants, describing her as one of the co-sharers of the lands; (d) made two applications jointly with her for ejectment of certain tenants, and in both of them she was mentioned as one of the landlords; and it was proved also that (e) she paid off the debts of the deceased and was in possession of his property and expended money on it making improvements.

Held, that, taken collectively, these acts and omissions amounted to an acquiescence on the part of the collaterals in the title of the sister, and hence their suit for recovery of the land from her must be dismissed. **Sher Khan v. Mussammat Sis Bano**, 225 P.L.R. 1914=125 P.W.R. 1914=24 Ind. Cas. 930.

RATTIGAN and SHADI LAL, J.J.

(10) *Gurmani Biloches of Muzaffargarh District—Succession—Sister and collaterals in 5th and 6th degree—Sister preferred—Sister marrying outside brother's family not excluded—Burden of proof—Riwaj-i-am not supported by instances relied upon.*

Customs—Punjab—(Continued).**—7.—Inheritance and Succession—(Ctd.).**

Among *Gurmani Biloches* of the Muzaffargarh District a sister succeeds in preference to collaterals related in the 5th and 6th degree.

It makes no difference whatsoever even if the sister has married outside her brother's family.

The burden of proving that a sister is excluded by collaterals in the 5th and 6th degree, or that she is so excluded by reason of her marriage outside her brother's family, lies upon the collaterals.

A *Riwaj-i-am* is not to be disregarded simply because no instances are given in support of the proposition laid down in the *Riwaj-i-am*. **Ranjha v. Mussammat Jindwaddi**, 221 P.L.R. 1914=122 P.W.R. 1914=104 P.R. 1914=24 Ind. Cas. 942.

RATTIGAN and SHADI LAL, J.J.

(11) *Khattars of Attock—Inheritance—Self-acquired and ancestral property—Daughters and collaterals in third degree—Will—Daughters preferred as to self-acquired property—Collaterals in third degree preferred as regards ancestral property—Marriage of daughter with one of nearest collaterals, effect of.*

Among *Muhammadan Khattars* of the Attock District, daughters will succeed to the self-acquired property of their father in preference to collaterals in the third degree. But as regards ancestral property, a sonless proprietor is incompetent to bequeath it to his daughters in the presence of his collaterals in the third degree, and a daughter even if she marries one of the nearest collaterals has no right as heir in the presence of these collaterals. **Mowaz v. Mussammat Gulab Jan**, 220 P.L.R. 1914=121 P.W.R. 1914=97 P.R. 1914=24 Ind. Cas. 920.

JOHNSTONE and CHEVIS, J.J.

(12) *Shiakh Sayads of Ambala city—Ancestral property—Whether collaterals exclude daughters—Mahomedan Law—Applicability.* **Akbar Ali v. Mussammat Alla Del**, 98 P.R. 1913=132 P.L.R. 1914=22 Ind. Cas. 2. See Final Part, 1913, Col. 508.

(13) *Succession—Muhammadan Jats of Jullundur District—Specific custom not proved—Muhammadan Law applied—Maternal uncle excludes son of grand-daughter of great-great-grandfather of deceased.* **Rulla v. Sultanf**, 193 P.W.R. 1913=20 Ind. Cas. 532=386 P.L.R. 1913=17 P.R. 1914. See Final Part, 1913, Col. 509.

(14) *Khattars of Attock District—Gift—Collaterals of donor excluded by all heirs, male or female, of the donee.* **Shahanchi Khan v. Mussammat Begam Jan**, 286 P.L.R. 1913=20 Ind. Cas. 451=191 P.W.R. 1913=13 P.R. 1914. See Final Part, 1913, Col. 514.

(15) *Tribes of Jullundur Doab—Collateral succession of widows—Presumption.* See CUSTOMS (PUNJAB—GIFT), No. 8, 206 P.L.R. 1914.

Customs—Punjab—(Continued).**—8.—Maintenance.**

Rights of daughter-in-law of deceased proprietor. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 7, 85 P.L.R. 1914.

—9.—Marriage.

Widow—Re-marriage—Forfeiture of right in her husband's land. See RES JUDICATA, No. 4, 19 P.L.R. 1914.

—10.—Pre-emption.

(1) *Declaratory suit—Pre-emption—Succession—Mortgage of ancestral land—Sale of equity of redemption—Whether sale for purposes of pre-emption—Widow of donor still alive—Sale of ancestral house—Ancestral and acquired property.*

A mortgaged his ancestral as well as acquired land to B, and later on be gifted the mortgaged property and an ancestral house to B in lieu of mortgage money, plus past services and maintenance of A's widow till her death. A died leaving N his widow.

The reversioners of A, brought a suit claiming—(1) immediate possession as heir to A; (2) pre-emption rights in respect of the gift as if it was a sale; (3) declaration protecting their reversionary rights. The first Court decreed the claim holding the gift to be a sale, but the Divisional Courts on appeal dismissed the suit *in toto*.

On further appeal to the Chief Court, *held*, that the plaintiffs cannot get possession of the land as heirs in the lifetime of the widow.

Held, also that, as regards the area already mortgaged, the transaction should be treated as a valid gift of the equity of redemption in lieu of services, and hence the plaintiffs cannot get the land by pre-emption.

Held, further, that the acquired property can be given to any one at the pleasure of the owner, and consequently the reversioners have no business to challenge alienation of this property.

Held, lastly, that reversioners are entitled to a declaratory decree only as regards the ancestral house, if not having been mortgaged before the gift of equity of redemption took place. *Yaran v. Gulrang*, 164 P.W.R. 1914.

KENSINGTON and SHAH DIN, JJ.

(2) *Town of Banga—Custom of pre-emption, Partap Singh v. Hazara Singh*, 73 P.R. 1913 = 21 Ind. Cas. 855 = 275 P.L.R. 1914. See Final Part, 1913, Col. 517.

(3) *Alienation by widow—Reversioner suing for pre-emption whether debarred from contesting validity of alienation—Amount payable by reversioner.* See CUSTOMS (PUNJAB—ALIENATION), No. 13, 184 P.L.R. 1914.

—11.—Will.

(1) *Alienation—Custom or Hindu Law—Bequest of ancestral land by a Girth of*

Customs—Punjab—(Continued).**—11.—Will—(Continued).**

Kangra District in favour of a stranger—Competency of his brother's daughter and her sons to object.

Found, that, among Girths of the Kangra District, there is no custom either in favour of or against, the right of succession of brother's daughters or their sons, who, according to Hindu Law, are entitled to succeed as *Bandhus* and, consequently, in the absence of other nearer heirs, they are competent to obtain a declaration that a bequest of ancestral holding by their uncle to a stranger shall not affect their reversionary rights after the testator's death.

Held, that persons governed by the customs of agriculturists can fall back on their personal law where no custom against it is in existence (a). *Nihala v. Mt. Bhuti*, 10 P.W.R. 1914 = 29 P.L.R. 1914 = 23 Ind. Cas. 418.

SHADI LAL, J.

References :—(a) 110 P.R. 1906 = 59 P.W.R. 1907, F.

(2) *Custom—Sonless proprietor in the Daud-zai ilaqua, Peshawar District—Death-bed disposition by gift and will.*

One S. K. executed a deed of gift covering his ancestral property in favour of his mother, and a will which covered the lands held by him in mortgage in favour of his daughter and step-mother. The widow was entirely disinherited. On a suit by the reversioners of S. K., the District Judge held both the will and the gift invalid. On appeal by the defendant's beneficiaries :

Held, that, wills are ordinarily valid when made in favour of defendants and near relatives of the testator, *e.g.*, sons, daughters, sons-in-law and wives, and in the present case the will of S. K., so far as his step-mother was concerned, was invalid.

Held, further, that the gift in favour of S. K.'s mother was tantamount to a will, as it was made in expectation of death, and as it fails to stand the test applied to the actual will of S. K., and as the earlier *riwaj* does not assert power to a sonless proprietor to gift away the greater part of his property to his mother in the presence of his daughter, it must be held to be invalid. *Maryama v. Ghulam Hassan Khan*, 2 P.W.R. 1914 (N.W.F.P.) = 284 P.L.R. 1914.

BARTON, J.C.

References :—17 P.R. 1903; 26 P.R. 1909 = 5 P.W.R. 1909; 59 P.R. 1912 = 6 P.W.R. 1913; 62 P.R. 1913 = 9 P.W.R. 1913, R.

(3) *Custom—Power of bequest among Razzars, Peshawar District.*

Held, that there is no presumption among Razzars that a father can by testamentary disposition vary the customary shares of his sons in his immoveable property and the burden of proving such a power is on the person alleging it.

Customs—Punjab—(Concluded).**—11.—Will—(Concluded).**

Entries in Ss. 21 and 10 of *Riwaj-i-am*, Peshawar, of 1870, relied upon and Q and A. 119, Lorimer's Customary Law differed from. **Khalista Khan v. Mira Khan**, 4 P.W.R. 1914 (N.W.F.P.).

DOBBS, J.C.

(4) Awans of Attock Tahsil—Sonless proprietor making will in respect of whole of his property in presence of near collaterals—Validity—Will to be set aside as a whole. **Yakub Khan v. Fateh Khan**, 263 P.L.R. 1913=161 P.W.R. 1913=20 Ind. Cas. 14=5 P.R. 1914. See Final Part, 1913, Col. 519.

(5) Mahomedan *Khattars* of Attock—Right of sonless proprietor to bequeath ancestral property to his daughter in presence of collaterals. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 11, 220 P.L.R. 1914.

Cutchi Memons.

Cutchi Memons—Inheritance and succession—Joint family property rule does not apply to Cutchi Memons—Son does not by birth acquire interest in property inherited by father.

The Hindu law of joint family property is not applicable to Cutchi Memons. Hence, the son of a Cutchi Memon does not acquire by birth an interest in property inherited by his father by the law of inheritance and succession. **Mangaldas N. Motivalla v. Abdul Razak Haji Sulaiman Abdul Wahed**, 16 Bom. L.R. 224=23 Ind. Cas. 565.

MACLEOD, J.

Dahyak Allowance.

(1) How to be paid. See ACT XXII OF 1886 (OUDEH RENT), No. 8, 21 Ind. Cas. 201.

(2) Nature and incidents of Dahyak right. See UNDER-PROPRIETARY RIGHTS, No. 2, 23 Ind. Cas. 231.

Damage.

(1) Suit for removal of obstruction to public road—Proof of special damage necessary. See APPEAL (GENERAL), No. 6, 22 Ind. Cas. 916.

(2) Obstruction to public highway—Special damage to be proved. See BUILDING, No. 1, 12 A.L.J. 1026.

Damages.

(1) *Marriage—Breach of contract of marriage—Damages—Will a suit for such damages lie?*

Damages for a breach of a contract of marriage may be awarded to a man (a).

Between Burman Buddhists a suit by the man will lie, unless it can be shown to be forbidden by the Burmese Buddhist Law.

The respondent sued appellant for damages valued at Rs. 200 for breach of contract of marriage and was awarded Rs. 30—Rs. 13 being

Damages—(Continued).

loss incurred by him over purchase of furniture for the marriage and Rs. 17 for injury to his reputation in public.

Both sides appealed and the District Court increased the damages to Rs. 20 for the furniture and Rs. 30 for injury to his social standing and his reputation.

The defendant now appeals on the grounds (*inter alia*) that there was no evidence of actual loss over the furniture or of actual damage owing to alteration of his social condition or reputation.

Held, that there was no evidence of actual loss having been sustained by reason of the purchase of the furniture, much less of what the amount of that loss was, and that, therefore, there was nothing to base the finding of either Rs. 13 or Rs. 30 upon.

Held, also, that there was nothing of the record to indicate that the plaintiff had suffered injury either to his social standing or to his reputation, nor any evidence indicating any measure of damages for such injury.

Held, further, that the fact that a man has merely become the butt of his acquaintances, jests, or has experienced a feeling of shame, does not constitute an injury for which damages can be awarded in a suit of this nature. **Ma Ngwe Yin v. Maung Po Taw**, 7 Bur. L.T. 14=23 Ind. Cas. 376.

PARLETT, J.

Reference:—(a) 21 B. 23, F.

(2) *Damages—Wrongful intervention in execution proceeding—Loss caused by—Suit to recover damages occasioned by such loss—Maintainability—Proper course for compensating the loss.*

No suit is maintainable for the recovery of damages for loss occasioned by the defendants wrongfully obstructing execution of decrees against the plaintiff (a).

It is not a tort to wrongfully intervene in execution (b).

The only costs which the law recognizes and for which it will compensate him are the costs properly incurred in the proceeding itself (b). **Hesomal v. Chimanmal**, 7 S.L.R. 104=24 Ind. Cas. 261.

PRATT, J.C., and HAYWARD, A.J.C.

References:—(a) 1 B. 467, R. (b) (1883) 11 Q. B.D. 674 (690), 11.

(3) *Suit for damages for wrongfully obtaining an injunction if lies, when injunction temporary and when permanent—Civ. Pro. Code (1908), S. 95—Limitation Act (1908), Sch. I, Art. 42—Limitation—Suit for damages for procuring an erroneous decision if lies—Pleadings—Want of reasonable and probable cause, allegation of, what sufficient.*

No suit lies for damages against a defendant for maliciously and without reasonable and

Damages—(Continued).

probable cause obtaining a perpetual injunction which has been subsequently dissolved on appeal.

A temporary injunction granted in such a suit is *ipso facto* dissolved by the Court's decree granting a perpetual injunction.

In a suit for damages in respect of the temporary injunction, limitation would therefore run from the date when the temporary injunction was dissolved by the decree granting perpetual injunction.

Per *Fletcher, J.*—Nothing in the Limitation Act can give a party a right of suit, unless such right exists independent of the Limitation Act.

Nand Kumar Shaha v. Gour Sunkur (a) is questionable authority in so far as it decides that a plaintiff can maintain a suit for damages against a defendant for maliciously and without probable cause obtaining an interlocutory injunction.

An allegation by the plaintiff that the defendants were actuated by malice and that their suit for perpetual injunction ultimately proved unsuccessful when the decree of the High Court in their favour was set aside by His Majesty in Council was not a sufficient allegation of want of reasonable and probable cause.

Want of probable cause is not to be inferred because of mere evidence of malice (b).

Per *Richardson, J.*—S. 95, Civ. Pro. Code, seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable or probable cause.

It is at least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation.

A party is not liable in damages for procuring an erroneous decision (c). *Mohini Mohan Misser v. Surendra Narain Singh*, 18 C.W.N. 1189.

FLETCHER and RICHARDSON, JJ.

References:—(a) 13 W.R. 305, R. (b) (1847) 10 Q. B. 252, R. (c) 18 W.R. 440, R.

(4) *Damages—Suit for injunction and damages—Execution proceedings—If damages can be ordered to be ascertained in execution.*

*In a suit for injunction and damages, it is altogether beyond the authority of the Court to leave the ascertainment of damages for determination in execution as if they were mesne profits. *Moula Baksh v. Strughan Deb Dhabai*, 23 Ind. Cas. 595.

STEPHEN and MULLICK, JJ.

(5) *Jurisdiction—Small Cause Court—Money paid to save property from sale—Suit to recover damages.*

The defendant's predecessor-in-title sold certain property to plaintiffs mentioning certain incumbrances on the property and also stating that there was no other incumbrance. As a

Damages—(Concluded).

matter of fact this property as well as other properties of the vendor were subject to a mortgage. The mortgages brought a suit upon the mortgage and obtained a decree. The plaintiffs paid up the decree and sued the defendants for recovery of the amount so paid. Held that the suit was not a suit for contribution but one for damages and was cognisable by the Court of Small Causes. *Sarju Pandey v. Mullo Chaudhry*, 12 A.L.J. 279.

BANERJI, J.

(6) *Damages, suit for—Maintainability—Obstruction in erection of Kutohery—Loss of goods—Negligence. Tribeni Prasad Singh v. Sheikh Basirul Meah*, 18 C.L.J. 327 = 21 Ind. Cas. 513. See Final Part, 1913, Col. 519.

(7) *Right of suit—Obstruction to pathway from public road to field—Proof of special damage of a substantial character. Kandasami Kovundan v. Karupanna Kovundan*, (1913) M.W.N. 1001 = 14 M.L.T. 509 = 21 Ind. Cas. 601. See Final Part, 1913, Col. 520.

(8) *Fraudulent execution of a decree—Suit for damages—Maintainability—Measure of damages. See CIV. PRO. CODE (1908), No. 70, (1914) M.W.N. 174.*

(9) *Jurisdiction of High Court to interfere on question of damages in second appeal. See CIV. PRO. CODE (1908), No. 295, 12 A.L.J. 1270.*

(10) *Contract—Sale of calf—Contract not to sell to another and not to castrate—Expenses of purificatory ceremony whether can be claimed as damages. See CONTRACT, No. 7, 24 Ind. Cas. 86.*

(11) *Damages—Breach of contract—Writing—Clause providing exemption from liability—Negligence of promisor—Liability not excused. See CONTRACT, No. 9, 7 L.B.R. 105.*

(12) *Vendee's previous contract with third person—No notice of this to vendor of goods—Vendor's liability—Damages for breach of warranty. See CONTRACT ACT, No. 72, 23 Ind. Cas. 949.*

(13) *Opinion based on rumours—Admissibility—Amount of damages. See DEFAMATION, No. 1, 7 Bur L.T. 155.*

(14) *Right to mandatory injunction when damages will be adequate remedy. See INJUNCTION, No. 5, 23 Ind. Cas. 785.*

(15) *Infringement of right—No actual damage suffered—Nominal damages. See LEASE, No. 13, 20 C.L.J. 551.*

(16) *Breach of contract—Claim for damages—Whether an actionable claim—Assignment—Right of assignee to sue. See TRANSFER OF PROPERTY ACT, No. 9, 106 P.R. 1914.*

(17) *Flood water remaining on land for long time—Impossibility of sowing crop—Suit for damages after five years—Decree for Rs. 50—Right of second appeal—Limitation. See WATER, No. 2, 21 Ind. Cas. 393.*

Damduput.

(1) *Scope of rule of Damduput—Hindus—Mortgage decree—Interest accruing after date fixed for redemption—Applicability of the rule.* **Nanda Lal Roy v. Dharendra Nath Chakravarthi**, 40 C. 710=21 Ind. Cas. 974. See Final Part, 1913, Col. 522.

(2) *Damduput—Interest in excess of what is recoverable under the law of—Alienation by widow for payment of such interest—Illegality.* See HINDU LAW (WIDOW), No. 23, 10 N.L.R. 91.

Dancing Girls.

Rights of inheritance among. See HINDU LAW (SUCCESSION), No. 5, (1914) M.W.N. 672.

Dandidari Right.

Dandidari right, if a monopoly or a legal right to be recognised by Courts of Justice—Such right if personal or if can be transferred—Transfer if must be by registered instrument—Estoppel, application of rule of, to employees and contracting parties—Assignee of right having enjoyed profits if can deny assignor's title.

At a public auction held at the instance of Government the plaintiff as the highest bidder purchased the road-side lands of the bank of a river together with the dandidari right for one year. It appeared from the lease granted to him by Government that he became entitled to occupy the lands for one year and to exercise the calling of a broker in the market held thereon during that period. The defendants took an assignment from the plaintiff of the dandidari right and they commenced at once to exercise the calling of a broker in the market-place by virtue of the Government license which was made over to them, but they withheld payment of the money they had agreed to pay. The plaintiff sued for recovery of the consideration with damages for unlawful detention of his money:

Held that the term dandidar literally means a measurer and is applied to signify a broker who negotiates the sale of the paddy and other produce in a market-place and receives as remuneration for his service a commission from the seller and the buyer who may choose to employ him.

That the contention of the defendants that the alleged dandidari right tended to create a monopoly and should not be recognised as a legal right by any Court of Justice was untenable. The principle that every arrangement which places a restriction upon a man's right to exercise his trade or calling tends to create a monopoly and is void as against public policy has no application to the present case. There is nothing illegal or contrary to public policy in Government allowing a market to be held on its land and taking measures to restrict the admission of brokers.

That the dandidari right was not a right personal to the grantor from Government and

Dandidari Right—(Concluded).

could be transferred. The very fact that the right was granted by Government to the highest bidder affords some indication that the personal element does not enter into consideration when the grant is made.

That there was no force in the contention that the dandidari right was transferable only by a registered instrument.

That the defendants were at least licensees under the plaintiff and as they had exercised their calling without interruption or interference, they at any rate were not entitled to contend that the plaintiff had no title or that they themselves had acquired none from him.

The rule of estoppel which binds landlord and tenants, mortgagors and mortgagees, bailors and bailees applies to employees and contracting parties generally, who cannot accept the benefit of the contract, and yet, when called upon to perform their duties under it, repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right accepted and acted under is accordingly estopped to deny the authority from which the right proceeds. **Lakhan Jena v. Arjun Naik**, 18 C.W.N. 1194=24 Ind. Cas. 387.

MOOKERJEE and BEACHCROFT, JJ.

Darkast Rules.

(1) *Darkast rules—Assignment of land—Subsequent cancellation of assignment by Collector—Transfer of unassessed to assessed land necessary before assignment—No formal order of transfer + Sanction to assignment, implied.*

Where, under the darkast rules framed by the Government, a Deputy Tahsildar could assign "unassessed waste" only after the Collector had transferred it to the head of "assessed land," an order of the Collector sanctioning the assignment of the lands made with the knowledge that the lands are unassessed waste, operates to transfer the same to the heading "assessed land."

When a patta is once granted, and the revenue due thereon collected from the grantee, it is not open to the Collector to cancel the order of assignment on a knowledge of facts gained by him subsequent to the assignment. G.O. No. 687 does not affect an assignment made before the date of the order. **Secretary of State v. Krishnamachariar**, 22 Ind. Cas. 931.

SANKARAN NAIR and OLDFIELD, JJ.

(2) *Grant of land under—Divisional officer not complying with the Darkast rules—Jurisdiction of such officer to cancel grant made by Tahsildar.* See ADVERSE POSSESSION, No. 6, 23 Ind. Cas. 520.

Dead man.

Suit instituted against—Substitution of heirs of defendant—Jurisdiction. See SUBSTITUTION, No. 7, 24 Ind. Cas. 112.

Debtor and Creditor.

- (1) *Debtor and creditor—Composition arranged by some creditors on behalf of all—Consent of all creditors not obtained—Some creditors not agreeing to be bound by arrangement—Effect—None bound.*

Where a few of the creditors, without formally consulting the whole body of creditors and obtaining their consent, arranged that certain assets shall be set apart to satisfy the claims of the Madras creditors and certain other assets should go to the Mofussil creditors, and an agreement was also drawn up to which all the Madras creditors were made parties, but some of the creditors who failed to agree brought two suits and attached part of the property included in the agreement.

Held, that even a creditor who was a party to the agreement was not bound by the agreement unless all the creditors consented (a).

If one creditor has chosen to claim the total amount of his debt, the property divisible among the rest must be *pro tanto* diminished and the consideration for the whole contract must fail. *Chundra Guruviah v. Guggilam Kotiah*, 26 M.L.J. 366 = 24 Ind. Cas. 462.

BAKEWELL, J.

Reference:—(a) 9 A. 330 (P.C.), *Appl.*

- (2) *Creditor and debtor—Former obtaining a general deed of hypothecation of latter's assets—Effect of debtor's alienating his property to another creditor—Notice—Registration—Delay in decision of case—Discretion in awarding interest under S. 34, Civ. Pro Code (1908), after institution.*

Held, that A., by holding a registered general deed of hypothecation of all B.'s assets, cannot recover his money owed by B. from the property mortgaged by B. to C., another creditor of B., to whom B has transferred his property and has also paid certain money in contravention of the conditions of the said deed, until and unless A. is able to prove that C. had become aware of its contents before B. alienated the property and paid the money to C.

The mere fact that C. resides at the place of registration of the said deed is insufficient to fix him with the knowledge of its terms.

Held, also, that, where delay in the decision of a case is wholly due to some erroneous action of the plaintiff, the Court is justified in not awarding, under S. 34, Civ. Pro. Code (1908), further interest after institution of the suit up to date of realization of the decretal money. *Hira Lal v. Chanan Khan*, 98 P.W.R. 1914 = 199 P.L.R. 1914.

SCOTT-SMITH and SHADI LAL, JJ.

- (3) *Sequestration of property by attachment, effect of—Creditor's right of—Personal liability of heirs-at-law—Heirs, right of, to profits.*

Held, that till the sequestration of the estate by attachment or otherwise, a creditor is not entitled to seize the rents and profits of the

Debtor and Creditor—(Concluded).

property of the deceased accruing after the property has devolved on his heirs-at-law, or to make them personally liable to the extent of those profits prior to the sequestration. Such profits cannot be treated as the estate of the deceased and the heirs of the deceased are entitled to appropriate them. *Kishan Lal Atal Pandit v. Nawab Ummatul Fatima Begam*, 17 O.C. 207.

PANDIT KANHAIYA LAL, A.J.C.

References:—7 A. 822; 19 A. 235; L.R. 38 Ch. D. 609, R.

- (4) *Creditor admitting payment before transferring his debt to a third person—Effect upon transferee. See EVIDENCE ACT, No. 11, 108 P.W.R. 1914.*

(5) *Renewal of debt—Security apportioned—Apportionment found invalid—Right of creditor to fall back upon original security. See HINDU LAW (JOINT FAMILY), No. 11, 16 M.L.T. 489.*

(6) *Nature of relation between. See LIMITATION ACT (1908), No. 28, 22 Ind. Cas. 936.*

(7) *Agreement to discharge debt in a particular manner—Other remedies of creditor whether excluded. See NATTUKOTTAI CHETTIES, No. 1, 27 M.L.J. 631.*

Decennial Settlement Regulation.

See REG. VIII OF 1793.

Declaration.

Wrong declaration—Court can allow a further declaration. See INSURANCE, No. 1, 21 Ind. Cas. 836.

Declaratory Suit.

- (1) *Suit for declaration that a decree had been satisfied and should not be executed against plaintiff—Maintainability—S. 47 and O. XXI, r. 2, Civ. Pro. Code—No bar.*

A suit lies for a declaration that a decree in favour of the defendant against plaintiff's father and others had been satisfied so far as it concerned the plaintiff and his father, and that consequently it should not be executed against the plaintiff. S. 47 or O. XXI, r. 2, Civ. Pro. Code, does not bar such a suit. *Jamun Ram v. Kishen Ram*, 42 P.R. 1914 = 79 P.W.R. 1914 = 234 P.L.R. 1914.

REID, C.J., and KENSINGTON, J.

Reference:—16 P.R. 1910, F.

- (2) *Limitation—Declaratory suit—Erroneous entry in Revenue papers—Refusal of Settlement Officer to correct the entry—Cause of action.*

A usufructuary mortgage of an occupancy holding was executed in 1877. In 1880, the name of the mortgagee of the holding was wrongly recorded as tenant-in-chief in respect of it. In 1907, the mortgagor made an application for correction of the entry to the Settlement Officer, who, on the opposition of the mortgagee, refused to correct the mistake. The

Declaratory Suit—(Continued).

mortgagor, within six years of the order of the Settlement Officer, instituted a suit for declaration of his title as mortgagor.

Held, (1) that the cause of action was the refusal of the Settlement Officer to correct the erroneous entry; and (2) that the suit was within time. *Buti Ram v. Tara Chand*, 22 Ind. Cas. 608.

RICHARDS, C.J., and BANERJI, J.

- (3) *Establishment of heirship—Declaration to establish heirship, whether may be made, before succession has opened out—Reversioner, if entitled to declaration that certain deed is invalid—Specific Relief Act, S. 42, III. (c).*

A Court will not make a declaration to establish heirship, before the succession in regard to which it is claimed has opened out (a).

A reversioner of a limited estate is entitled to a declaration that a deed is invalid if the invalidity depends on facts which may be obliterated by lapse of time. The fact that such a declaration must be founded on the same reasons as would support a declaration of heirship, cannot deprive him of the relief sought. *Jagdeep Narain v. Jaibasi Koer*, 22 Ind. Cas. 928.

STEPHEN and MULLICK, JJ.

References:—(a) 2 I.A. 169 (191) = 15 B.L.R. 89 = 23 W.R. 314 = 6 M.H.O.R. 310, R.

- (4) *Declaratory suit—Mutation in favour of defendants—Suit competent where some tenants acknowledge plaintiffs, and some defendants—Ancestral property—Onus probandi—Pleadings—Plea not taken in lower Courts, nor in grounds of appeal to Chief Court, whether to be allowed at hearing.*

Some of the land in dispute was in possession of the plaintiffs, and other portions of it were in possession of the defendants, and some tenants acknowledged plaintiffs and some defendants.

Held, that a suit for declaration that the mutation of the land effected in favour of defendants shall be null and void as against plaintiffs was maintainable (3).

The *onus probandi* of showing that certain property is ancestral lies upon the person who asserts it (b).

Where the defendants did not accept and plead Muhammadan Law as contended in the plaint, nor did they put forward this plea either in the Courts below or in their grounds of appeal to the Chief Court, they were ruled to be too late at the hearing of the further appeal to urge Muhammadan Law as a defence to the suit. *Muhammad Umar v. Nawab Din*, 217 P.L.R. 1914 = 127 P.W.R. 1914 = 24 Ind. Cas. 678.

RATTIGAN and SHADI LAL, JJ.

References:—(a) 15 M. 307; 5 P.R. 1903 = 99 P.L.R. 1908 = 29 P.W.R. 1908. 21 Ind. Cas. 719 = 100 P.R. 1913 = 7 P.L.R. 1914 = 14 P.W.

Declaratory Suit—(Continued).

R. 1914, R. (b) 6 Ind. Cas. 721 = 42 P.R. 1910 = 128 P.W.R. 1908 (P.C.) = 12 C.W.N. 1049 = 35 C. 1039 = 8 C.L.J. 359 = 18 M.L.J. 379 = 35 I.A. 206 = 4 M.L.T. 207 = 10 Bom. L.R. 790, F.

- (5) *Declaratory suit—Civ. Pro. Code, O. I, r. 8—Representative suit—Right to enjoy one's property—Sic utere tuo ut alienum non laedas—General right, effect of bare denial of—Specific Relief Act, S. 42, general policy of.*

Three Mohammadan plaintiffs instituted a suit against four Hindu defendants for obtaining a declaration "that the plaintiffs and the other Sunni Mohammadans of the town of Bilgram are entitled to slaughter cows inside their houses at all times for purposes of sacrifice as well as for other necessities." This declaration was sought against the defendants "and other Hindus of Bilgram." An application made by the plaintiffs purporting to be under O. I, r. 8, to have the suit treated as a representative suit was dismissed by the lower Court. The result of the trial was that the lower Court gave a decree to the plaintiffs as against the defendants declaring that they have the right claimed—namely, "to kill cows in their houses for sacrifice or other purposes, provided that in the exercise of such right they do not commit a nuisance or offend any rule or regulation lawfully promulgated and applicable to Bilgram."

Held, that, although every one enjoys the general common law right embodied in the maxim *sic utere tuo ut alienum non laedas*, that is to say, a man is entitled to enjoy his own property in such manner as he chooses provided that in doing so he does not invade the legal rights of his neighbour, yet the bare denial of a general right of this character does not amount to such an invasion as would justify the granting of declaratory relief.

Further the nature of the relief awarded in the case being purely declaratory and the decree being incapable of execution, it leaves the parties exactly where they were before.

Held further, that, in view of the facts alleged and proved, there was no ground upon which the discretion could be properly exercised in the plaintiffs' favour so as to give them the decree.

The general policy of S. 42 of the Specific Relief Act appears to be to enable the Courts to grant relief where no relief at Common Law is available, and is not intended that the Courts should make declarations of abstract rights exclusive of any practical equity. *Ori Lal v. Mohammad Yakub*, 17 O.C. 354.

LINDSAY, J.C.

- (6) *Criminal Procedure Code, S. 488—Order for maintenance of an illegitimate son—Declaratory suit, maintainability of, where paternity of an illegitimate son is denied.*

Defendant No. 1 brought a claim for maintenance in the Magistrate's Court under S. 488,

Declaratory Suit—(Continued).

Crim. Pro. Code, against the plaintiff whom she averred to be the father of her illegitimate son, defendant No. 2. She obtained an order for maintenance. Basing his cause of action upon that order, the plaintiff brought the present suit for a declaration that the defendant No. 2 is not his son and that he had never an illicit connection with the defendant No. 1.

Held, that the suit for a declaration that defendant No. 2 was not an illegitimate son of the plaintiff was maintainable. **Kialasa (Musammatt) v. Raghu Bar**, 17 O.C. 331.

KENDALL, J.C.

• *References* :—18 A. 230, D.; P.R. 1901 (50); P.R. 1903 (26); 20 M. 48; 30 M. 400, R.

(7) *Declaratory suit, maintainability of—Suit for recovery of possession, bar of—Limitation Act, 1908, S. 23, Sch. I, Art. 142—Dispossession, allegation of—Burden of proof. Bishambhar Satbhaya v. Nadhar Chand Mandal Satbhaya*, 18 C.L.J. 601=22 Ind. Cas. 64. See Final Part, 1913, Col. 526.

(8) *Executor liable to pay income-tax for income of estate—Suit for declaration that such income is not liable to be taxed if lies. See ACT II OF 1886 (INCOME TAX), No. 1, 19 C.W.N. 138.*

(9) *Suit for declaration of shares in joint property—All sharers necessary parties—Death of one sharer—Heirs not brought on record in time—Abatement of suit. See CIV. PRO. CODE (1908), No. 373, 15 P.L.R. 1914.*

(10) *Suit to set aside revenue sale—Compromise that defendant should execute Kobala within 3 months—Suit for declaration of title after more than 3 years—Maintainability—Limitation. See CIV. PRO. CODE (1908), No. 72, 23 Ind. Cas. 240.*

(11) *Property purchased benami—Real purchaser obtaining and remaining in possession—Declaratory suit by real purchaser whether barred. See CIV. PRO. CODE (1908), No. 109, 7 L.B.R. 260.*

(12) *Suit for declaration and injunction—Consequential relief prayed for—Ad valorem Court-fee—Whether plaintiff entitled to put a fictitious value. See COURT FEES ACT, No. 2, 12 A.L.J. 844.*

(13) *Suit for declaration that plaintiff was member of committee of management—Consequential relief not warranted by averments in plaint—Suit incapable of valuation—Cognizance of plaintiff's valuation of relief sought when acceptable. See COURT FEES ACT, No. 5, 24 Ind. Cas. 316.*

(14) *Right coupled with onerous condition—Discretion of Court to refuse declaration of qualified right. See EASEMENTS, No. 3, 15 M.L.T. 247.*

(14-a) *What are 'declaratory decrees'—Declaratory decree—Not to be enforced by execution—Difference between executory and declaratory decrees. See EXECUTION OF DECREE, No. 10, 7 S.L.R. 192.*

Declaratory Suit—(Concluded).

(14-b) *Discretion in granting declarations—Hearing of case on merits—Government grant free of land revenue—Sale of land in execution—Government refusing sale—Suit against Secretary of State, the judgment-debtor and the subsequent transferee—Maintainability—Jurisdiction of Civil Court. See GRANT, No. 8-a, 17 O.C. 369.*

(15) *Alienation by Hindu widow—Legal necessity—Reversioner whether can sue for declaration without offering to reimburse money spent on legal necessity. See HINDU LAW (WIDOW), No. 18, 18 C.W.N. 1303.*

(16) *Grant of declaratory relief—Practice—Pronouncement on construction of will may be made to prevent further litigation. See HINDU LAW (WILL), No. 3, 26 M.L.J. 616.*

(17) *Suit for declaration to hold land rent free—Jurisdiction. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 3, 12 A.L.J. 805.*

(18) *Revenue Court's refusal to correct village papers—Suit for declaration of right—Limitation. See LIMITATION ACT (1908), No. 110, 12 A.L.J. 810.*

(19) *Denial of title—Declaratory suit—Only one cause of action—Subsequent act by revenue or other authority in favour of defendant—Effect. See SPECIFIC RELIEF ACT, No. 20, (1914) M.W.N. 197.*

(20) *Possession short of the statutory period whether sufficient for a declaratory suit—Levying of penal assessment when amounts to interference with possession—Penal assessment when leviable. See SPECIFIC RELIEF ACT, No. 24, 37 M. 298.*

(21) *Declaratory suit by remote reversioner against Hindu widow—Immediate reversioner living—Suit when to be decreed and when to be dismissed. See SPECIFIC RELIEF ACT, No. 25, 23 Ind. Cas. 809.*

(22) *Suit to declare that plaintiff is entitled to continue payment of subscriptions to the Kuri conducted by defendant—Maintainability. See SPECIFIC RELIEF ACT, No. 27, 27 M.L.J. 634.*

(23) *Suit for declaration that defendants are not under-proprietors—Accrual of cause of action—Dahyak right—Jurisdiction of Civil and Revenue Courts. See UNDER-PROPRIETARY RIGHTS, No. 2, 23 Ind. Cas. 231.*

Decree.

(1) *Decree—Setting aside on the ground of fraud—Suit for—When lies—False allegations of fact going to the root of the case—Proper ground—False evidence—Not sufficient—Civ. Pro. Code, O. IX, r. 13.*

Where a decree for specific performance of an agreement to sell was obtained ex parte against the plaintiff during his absence in Afghanistan, without effecting actual service of summons upon him, by means of a false representation that the plaintiff had entered into a contract for specific performance.

Decree—(Continued).

Held that a separate suit lay to set aside the decree on the ground of fraud.

Per Crouch, A.J.C.—No suit can be entertained to set aside a decree, where the only question submitted is one that could have been and should have been dealt with under O. IX, r. 13 (a).

A decree can be set aside, which has been obtained in a suit which is in its very foundation false, which has been obtained directly by false allegations of fact constituting the very cause of action, deliberately put forward for the purpose of deceiving the Court and defrauding the defendant. On the other hand, where a decree has been obtained by means of evidence challenged by the other side and duly weighed by the Court before acceptance, the decree cannot be set aside merely on the ground that the evidence can be proved to be false (b).

Hayward, J.C.—The mere fact that perjury had been committed would no doubt not have been sufficient to discharge the heavy burden of proving fraud lying upon the party alleging the fraud and to justify the setting aside of the previous decree of Court. *Khuchiram Pohumal v. Ghanshandas*, 8 S.L.R. 81.

HAYWARD, J.C. and CROUCH, A.J.C.

References :—(a) 29 C. 395, R. (b) (1878) L. R. 10 Ch. D. 327; 21 C. 612, 619; 38 C. 936; 2 Sm. L.C. 812; (1867) L.R. 3 Ch. 203, R.

(2) Award—Payment to defendant directed to be made within a time and thereafter ejectment of defendant—Decree—Executory or declaratory—Effect. See *AWARD*, No. 8, 8 S.L.R. 58.

(3) Question whether a compromise decree is against S. 375, Civ. Pro. Code, and is erroneous, to be raised in appeal and not in execution—Decree passed without jurisdiction—Question not to be passed in execution proceedings. See *CIV. PRO. CODE* (1882), No. 50, 15 M.L.T. 415.

(4) Applicability of Ss. 91, 92, Evidence Act, to the case of decrees. See *CIV. PRO. CODE* (1882), No. 24; 24 Ind. Cas. 391.

(5) Preliminary findings—Preliminary decree—Appeal—Court's duty to draw up decree—Practice. See *CIV. PRO. CODE* (1908), No. 136, 16 Bom. L.R. 67.

(6) What are cross-decrees. See *CIV. PRO. CODE* (1908), No. 320, (1914) M.W.N. 85.

(7) Suit by decree-holder against judgment-debtor—Defence that decree was collusively obtained whether available to defendant. See *CIV. PRO. CODE* (1908), No. 338, 23 Ind. Cas. 755.

(8) Preliminary and final decrees, nature of—Appeal—Omission of Court to embody decision in formal expression—Effect. See *CIV. PRO. CODE* (1908), No. 14, 20 C.L.J. 476.

(9) Partition of properties assessed to land revenue—Form of decree—Lower Court not to add to terms of decree as passed by appellate

Decree—(Concluded).

Court—Decree defective and not capable of being enforced—Decree-holder's remedy in case of decree not being in proper form—Review—Saying of limitation. See *CIV. PRO. CODE* (1908), No. 307, 24 Ind. Cas. 113.

(10) What decisions amount, to preliminary decrees—Decisions as to, misjoinder, limitation and jurisdiction—Whether preliminary decrees. See *CIV. PRO. CODE* (1908), No. 137, 16 Bom. L.R. 954.

(11) Suit to set aside decree as fraudulent—Pleading—Onus. See *FRAUD*, No. 3, 18 C.W. N. 681.

(12) Decree obtained by fraud—Effect. See *FRAUD*, No. 5, 9 S.L.R. 3.

(13) Self-contradictory decrees of lower Court, —Power of High Court to interfere Proper order. See *HIGH COURT*, No. 1, 19 C.L.J. 9.

(14) Acknowledgments of decree debts are not acknowledgments. See *LIMITATION ACT* (1908), No. 45, (1914) M.W.N. 875.

(15) Defendant wrongly described—Defendant accepting summons—Decree *ex parte*—Right of defendant or her successor in interest to question decree as *ultra vires*. See *PARTIES*, No. 1, 10 N.L.R. 144.

Dedication.

What amounts to. See *TRUST*, No. 4, (1914) M.W.N. 703.

Defamation.

(1) *Defamation*—Absence of intention to defame immaterial—Evidence of witnesses as to whom the article refers—Opinion based on rumours—Admissibility of such opinion—Amount of damages.

In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff. The question for decision in such cases is whether the article is libellous and whether it designates the plaintiff in such a way as to let those who know him understand that he is the person meant.

One of the ways in which people could form an opinion that the article refers to plaintiff is to use what they knew and have heard of his past history.

The existence of unproved rumours regarding the plaintiff is no reason for giving him slight damages. *W. A. Providence v. P. T. Christenson*, 7 Bur. L.T. 155=24 Ind. Cas. 749.

HARTNOLL, OFFG. C.J. and TWOMEY, J.

(2) *Comments in newspaper upon matters of public interest—Essentials of fair comment—Plea of justification.* *Ramakrishna Pillai v. Karunakara Menon*, 25 M.L.J. 476=21 Ind. Cas. 625. See *Final Part*, 1913, Col. 532.

(3) *Damages—Statements made to a Police Officer in the course of inquiries under preventive sections of the Crim. Pro. Code—Qualified privilege—Burden of proof—Malice—Reasonable*

Defamation—(Concluded).

and probable cause. **Maung Lu Gale v. Maung Po Thein**, 20 Ind. Cas. 290=6 Bur. L.T. 100=7 L.B.R. 64=22 Ind. Cas. 273. See Final Part, 1913, Col: 532.

(4) See SLANDER.

Defendant.

What person can be made defendant. See **HINDU LAW (ALIENATION)**, No. 9, 215 P.L.R. 1914.

Dekkhan Agriculturists' Relief.

See ACT XVII OF 1879.

Delay.

(1) Practice of Madras High Court—Admission Court excusing delay—Order subject to objection. See **APPEAL (GENERAL)**, No. 10, 23 Ind. Cas. 946.

(2) Delay caused by plaintiff in deciding case—Discretion not to award interest. See **DEBTOR AND CREDITOR**, No. 2, 99 P.W.R. 1914.

Delivery Order.

Is the giving of such order equivalent to putting donee in possession?—Is the assent of the original party essential to the assignment—Contract Act, S. 90, ill. (e).

The handing over of a delivery order to the warehouseman or mill, unless accompanied by the latter's assent to the transfer, is not equivalent to giving possession of the goods to the purchaser, and no claim for non-delivery can be brought by the latter against the warehouseman or mill under such circumstances. **A.T.K.P.L. Chetty v. S.K.R.S.S.T. Chetty Firm**, 7 Bur. L.T. 93=22 Ind. Cas. 952.

ROBINSON, J.

Deposit.

(1) Deposit in one bank—Receipt not transferable—Money borrowed from another bank on its security—Charge acknowledged by the first bank—Effect—Equitable assignment. See **ASSIGNMENT**, No. 3, 12 A.L.J. 886.

(2) Deposit of money—Value of deposit receipt payable to bearer—Deposit receipt stolen—Money paid to bearer—Banker's liability—Good faith. See **BANKER AND CUSTOMER**, No. 1, 24 Ind. Cas. 201.

(3) Meaning of. See **LIMITATION ACT** (1908), No. 82, (1914) M.W.N. 264.

(4) Meaning of the word—Deposit of money—Suit to recover—Limitation. See **LIMITATION ACT** (1908), No. 93, 37 M. 175.

(5) Nature of relation between depositor and banker. See **LIMITATION ACT** (1908), No. 28, 22 Ind. Cas. 936.

(6) Fixed deposit receipt—Depositor asking Bank on due date to renew the deposit on donee's name—Valid gift—Resulting trust cannot be implied from the transaction. See **TRANSFER OF PROPERTY ACT**, No. 105, 16 Bom. L.R. 584.

Description.

Conflicting description of the same property—Grounds for selection therefrom—Application of decree to description of property. See **EXECUTION OF DECREE**, No. 12, 17 O.C. 256.

Diary.

Regularly kept private diary—Admissibility in evidence. See **EVIDENCE ACT**, No. 26, 10 N.L.R. 44.

Digwari Tenure.

Digwari tenure, incidents of—Limitations subject to which such tenures are hereditary—Powers of Government to decide fitness of heir—Sanction of Government, if means prior approval—Jurisdiction of Courts—Grounds of disapproval of heir by Government, if open to review by the Court—Sanction of Government, if may be withheld on grounds other than that of fitness—Temporary appointment if signifies approval of fitness for permanent post.

One K, who was a Sardar Digwar, was dismissed for neglect of duty and improper conduct, and two persons were successively appointed to the post, and ultimately the plaintiff's father. Thereafter, on the recommendation of the Police for the re-employment of K, K was informed that, in the case of a vacancy occurring the appointment would be first offered to him. Prior to his death the plaintiff's father was allowed leave for six months and the plaintiff was appointed as being a fit person to act in his place. On the death of his father, the plaintiff was directed by the District Magistrate to act in place of his deceased father until further orders. The widow of K thereupon applied to the District Magistrate on behalf of her minor son praying that he might be appointed in accordance with the promise made to his father, but the District Magistrate rejected her application and confirmed the appointment of the plaintiff. The Divisional Commissioner reversed this decision of the District Magistrate and appointed K's son not on the ground of plaintiff's unfitness, but upon his view of the legal rights of the parties. On appeal to the Lieutenant Governor, the plaintiff was referred for remedy to the civil Court and brought this suit:

Held, that a Digwari tenure in the District of Bankura which is similar to a Ghatwali tenure is hereditary, but the right of the heir to the tenure is subject to the approval or sanction of the Government, and notwithstanding that the tenure is hereditary, the Government has the power of dismissing the Ghatwal for misconduct.

Per N.R. Chatterjee, J.—When a Ghatwal is dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure so far as his family is concerned, and where in such a case a stranger to the family is permanently appointed in his place, a subsequently born son of the dismissed Ghatwal, on the death

Digwari Tenure—(Concluded).

of the latter and after the tenure has passed to another family, cannot claim it on the ground that it is his hereditary tenure.

It is for the Government to say whether the heir is a fit and proper person, and so far as that question is concerned, the Government is the sole Judge, and the Civil Courts cannot go into that question; but the Government cannot disapprove of the heir or withhold with sanction upon any ground it likes, and apart from the question whether he is a fit and proper person.

That in the present case, having regard to the proceedings taken, the plaintiff should be held to have been approved by Government as a fit and proper person.

Per Fletcher, J.—Sanction in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.

In view of the authorities that the Court cannot interfere to reinstate a person who has actually been in possession of the Ghatwali land, it must be held that the Court cannot interfere in favour of a person who has never in fact been appointed Ghatwal.

That in the present case, the plaintiff failed to obtain the sanction of the Government which was a condition precedent to his succeeding to the Ghatwali lands.

That the decision of the Executive authorities refusing to sanction the appointment of the heir of a deceased Ghatwal as Ghatwal cannot be challenged in the Civil Court on the ground that sanction has been unreasonably withheld.

A Civil Court is not in a position to determine what are the qualifications necessary in a Ghatwal. It is a matter solely for the Executive authorities. **Hemendra Nath Roy v. Upendra Narain Roy**, 18 C.W.N. 1036 = 23 Ind. Cas. 849.

FLETCHER and N.R. CHATTERJEA, JJ.

References:—2 C. 187 (199); 9 C.W.N. 663; 1 W.R. 321; 5 C. 470; 10 W.R. 401, *Considered*.

Discretion.

Discretionary duty if becomes obligatory by part performance. See **MANDAMUS**, No. 1, 18 C.W.N. 430.

Dismissal for default.

Default, dismissal of suit for—Some defendants and plaintiff absent—Fresh suit—No bar. See **CIV. PRO. CODE** (1908), No. 276, 10 N.L.R. 39.

Distrain.

(1) *Distrain*—Intermediate tenure-holder—Levy of distraint upon property of, by Zamindar—Illegality—Recovery of cess—Recovery of rent—Powers of distraint—Not same—**Madras Act I of 1908 (Estates Land)**, S. 77—**Madras**

Distrain—(Concluded).

Act V of 1884 (Local Boards), Ss. 73, 74.—**Peri Lakshminarasimham Pantulu v. Ramachandra Mardaraja Deo**, 13 M.L.T. 204 = 24 M.L.J. 290 = (1913) M.W.N. 280 = 18 Ind. Cas. 308 = 37 M. 319. See Final Part, 1913, Col. 534.

(2) Non-payment of arrears of tax—Presentment of bill—Statutory requirements not specified in the bill—Notice of demand—Distress warrant—Payment of arrears under protest—Suit to recover the amount. See **ACT III OF 1901 (BOMBAY DT. MUNICIPALITIES)**, No. 1, 16 Bom. L.R. 749.

District Municipalities Act.

See **BOM. ACT III OF 1901**.

See **MAD. ACT IV OF 1884**.

Divorce.

(1) *Divorce—Application by husband for dissolution of marriage—No one joined as co-respondent—Court adding a person as such suo motu—No direction to amend petition—Illegality—Adultery—Birth of child 333 days after date of non-access—Illegitimacy—Period of gestation—Proof of non-access—Husband—Competency to give evidence—Evidence Act*, Ss. 118, 120—*Court's power to consider expert evidence contained in treatises—Evidence Act*, S. 60. **John Howe v. Charlotte Howe**, 25 M.L.J. 594 = 14 M.L.T. 447 = (1913) M.W.N. 983 = 21 Ind. Cas. 645 (F.B.). See Final Part, 1913, Col. 535.

(2) Mere caprice and petty quarrels not sufficient ground for granting a divorce. See **BUDDHIST LAW (DIVORCE)**, No. 1, 7 Bur. L. T. 16.

(3) Petition by husband for dissolution of marriage—Security for wife's costs. See **COSTS**, No. 3, 41 C. 963.

Divorce Act.

See **ACT IV OF 1869**.

Dobas.

River shifting course—Exercise of fishery right in new channel—Suit for possession of dobas—Limitation. See **LIMITATION ACT** (1877), No. 21, 23 Ind. Cas. 136.

Documents.

(1) *Document reciting that it was executed by 3 persons—Actual execution by 2 alone—Liability of executants.*

When a document which recites that it was executed by A, B and C is executed by A and B alone, the question whether in such a case A and B agreed to be liable under it only if C also joined in executing it is a question of fact, to be decided in the circumstances of each particular case. **Bangarusawmi Iyengar v. A. R. A. R. S. M. Somasundram**, 16 M.L.T. 102 = 27 M.L.J. 176.

SADASIVA AIYAR and TYABJI, JJ.

References:—25 M. 389; 31 M. 114, R.

(2) *Documents filed with plaint or written statement, party filing not permitted to resile therefrom—Bona fide mistake.*

Documents—(Concluded).

If a party to a suit files a document making it a part of the plaint or written statement with the object of relying on it, he cannot be permitted to resile therefrom afterwards without at least proving that it was filed owing to a bona fide mistake, and that he had not intended to use it. **Sheo Dat Singh v. Musammat Sidhau Kunwar**, 17 O.O. 327.

KENDALL, A.J.C.

Reference:—29 A. 184, R.

(3) Material alteration—Suit based on—Dismissal of suit—No revision. See ALTERATION, No. 1, 28 P.W.R. 1914.

(4) Recital in document as to existence of debt—Whether evidence of the binding nature of the debt. See EVIDENCE, No. 9, (1914) M.W.N. 874.

(5) Importance of document realised in Court of appeal—Opportunity to be given for proving document. See EVIDENCE, No. 6, 22 Ind. Cas. 833.

(6) Admissibility of documents without production of writer. See EVIDENCE ACT, No. 18, 22 Ind. Cas. 654.

(7) Validity of instrument if can be challenged by a stranger. See WILL, No. 6, 20 C.L.J. 148.

Drainage Act (Bengal).

See BENGAL ACT VI OF 1880.

Dubash.

Dubash—Mercantile firm—His position explained. See CONTRACT ACT, No. 96, 27 M. L.J. 501.

Durbhanga Raj.

Babuana and Sohag grants to junior members and their wives, incidents of—Rule of succession—Kulachar or family custom—Exclusion of females and daughter's sons—Grant if partible—Custom of exclusion if applies to partitioned share of grant—Widow's right to maintenance. See HINDU LAW (SUCCESSION), No. 6, 18 C.W.N. 1249.

Dusturat.

Dusturat, suit to recover—Periodically recurring right—Interest in immoveable property—Limitation Act, 1908, Sch. I, Art. 131.

The proprietor of an estate transferred, towards the end of the eighteenth century, portions of his estate to different persons, on condition that the latter and their representatives-in-interest would in perpetuity pay to the transferor and his representatives-in-interest certain sums as *dusturat*. The representatives-in-interest of the proprietor sued to recover the *dusturat*. On many previous occasions, the predecessors of the plaintiffs had obtained decrees against the predecessors of the defendants, either upon contest or *ex parte*, on the basis of the alleged right to recover the *dusturat*:

Dusturat—(Concluded).

Held, that the legitimate inference was that the right alleged by the plaintiffs existed, that the suit was to establish a periodically recurring right in the nature of an interest in immoveable property, and as such was governed by Art. 131, Limitation Act, 1908; that as the plaintiffs asserted that there had been no demand and refusal within twelve years of the commencement of the suit, the burden was on the defendants to establish that the plaintiffs had made a demand and that the defendants had refused; and that, as there was no evidence of this, the suit was not barred by limitation. **Hem Chandra Chowdhury v. Atul Chandra Chakravarti**, 21 Ind. Cas. 179=19 C.L.J. 118.

MOOKERJEE and BEACHCROFT, JJ.

Easements.

(1) Prescriptive right to discharge water—Tenements, not contiguous—Channel across the public way, right of easement in—Right of easement of a private individual over a public property.

A person cannot acquire a prescriptive right to discharge the surplus water of his land and tank on the land and tank of another through a channel across a public road.

There can be no prescription to make a common nuisance which is prejudicial to all people, because it cannot have a legal beginning by license or otherwise, being against the common law (a).

A private right of way and highway may exist over the same road, and the acquisition by the public of a highway over a road in respect of which private individuals enjoy a right of way does not necessarily destroy the rights of the latter (b). **Khudiram Nandi v. Surendra Nath Samanta**, 19 C.L.J. 42=18 C.W.N. 378=21 Ind. Cas. 857.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) (1618) Cro. Jac. 446; (1619) Cro. Jac. 490, R. (b) 12 Q.B. 515 (520); 2 Ch. 647, R.

(2) Easement—Surplus water, use of—Surplus water passing through defendants' land and across the land of other owners—Defendants' right to use wholly for their own purpose.

Easement exists for the benefit of the dominant tenement alone, and the servient owner acquires no right to insist on its continuance or to ask for damages in its abandonment (a).

The plaintiff and the defendants were neighbouring owners of land. Towards the west of the land of the defendants, there was a pathway by which water passed during the rains, through a channel on the land of the defendants and across the land of other neighbours, to the land of the plaintiff. The water was the surplus rain water collected on the land of the adjoining owners.

Easements—(Continued).

Held, that, as the plaintiff did not establish that he had any right to the use of the surplus water before it reached the land of the defendants, the defendants were entitled to use it wholly for their purposes as soon as it reached their land (b). **Bimolanand Chakrabarti v. Chandra Kant Chakrabarti**, 19 C.L.J. 45 = 22 Ind. Cas. 514.

MOOKERJEE and BEACHEROFT, JJ.

References:—(a) (1871) L.B. 6 Q.B. 578, R. (b) 18 C.L.J. 131 = 17 C.W.N. 1066; 16 C.W.N. 875, F.

- (3) *Water-course—Non-tidal river—Bed of—Ownership—Riparian owners—Rights of Government—Right of riparian owner to put up a dam—Whether exists—Right coupled with onerous condition—Discretion of Court to refuse declaration of qualified right—Madras Act III of 1905, S. 2—Presumption of rights of ownership in Government—Burden of proof.*

The plaintiff who has been constructing a dam at a particular spot across the bed of the Kottammal Thodu or stream for the past 25 or 30 years sued for the declaration of her easement rights to put a dam in the Thodu and taking water from it in accordance with the ancient usage for the use of the cultivation of the plaintiff lands, alleging that the channel is private *jenm* property and the bed of the stream belongs to the *jenmis* who own lands on neither side of the thodu.

Held, per Sankaran Nair, J.—That the Thodu or channel is private property and that the plaintiff is entitled to a declaration of her right to construct a dam which would not interfere with the use of the public path across the channel.

In the case of river beds which are not tidal and navigable, *prima facie* every proprietor of land on the banks of a river is entitled to that moiety of the soil of the river which adjoins to his land and the legal expression is that each is entitled to the soil *usque filum aquea* (a).

If the river bed is private property, then Act II of 1905 has no application.

Per Sadasiva Iyer, J.—Assuming that the bed of the Thodu belongs to the *Jenmis* who own lands on either side of the stream, the omission to make *jenmis* parties to the suit is fatal to the plaintiff's claim.

Where the plaintiff's right is not as extensive as she claims in the plaint but only a more restricted right, for example, where as in the present case, the right to construct a dam is subject to the onerous condition that she should not interfere with the use of the path by the public, the suit for a declaration of the comprehensive right ought to be dismissed because the Court is entitled to exercise a discretion in these matters and it is not bound to give a declaration of the qualified right even holding that the plaintiff has proved the qualified right.

Where the District Judge did not merely act upon a presumption in favour of the rights of

Easements—(Continued).

Government, but relied also upon several other circumstances to find in favour of the Government, the High Court is not entitled to interfere with his finding of fact.

The Government, as representing the public, should be presumed to be the owners of the beds of natural streams and of the sites of public paths in Malabar as well as in other Districts (b).

So far as public roads, streets, lanes and paths and the beds of rivers, streams, nalas, lakes and tanks, canals and water courses are concerned, the presumption, after the date of Act III of 1905 should be that they are Government property and not private property (*Vide* S. 2, Madras Act III of 1905). If any private owner wishes to establish that the bed of a natural stream or the site of a public road belongs to him, the burden of proof is clearly cast upon him to establish the same (c). **Mukkassa Nair Yeettil Meenakshi Amma v. The Secretary of State for India in Council**, 15 M.L.T. 247 = 26 M.L.J. 385 = (1914) M.W.N. 521 = 24 Ind. Cas. 547.

SANKARAN NAIR and SADASIYA IYER, JJ.

References:—(a) 1 Sim. and St. 190; 4 Mason, n.s. R. 397; 17 I. A. 62; 1 H. L. Sc. 27; L.R. 3 Eq. 279; 9 M. 175; 13 M. 369; 13 M. 89, R. (b) 9 M. 175, R. (c) 34 M. 295; 13 M. 169, R.

- (4) *Ancient lights—Nature of right—What amounts to infringement—Act done should amount to nuisance.*

The easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription.

The owner of the dominant tenement obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings. There is no infringement of the right, unless that is done amounts to a nuisance.

Jolly v. Kine (1907) A.C. 1 has established that the law as formulated by Lord Davey in *Colls's* case (1904) A. C. 179 is the law laid down by that decision. **Peter Charles Ernest Paul v. William Robson**, 18 C.W.N. 933 = 27 M.L.J. 117 = 16 M.L.T. 204 = (1914) M.W.N. 631 = 24 Ind. Cas. 300 = 12 A.L.J. 1166 = 16 Bom. L.R. 803 = 20 C.L.J. 353 (P.G.).^c

LORD DUNEDIN, LORD MULTON, SIR JOHN EDGE and MR. AMEER ALI.

- (5) *Prescription—Right to take water from tank—Right to reach water by definite mode of access—Servient owner, if can substitute some other means of access—Right of prescription extent of, how measured—Motive.*

When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access

Easements—(Continued).

for the statutory period, he has acquired a right to reach the water by means of such definite mode of access. The servient owner cannot, at his own discretion, substitute for his use some other means of access.

- The extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period.

No use of property which would be legal if due to a proper motive, can become illegal, because it is prompted by a motive which is improper or even malicious. **Jibananda Chakrabarti v. Kalidas Mallik**, 20 C.B.J. 97=18 C.W.N. 1296.

MOOKERJEE and BEACHCROFT, JJ.

Reference :—(1895) A.C. 587, R.

- (6) *Easement—Light and air—Obstruction—Test of right—Nuisance—Substantial interference with comfortable enjoyment—Blocking up plaintiff's window to extent of three-fourths.*

The test of the interference of the rights to light and air is whether the obstruction complained of is a nuisance; in other words, whether there has been a substantial interference with the comfortable enjoyment of premises (a).

The fact that a wall has been erected right against the window blocking it up to the extent of three-fourths would render it very probable that there has been a substantial interference with the access of light and air, but the question must be decided upon evidence when the defendant asserts that there has been no such obstruction. The mere fact that the wall erected by the defendant is in close proximity to the window of the plaintiff's house is not decisive of the matter. **Bonomall Roof v. Mokund Lal Ghose**, 23 Ind. Cas. 959.

CHATTERJEE and TEUNON, JJ.

References :—(a) (1904) A.C. 179=73 L.J. Ch. 484=53 W.R. 30=90 L.T. 687=20 T.L.R. 475, F.

- (7) *Light and air—Intention to erect a balcony—Right of neighbour in a crowded city—Principles to be applied in granting injunctions—Ss. 55 and 56 of Act I of 1877.* **Arjan Dass v. Ganesh Dass**, 172 P.W.R. 1918=308 P.L.R. 1918=21 Ind. Cas. 249. See Final Part, 1913, Col. 538.

- (8) *Easement—Landlord and tenant—Tenant of one joint owner cannot claim a right of easement against the others—Ex-proprietary tenant.* **Bahadur v. Khushi Ram**, 11 A.L.J. 990=22 Ind. Cas. 379. See Final Part, 1913, Col. 540.

- (9) *Trespass committed upon plaintiff's land—Recurring cause of action—No right of easement acquired—Declaratory suit—Limitation.* See LIMITATION ACT (1908), No. 111, 12 A.L.J. 1150.

- (10) *Right to flow of water to another's land—Nature of right—Obstruction—Damages—Limitation.* See WATER, No. 2, 21 Ind. Cas. 393.

Easements—(Concluded).

- (11) *Right to discharge water not claimed as easement but as ancillary to ownership of land.* See WATER, No. 3, 19 C.W.N. 54.

Easements Act.

- (1) *S. 7—Test of 'user'—Zemindari tenant whether owner for purposes of the section.*

The test of 'user' under S. 7 of the Easements Act is whether the owner uses more than a reasonable quantity, and the user is not as a rule to be deemed unreasonable unless there is material diminution of water so as to affect the right of other like owners.

An occupier of Zemindari land and not the Zemindari is the owner for the purposes of S. 7 of the Easements Act. **Gopichetty Narayana-swami Naidu v. Madula Venkanna**, (1914) M. W.N. 481=24 Ind. Cas. 685.

TYABJI and SPENCER, JJ.

- (2) *S. 7, illus. (h) and (i)—Attributes of a natural stream—Rights of upper and lower land-owners—Right of lower owner to obstruct the flow by a dam.* See WATER, No. 4, 16 M.L. T. 597.

- (3) *S. 7, illus. (i)—Flow of rain water—Right to regulate on the lower land rain water flowing from the higher.*

The right of every owner of land lying on a higher level to flow water naturally falling on such land and not passing in defined channels to the land lying on the lower level is a right *ex jure nature* and not a right founded on prescription.

Where the owner of lower land builds upon his land so as to obstruct the flow of water from the upper land, the owner of the latter is only entitled to a decree directing the owner of the former to make provision for the carrying off of rain water. **Ambica Saran Singh v. Debi Saran Singh**, 12 A.L.J. 685=24 Ind. Cas. 91.

BANERJI, J.

References :—20 B. 788; 1 M. 335, F.; 29 M. 539, D.

- (4) *S. 15—Right of way by prescription—Period of user to be 20 years or more.*

The defendant used for many years a right of way across the plaintiff's land, but this way (at least in its entirety) was not, owing to some alterations in the defendants' premises, used for a period of fifteen or sixteen years. The finding of the lower appellate Court was that the defendants had not used the way in question for twenty years.

Held that, under S. 15 of the Easements Act, the period of user must be twenty years or more ending within two years before the institution of the suit wherein the claim to which such period relates is contested. **Muhammad Maruf v. Sultan Ahmad**, 12 A.L.J. 415=24 Ind. Cas. 126.

RICHARDS, C.J. and BANERJI, J.

Easements Act—(Continued).*

- (5) S. 15—*Interruption in user—Litigation between parties in which interruption admitted—Enjoyment quietly, peaceably and without interruption.*

In a suit for an injunction to restrain the defendant from flowing water through plaintiff's land, a right of easement was pleaded by the former. It appeared that, in a previous suit, the present defendants sued the present plaintiff on the ground that the flow of water had been interfered with by the present plaintiff, and the Court then found that the enjoyment had not been proved for a sufficient period to establish a right of easement.

Held, that, during the entire period during which the former litigation was proceeding, the defendant was not "quietly, peaceably and without interruption" enjoying the right of easement claimed; and where the user is interrupted, it is necessary for the person, claiming the right of easement, to show a further full period of twenty years in order to establish the right. The user proved cannot be added to any period prior to the interruption. **Kedar Nath v. Sohan Lal**, 12 A.L.J. 693.

RICHARDS, C.J., and TUDBALL, J.

- (6) S. 18—*Landlord and tenant—A right to crush the sugarcane and the expression and boiling of the juice—Customary easement.*

Some of the co-sharers in a village sued certain occupancy tenants of the village for ejectment as trespassers from certain waste lands in the *abadi*. The defendants pleaded that as old sugarcane cultivators they were, by a village custom, entitled to use the plot of land for the purpose of expressing and boiling the sugarcane juice and for cognate purposes. *Held*, that the crushing of the sugarcane and the expression 'and boiling of the juice' are the last of the agricultural operations incidental to the cultivation of sugarcane, and the right to do so is not a right of easement claimed by the owner of a dominant tenement against a servient tenement but is of the nature of a customary easement within the meaning of S. 18 of the Easements Act and can be acquired by tenants against their landlords. **Rajab Ali v. Rajjoo Khan**, 12 A.L.J. 963.

SUNDER LAL, J.

References:—34 L.J. Ex. 52; 6 A. 497; L.R. 11 Ch. 538; P.R. (1897) 53, R.

- (7) S. 18. See No. 8, *infra*.

(8) Ss. 23, 18—*Eaves—Projection—Raising eaves in raising the wall—Customary easements—Privacy, right of.* **Mulla Bhana v. Sundar Dana**, 15 Bom. L.R. 876=21 Ind. Cas. 352=38 B. 1. See Final Part, 1913, Col. 541.

- (9) S. 60—*Practice—Defendant's plea contained in a robkar drawn up at the first hearing—Decision on—Building of permanent nature.*

On a suit for ejectment from a house and for rent, it appeared that the defendants were licensees of the plot on which the house stood.

Easements Act—(Concluded).

There was however no allegation in the written statement filed by the defendants that they had built the house with the license of the plaintiff, but on the first hearing of the case a *robkar* was drawn up in which the defendants stated that the plaintiff had allowed them to occupy the land in lieu of service rendered by them and that they had erected buildings on that land.

Held, that the lower appellate Court was right in considering the plea of the defendant contained in the *robkar* and in holding that the licenses having erected certain buildings of a permanent nature on the land were not liable to ejectment. **Kishun Sahai v. Gangax Bux**, 12 A.L.J. 455.

RICHARDS, C.J., and BANERJI, J.

Ejectment.

- (1) *Possession, suit for—Custom—Ikrar malikan deh—Estoppel by acquiescence—Deed, construction of.*

The plaintiff, a *pattidar*, sued to eject the defendants, other *pattidars* of the village, who had indirectly obtained portions of certain house-sites from the plaintiff's tenants and tacked them on to their own land and enclosed them. The *ikrar malikan deh* laid down that one *pattidar* was not entitled to take transfers of house-sites from the tenants of other *pattidars* holding in different *pattis*, and that, on the land in the occupation of a tenant becoming unoccupied, it reverted to the landlord. The defendants contended that the suit did not lie as he said *ikrar* did not provide for a right of re-entry on the part of the landlord, as the landlord had no right to get possession unless all the plots had become unoccupied; and as the plaintiff was estopped from suing the defendants by his acquiescing in the defendants enclosing the land:

Held, (1) that the suit did lie inasmuch as the plaintiff was really seeking to enforce his right as owner, in order to recover possession from the defendants who were trespassers (a);

(2) the plaintiff was entitled to claim even the portions of the land as against the defendants;

(3) the defendants, having full knowledge of the *ikrar* and thus knowing that they were in the wrong, could not be allowed to raise the plea of estoppel by acquiescence. **Khandhai Parshad v. Gauri Shankar**, 21 Ind. Cas. 256.

LINDSAY, J.C.

Reference:—(a) 10 O.C. 31, D.

- (2) *Ejectment—Suit by yearly tenant—Suit brought eight years after dispossession—Defendant also yearly tenant—Proof of title—Present right to possession—Jus tertii relied on by defendants.*

The plaintiffs were in possession of certain lands from 1860 to 1899. They claimed to be permanent tenants, but in the absence of proof they were presumed to be tenants from year to year. They were dispossessed in 1899 by the

Ejectment—(Continued).

defendants, who also claimed to be permanent tenants but failed to establish the same. In 1908, the plaintiffs sued to recover possession from the defendants.

Held, (1) that the presumption of right arising from possession applied as much to the defendants as to the plaintiffs, inasmuch as the suit was not a possessory suit brought within six months of a wrongful dispossession, but was a suit based upon title against defendants who had been in possession for eight years.

(2) That it would be a reasonable inference that, as the plaintiffs had not asserted their right as yearly tenants for eight years, they must be taken to have abandoned the tenancy or to have relinquished such other occupancy rights as they might have, and, if so, they would have no present right to possession such as would entitle them to maintain a suit for ejectment.

(3) That the defendants were entitled to rely on *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim.

• To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession. **Sitaram Bhimaji Deshpande v. Sadhu Awaji Parit**, 16 Bom. L.R. 132=38 B. 240=23 Ind. Cas. 786.

SCOTT, C.J., and BATCHELOR, J.

(3) *Suit in ejectment based on tenancy not proved—Proof of title to eject as trespasser not permissible.*

Where in an ejectment suit the plaintiff treats the defendant as a tenant and fails to prove the tenancy, he should not be allowed to prove his title for the purpose of ejecting him as a trespasser. **Chennaverasawmy v. Chinna Satyanarayana Murthy**, 21 Ind. Cas. 560.

AYLING and OLDFIELD, JJ.

References :—25 A. 498 ; 23 A.W.N. 112, R.

(4) *Custom—Ejectment—Right of a proprietor to eject a non-proprietor from mianas built by the latter on land which was shamilat when the mianas were built but which subsequently fell to the plaintiff—Distinction drawn between a tenancy based on a lease or its equivalent and a tenancy of a permanent nature.*

Plaintiff, a member of the proprietary body of Charsadda, sued the defendants, non-proprietors, for possession of a plot of land situated in the village *abadi* on which the latter had built certain *mianas*, on the allegation that they refused to pay the customary dues exigible from tenants of their status :

Held, that the land in question was admittedly *shamilat* when it was first occupied by the predecessors-in-interest of defendants, and that plaintiff had failed to prove that the general custom as to ejectment does not apply

Ejectment—(Continued).

in the present case. **Abdul Manan v. Shahbaz**, 1 P.W.R. 1914 (N.W.F.P.)=169 P.L.R. 1914.

BARTON, J.C.

References :—43 P.R. 1912=6 P.W.R. 1912 ; C.A. 31 of 1909, R.

(5) *Ejectment suit—Burden of proof.*

In an ejectment suit the plaintiff must prove his title ; but when he produces a title-deed which *prima facie* proves his title, the *onus* shifts to the defendant to show that the title-deed does not represent the true state of the facts of the case. **Sukira Nainar v. Viraswami Pillai**, 23 Ind. Cas. 815.

SANKARAN NAIR and AYLING, JJ.

References :—8 C. 759 ; 2 C.L.R. 48, D.

(6) *Ejectment suit—Pleas open to defence.*

A person in possession can resist a suit for ejectment against all but the true owner. It is always open to a person sued in ejectment to show that the plaintiff's title was only a sham transaction and to resist the suit on that ground. **Rajammal v. Mahadeva Yogi**, (1914) M.W.N. 717=27 M.L.J. 445.

AYLING and HANNAY, JJ.

(7) *Ejectment, suit for—Purchaser at revenue sale—Documents creating tenures—Some protected—Lands not protected mixed with lands protected—Decree for joint possession.* **Saroda Kumar Roy v. Jagabandhu Saha**, 18 C.L.J. 332=22 Ind. Cas. 247. See Final Part, 1913, Col. 543.

(8) *Trespass—Eviction of one whose title is found—Relief to be given—Mandatory injunction—Damages.* **Sikkhinder Rowthan v. Mahomed Abbubaker Rowthen**, (1913) M. W.N. 648=21 Ind. Cas. 45. See Final Part, 1913, Col. 544.

(9) *Practice—Suit for ejectment—Conversion into one of partition—Not allowed.* **Yaithilinga Mudali v. Murogian alias Natesa Mudali**, 23 M.L.J. 189=15 Ind. Cas. 299=(1912) M.W. N. 1127=37 M. 529. See Final Part, 1912, Col. 521.

(10) Distinction between common law action for ejectment and equity suit for injunction if should be introduced in India. See OOSHARERS, No. 2, 18 C.W.N. 328.

(11) Suit in ejectment—Plaintiff to strictly prove title. See HINDU LAW (INHERITANCE) No. 2, 18 C.W.N. 1154.

(12) Suit by Hindu husband to eject wife from his house—Question of immorality or unchastity of wife does not arise. See HINDU LAW (MARRIAGE), No. 1, 12 A.L.J. 1039.

(13) Ejectment suit—Proof of lawful title by plaintiff—Presumption—Holding over of agricultural lease—Law governing agricultural leases. See LANDLORD AND TENANT, No. 26, (1914) M.W.N. 728.

(14) Suit for compensation for use and occupation without asking for ejectment if

Ejectment—(Concluded).

converts defendant into tenant—Subsequent suit for ejectment if lies. See **LANDLORD AND TENANT**, No. 4, 21 Ind. Cas. 197.

(15) Suit for—Unauthorized sale of a plot within the holding—Effect of recognition by landlord. See **LANDLORD AND TENANT**, No. 11, 19 O.L.J. 462.

(16) Expiration of lease—Lessee's right to eject a trespasser—Acquiescence of landlord—Effect. See **LEASE**, No. 10, 37 M. 281.

(17) Lessee's title under expired lease—Right of lessee to eject trespasser. See **LEASE**, No. 8, 22 Ind. Cas. 789.

(18) Defendant in possession as trespasser—Suit for possession—Burden of proof—Plaintiff to prove his title. See **POSSESSION**, No. 5, 37 M. 293.

Election.

(1) *Election—Election of additional non-official members to Supreme Council by members of Bengal Legislative Council—Some members voting before taking oath of allegiance—Non-election of plaintiff—Appeal by plaintiff to Governor-General in Council rejected—Suit by plaintiff for declaration—Injunction—Specific Relief Act, S. 42—Civ. Pro. Code (1908), S. 9. Bupendra Nath Basu v. Ranajit Singh Bahadur*, 20 Ind. Cas. 676=41 C. 384. See **Final Part**, 1913, Col. 547.

(2) Validity of Municipal election whether can be questioned by suit. See **ACT I OF 1900 (U.P. MUNICIPALITIES)**, No. 5, 21 Ind. Cas. 655.

Electricity Act.

See **ACT IX OF 1910**.

Embankment Act (Bengal).

See **BEN. ACT II OF 1882**.

Encumbrance.

Meaning and annulment of. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 86, 19 C.W.N. 18.

Endorsement.

Endorsement for collection, what constitutes. See **PROMISSORY NOTE**, No. 8, 23 Ind. Cas. 545.

English Law.

(1) Indian Act taken *verbatim* from—Parliamentary enactment—Applicability of English authorities in India. See **ACT VI OF 1882 (COMPANIES)**, No. 4, 102 P.W.R. 1914.

(2) English Law of waters—Applicability to Lower Bengal—English Common Law when to be adopted. See **JALKAR**, No. 2, 18 C.W.N. 1217.

Epidemic Diseases Act.

See **ACT III OF 1897**.

Equity of Redemption.

Adverse possession of—Limitation. See **ADVERSE POSSESSION**, No. 10, 17 O.C. 294.

Escheat.

(1) Doctrine of escheat—Applicability. See **HINDU LAW (STRIDHANAM)**, No. 3, 37 M. 293.

(2) Tenant's rights not alienable—Death of tenant issueless—Tanancy whether escheats to the Crown or lapses to the zamindar—Rights of escheat when arises. See **LANDLORD AND TENANT**, No. 17, 22 Ind. Cas. 891.

Estates Act (Oudh).

See **OUDH ACT (I OF 1869)**.

Estates Land Act.

See **MAD. ACT (I OF 1903)**.

Estoppel.

(1) *Pleadings—Plaintiff alleging in plaint that a certain agreement was not binding on him, whether can be subsequently allowed to claim benefit of its terms—Practice—Estoppel.*

A plaintiff, who came into Court denying that a certain agreement of relinquishment was binding on him, cannot be allowed subsequently, when the agreement is held to be valid, to turn round and claim the benefit of its terms by enforcing it in his favour. **Rameshwar Dayal v. Sikhdar Singh**, 21 Ind. Cas. 64.

LYLE, J.

(2) *Estoppel—Right to property—Prior suit to establish—Guardian of minor defendant—Later suit to establish his own right to the property by such guardian—Omission to plead personal title in former suit—No bar to subsequent suit.*

B, the Mahant of a shrine at J, left two *chelas*, viz., N, the defendant, in the present suit, and one D, of whom the latter had two *chelas*, viz., G, the plaintiff in the present suit and one S, a minor. B made a gift of the suit property in favour of S. After B's death, N brought a suit against S for possession of the property. In that suit, G, acted as the guardian *ad litem* of S and the suit was decided in favour of N, who was put accordingly in possession of the property. G now brought the present suit against N for the possession of the property on the ground that G is the heir of B under a separate deed of gift and that he is entitled as such heir to the suit property.

Held, that the fact that G omitted in the previous suit, (in which he was merely acting in the capacity of guardian of S) to mention that he is the heir of B, did not estop him from now urging his claim as heir of B. **Ganga Ram v. Narain Das**, 1 P.R. 1914=118 P.L.R. 1914=23 Ind. Cas. 955.

KENSINGTON and BEADON, JJ.

Reference:—4 O.W.N. 283, *Appr.*

(3) *Estoppel—Purchaser under a mortgage decree—Whether purchaser representative of mortgagor.*

A purchaser of mortgaged property in execution of a decree is a representative of the mortgagor and is estopped from denying the validity of the mortgage, if the mortgagor himself

Estoppel—(Continued).

could not be permitted to challenge its validity. *Tota Ram v. Hargobind*, 12 A.L.J. 123=21 Ind. Cas. 721=86 A. 141.

RYVES and PIGGOTT, JJ.

* *References*:—10 A.L.J. 112; 11 A.L.J. 371, F.

- (4) *Estoppel—Reversioner accepting mortgage of land sold by a widow not estopped from claiming it.*

Held, that a reversioner, by unknowingly accepting the mortgage of the land in the joint holding sold by a widow to another reversioner, is not estopped from contesting the validity of its sale and claiming his share therein on her death, particularly when the mortgagor alienates the land as a share-holder. *Shera v. Hayat Muhammad*, 32 P.W.R. 1914=108 P.L.R. 1914=23 Ind. Cas. 525.

CHEVIS, J.

- (5) *Mortgagor and mortgagee—Mortgagee's right to deny the mortgagor's title—Benami transactions.*

In a suit for redemption of a mortgage, the defendant pleaded that he was the real owner of the property and that the plaintiff had no right of any sort and that the mortgage was a fictitious transaction;

Held, that no question of estoppel arose in the case. The Court was entitled to go into the evidence as to what was the real nature of the transaction of the mortgage. *Fateh Lal v. Cheda*, 22 Ind. Cas. 655.

RICHARDS, C.J., and BANERJI, J.

- (6) There can be no estoppel against an Act of the Legislature. See BOM. ACT I OF 1880 (KHOTI SETTLEMENT), No. 1, 16 Bom. L.R. 586.

- (7) Petition of compromise filed in mutation proceedings—Estoppel. See ACT III OF 1901 (U.P. LAND REVENUE), No. 12, 23 Ind. Cas. 965.

- (8) Pre-emption suit—Estoppel by conduct. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 1, 132 P.W.R. 1914.

- (9) Applicability of doctrine of estoppel between decree-holder and judgment-debtor—Doctrine cannot be invoked to nullify express statutory provision. See CIV. PRO. CODE (1908), No. 312, 19 C.L.J. 126.

- (10) Application of rule of estoppel to employees and contracting parties—Assignee of right having enjoyed profits if can deny assignor's title. See DANDIDARI RIGHT, No. 1, 18 C.W.N. 1194.

- (11) By acquiescence—When arises. See EJECTMENT, No. 1, 21 Ind. Cas. 256.

- (12) Minor widow—Reversioner taking power of attorney from her with knowledge of her minority—Inducing stranger to make advances of money to her—Suits by stranger to recover

Estoppel—(Concluded).

money—Plea of widow's minority—Reversioner precluded from raising the plea. See HINDU LAW (WIDOW), No. 6, 15 M.L.T. 323.

- (13) Contract of indemnity—Breach of contract—Suit by third person against promisor and promisee—Decree against promisee whether binds promisor—Co-defendants—Applicability of doctrine of *res judicata*—Equitable estoppel. See INDEMNITY, No. 1, 37 M. 270.

- (14) Estoppel by conduct—Doctrine when applicable. See LEASE, No. 1, 18 C.W.N. 420.

- (15) Pro-note payable by instalments—Calculation of limitation for each instalment—Willingness to pay barred instalments in prior suit—Subsequent suit for unpaid instalments—Whether defendant estopped from pleading limitation—No estoppel against the Act of the Legislature. See LIMITATION ACT (1908), No. 4, 24 Ind. Cas. 507.

- (16) Doctrine of—University lectureships—Writ of mandamus. See MANDAMUS, No. 1, 18 C.W.N. 430.

- (17) Non-transferable occupancy holding if may be disposed of by will—Title by estoppel—Testator or heir-at-law if estopped. See OCCUPANCY, No. 4, 18 C.W.N. 1290.

- (18) Principal and Agent—Money deposited with manager of business not in the course of business—Liability of proprietor—Estoppel. See PRINCIPAL AND AGENT, No. 5, 247 P.L.R. 1914.

- (19) Question whether S was son or stepson of K—Estoppel when arises. See RES JUDICATA, No. 4, 19 P.L.R. 1914.

- (20) Mortgage suit—Defendant setting up permanent tenure created before mortgage—Decree that defendant was subsequent incumbrancer and could redeem—Defendant if estopped from setting up tenancy before mortgage—Estoppel against benamidar whether binds beneficiary. See TRANSFER OF PROPERTY ACT, No. 93, 23 Ind. Cas. 762.

Evidence.

- (1) *Civil suit—Judge asking two members of Bar present to appraise evidence—Procedure illegal.*

A Judge, while trying a civil case, asked two gentlemen of the Bar, present in his Court to act as assessors presumably to appraise the value of the evidence in the case:

Held, that the procedure was illegal. *Kunthu Lal v. Jhommi Lal*, 21 Ind. Cas. 427.

RAFIQUE, J.

- (2) *Report made by kotwal in 1840, on reference by Political Agent—Public record of a public document—Admissibility in evidence.*

In order to prove that a certain Raja had the authority to appoint a *mahant* of a certain temple, the plaintiff produced a report made by the kotwal as far back as the year 1840 on a reference made to him by the Political Agent

Evidence—(Continued).

for enquiry in connection with the appointment of a certain mahant of that temple by the said Raja. *Held*, that the report was a public record of a public enquiry and was admissible in evidence. **Baldeo Das v. Gobind Das**, 12 A.L.J. 179=36 A. 161=23 Ind. Cas. 18.

RICHARDS and BANERJI, JJ.

- (3) *Evidence—Admissibility of Kanungo's report—Decision without other evidence—Practice—Duty of Judge.*

Three persons applied to the District Judge to be appointed guardian of the person and property of a minor. The District Judge asked the Collector to say which one of the three persons was the fittest to be appointed guardian. A report was called for by the Collector from the Girdwar Kanungo who reported in favour of the respondent. The District Judge, thereupon, appointed him as guardian of the person and property of the minor.

Held, that the report of the Kanungo could not be treated in law as evidence and it was the duty of the District Judge to have called upon the different claimants to give evidence and to decide on that evidence. **Subhag Singh v. Raghunandan Singh**, 12 A.L.J. 385=36 A. 282=24 Ind. Cas. 115.

RAFIQ and PIGGOTT, JJ.

- (4) *Oral evidence, admissibility of—Rent payable—Unregistered kabuliya.*

Oral evidence is admissible to prove the rent agreed to be paid by an unregistered *kabuliya*, which is inadmissible in evidence. **Amir Ali v. Aykup Ali Khan Saudagor**, 19 C.L.J. 428=41 C. 347.

JENKINS, C.J., and MOOKERJEE, J.

Reference :—14 C.W.N. 141, F.

- (5) *Evidence—Entries in books of Hardwar priests, their importance, if made ante litem motam—Joint ownership of an open plot of land, remote bearing on relationship of such owners—Oral evidence of persons as to relationship having no means of knowledge.*

Entries in the books of Hardwar priests, if proved to have been made *ante litem motam*, would be of great value in establishing a pedigree-table.

The fact that an open plot of land is the joint property of a large number of persons residing in the same locality has a very remote bearing, if any, upon the relationship *inter se* of the joint owners.

Oral evidence of persons who have no means of knowing the alleged relationship and are interested in the success of the case supported by them cannot be of much value for the purpose of proving an issue upon the decision of which the title to property of a large value depends. **Ram Singh v. Daulat Singh**, 171 P.L.R. 1914=97 P.W.R. 1914=23 Ind. Cas. 550.

JOHNSTONE and SHADI LAL, JJ.

Evidence—(Continued).

- (6) *Document—Production—Importance of document realized in Court of appeal—Opportunity to be given for proving document.*

When the importance of a document is for the first time realized in an Appellate Court, an opportunity should be given by that Court of producing and proving the document. **Kirtibas Panja v. Ram Pada Banerjee**, 22 Ind. Cas. 833.

TEUNON, J.

- (7) *Burden of proof, Acceptance of, by a party—Second appeal—Plea of having no duty to call evidence.*

Where the plaintiff accepted the burden of proof put upon him by the Court below and produced certain witnesses in order to prove execution of the deed, *held*, that he was not entitled in second appeal, because the evidence of the witnesses he put forward had been disbelieved, to turn round and say that it was not his duty to call evidence at all and to ask the Court to disregard the evidence which he had given. **Sita Ram v. Haidar Khan**, 17 O.C. 134.

LINDSAY, J.C.

Reference :—3 A. 824, R.

- (8) *Land Revenue Reports, proof of—Evidence, admissibility in—Judicial notice, if any.*

A Court cannot take judicial notice of Land Revenue Reports and they cannot be accepted in evidence unless they are sufficiently proved. **Boodhan Gope v. Mussammat Saira**, 20 C.L.J. 516.

CONE and WALMSLEY, JJ.

- (9) *Evidence—Recital in a sale-deed—Evidence aliunde.*

A recital in a document (sale-deed) should not by itself be treated as evidence of the binding nature of the debt. There must be evidence *aliunde*. **Ramneedi Ramachandrayya v. Bobha Janakiramayya**, (1914) M. W.N. 874.

AYLING and SESHAGIRI IYER, JJ.

- (10) *Evidence—Admissibility in proceedings—Application settling the dispute—Family settlement not registrable—Subsequent suit for possession. Kokla v. Pearey Lal*, 11 A.L.J. 765=35 A. 502=21 Ind. Cas. 29. See Final Part, 1913, Col. 553.

(11) *Trial of suit by Court having no jurisdiction—Evidence recorded by such Court—Suit re-instituted in proper Court—Admission of evidence taken in former trial by consent of parties—Validity—Waiver. Sri Raja Inugunti Prakasa Rajaningaru v. Yeranki Peda Venkata Rao*, 25 M.L.J. 360=(1913) M.W.N. 800=21 Ind. Cas. 319. See Final Part, 1913, Col. 554.

(12) *Document—Recitals—How for evidence. Koneri Sholagan v. Kumarappudayan*, (1913) M.W.N. 924.=21 Ind. Cas. 566. See Final Part, 1913, Col. 555.

Evidence—(Continued).

(13) Finding of fact on meagre evidence—Revision. See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 9, 70 P.W.R. 1914.

(14) Entries in draft record of rights if admissible in evidence in rent suits. See ACT VIII OF 1885 (BENGAL TENANCY), No. 52, 18 C.W. N. 896.

(15) Nethersole settlement khasra—Public record—Certified copy produced at late stage—Acceptance as evidence. See ACT XI OF 1898 (C. P. TENANCY), No. 2, 23 Ind. Cas. 604.

(16) Books of accounts tampered with—Presumption against owner of books. See ACCOUNTS, No. 1, 77 P.L.R. 1914.

(17) Unstamped acknowledgment received in evidence if can be rejected. See ACKNOWLEDGMENT, No. 1, 19 C.L.J. 87.

(18) Entry in Revenue records—Evidentiary value. See ADVERSE POSSESSION, No. 12, 240 P.L.R. 1914.

(19) Evidence conflicting—Opinion of first Court—Duty of Appellate Courts. See APPEAL (GENERAL), No. 5, 22 Ind. Cas. 512.

(20) Second appeal on the ground of the lower Court refusing to take whole evidence—Party closing his case—Practice. See APPEAL (SECOND APPEAL), No. 2, 3 P.W.R. 1914.

(21) Question as to value to be attached to evidence adduced by the parties is not a matter to be decided in second appeal. See APPEAL (SECOND APPEAL), No. 1, 21 Ind. Cas. 95.

(22) Court ignoring important evidence—Good ground for second appeal. See APPEAL (SECOND APPEAL), No. 5, 76 P.W.R. 1914.

(23) Decision based on evidence not on the record—Interference in second appeal. See APPEAL (SECOND APPEAL), No. 7, 19 C.L.J. 541.

(24) Power of parties to restrict or exclude evidence. See ARBITRATION, No. 1, 7 S.L.R. 113.

(25) Abortive arbitration proceedings—Clerk taking note of evidence—Note whether admissible. See BUDDHIST LAW (DIVORCE), No. 3, 23 Ind. Cas. 940.

(26) Appellate Court—Mode of letting in additional evidence. See CIV. PRO. CODE (1908), No. 454, 16 Bom. L.R. 641.

(27) No evidence offered in Court of first instance—Power of Appellate Court to call for additional evidence. See CIV. PRO. CODE (1908), No. 455, 16 M.L.T. 301.

(28) Additional evidence admitted at hearing of appeal—Legality—Judgment of appellate Court when to be set aside. See CIV. PRO. CODE (1908), No. 456, (1914) M.W.N. 795.

(29) Reception of additional evidence in appeal—When appellate Court will not interfere even if wrongly admitted. See CIV. PRO. CODE (1908), No. 457, (1914) M.W.N. 864.

Evidence—(Continued).

(30) Compromise evidencing release by a coparcener of his rights in family property—Admissibility in evidence, without registration. See COMPROMISE, No. 8, 27 M.L.J. 396.

(31) Consent to treat evidence in one case as evidence in another—Parties not same—How far legal. See EVIDENCE ACT, No. 1, (1914) M.W.N. 931.

(32) Perjured evidence whether a ground for setting aside decree. See FRAUD, No. 2, 18 C.W.N. 447.

(33) Whole evidence on both sides let in—Whether stress can be laid on burden of proof. See FRAUDULENT TRANSFERS, No. 1, (1914) M.W.N. 595.

(34) Recital in documents—Evidentiary value—Effect on *onus*. See GUARDIAN AND MINOR, No. 1, (1914) M.W.N. 490.

(35) Construction of an authority to adopt—Extrinsic evidence—Admissibility. See HINDU LAW (ADOPTION), No. 6, 27 M.L.J. 306.

(36) Grant to Hindu widow for maintenance—Oral evidence to prove grant—Admissibility. See HINDU LAW (MAINTENANCE), No. 5, 10 N.L.R. 111.

(37) Finding on fact without evidence—Interference in second appeal. See INJUNCTION, No. 4, 80 P.W.R. 1914.

(38) Unregistered lease-deed—Admissibility in evidence to prove nature of lessee's possession. See LEASE, No. 3, 15 M.L.T. 192.

(39) Extract from *khevat* produced in proof of legitimacy—Admissibility in evidence. See LEGITIMACY, No. 1, 23 Ind. Cas. 972.

(40) Criminal prosecution found to be false—Civil action for damages brought against the prosecutor—Judgment of the Criminal proceedings—Whether admissible in civil action. See LIMITATION ACT (1908), No. 8, 12 A.L.J. 837.

(41) Mere production of copy of mortgage deed not sufficient to prove the mortgage. See MORTGAGE (GENERAL), No. 24, 23 Ind. Cas. 864.

(42) Pro-note executed in consideration of giving evidence in executant's favour—Validity. See PROMISSORY NOTE, No. 5, (1914) M.W.N. 322.

(43) Fictitious entry of property with a view to give jurisdiction—Plea of mistake—Mutual mistake—*Onus*—Evidence of mistake—Admissibility—Concurrent finding of fact based on no evidence—Right of Privy Council to interfere—Decision that there is no evidence to support a finding is a decision of law. See REGISTRATION, No. 2, 18 C.W.N. 817.

(44) Application in mutation proceeding's—Matter compromised—Registration—Admission in evidence. See REGISTRATION ACT (1877), No. 3, 12 A.L.J. 1816.

(45) Registered sale deed—Unregistered letter inadmissible to show that it should operate as mortgage or not operate at all. See REGISTRATION ACT (1908), No. 16, (1914) M.W.N. 178.

Evidence—(Concluded).

(46) *Settler embodying agreement to transfer—Not registered—Admissibility in evidence.* See REGISTRATION ACT (1908), No. 11, 21 Ind. Cas. 777.

(47) *Deeds of endowment—Ancient deeds—Terms ambiguous—External evidence is admissible.* See RELIGIOUS ENDOWMENTS, No. 1, 20 C.L.J. 312.

(48) *Terms of sale certificate—Evidence to contradict if admissible—Ambiguous terms—Evidence to explain.* See SALE CERTIFICATE, No. 1, 19 C.L.J. 182.

(49) *Stamp—Two impressed sheets—Instrument wholly written on one sheet—Other sheet merely attached—Effect—Inadmissibility in evidence.* See STAMP ACT, No. 6, 15 M.L.T. 203.

(50) *Unregistered sale deed—Admissibility to prove nature of possession of purchaser.* See TRANSFER OF PROPERTY ACT, No. 36, 16 M.L.T. 344.

Evidence Act.

(1) *Evidence—Consent to treat evidence in one case as evidence in another—Parties not same—How far legal.*

Where the lower Court admitted in evidence, on the consent of the parties, evidence as to the death of a person which could not be admitted in evidence under S. 33, Evidence Act, it is none the less binding upon the parties.

It is not necessary for a reversioner in a suit to recover the estate to prove in what succession the previous life tenants died. It is enough if he proves that those who had prior interests in the estate have died.

Tyabji, J.—The Evidence Act lays down in ss. 6 to 55 certain rules of logic which are directions to the Court as to the cases in which the Court is to consider as a matter of logic that one fact has any relevance or logical bearing on another. These rules of logic are to be distinguished from rules laying down how the materials on which the Court is empowered to base its conclusions, that is, how the legal *media concludendi* are to be brought to the cognisance of the Court, i.e., the method of proving relevant facts. These rules have reference to the mode in which the Court has to collect the materials for the hypothesis; while the first class of rules refers to the use to be made of the materials, that is, the inference to be drawn from the hypothesis.

To prove relevant facts parties have unrestricted power to make admissions. But in regard to the logical conclusions to be deduced from the existence of the facts proved or admitted, the parties have no power to alter the directions given to the Courts by the legislature or to empower the Courts to act in a manner declared by the legislature to be illogical.

The question whether a party is bound by his consent that the examination of witnesses before a judge should be dispensed with and another method substituted for the judge's

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taking cognisance of oral testimony is regulated partly by the Evidence Act and partly by the law and practice relating to Civil and Criminal procedure, and in the absence of any such law by the discretion of the Court. What is disregarded by such procedure is not the law relating to the relevancy of evidence but the law in which the evidence shall be taken as contained in O. XVIII, r. 4 of the Civ. Pro. Code. The parties have a right to waive such rules of procedure as are intended to protect a personal interest and are not based on public policy. S. 33 of the Evidence Act is only an enabling section. *Krishna Reddy v. Sundara Reddy*, (1914) M.W.N. 931.

OLDFIELD and TYABJI, JJ.

(2) *Ss. 3, 33—Special Registrar acting for Registrar—Presentation of mortgage bond for registration—Denial of execution—Refusal by Special Registrar to register document—Subsequent inquiry by him as acting Registrar—Examination of attesting witnesses on solemn affirmation who were cross-examined—Order for registration of documents—Subsequent suit by mortgagee—Attesting witnesses all but one dead—Depositions taken in registration inquiry, whether admissible—Registration Act (III of 1877), Ss. 7, 72, 73, 74, 75. *Jekali Sheik v. Taibannessa Bibi*, 20 Ind. Cas. 661=18 C.W.N. 605. See Final Part, 1913, Col. 558.*

(3) S. 4. See No. 47, *infra*.

(4) S. 11. See INAM, No. 1, 22 Ind. Cas. 369.

(5) *Ss. 11, 32—Statement as to date of birth—Deceased person—Minority, question of.*

A statement by a person who is dead, in a petition for guardianship, that a certain person was born at a certain time, is not admissible in evidence under S. 32 of the Evidence Act. Such a statement alone is not admissible under S. 11 of the said Act. *Ram Krishna Sadhukhan v. Monindra Mohan Ray*, 20 C.L.J. 302.

CONE and BEACHCROFT, JJ.

(6) *S. 13—Transaction between two persons—Rights of third person—Whether transaction admissible against the third person.*

A private transaction between persons, who have no power to bind a person whose rights it is sought thereby to affect, cannot be admitted as evidence against him under S. 13 of the Evidence Act. *Abdul Ali v. Rejan Ali*, 21 Ind. Cas. 618.

STEPHEN and MULLICK, JJ.

Reference :—5 C.L.J. 55, *Diss.*

(7) *S. 13—Meaning of 'transaction'—Whether written statements transactions—Recitals in documents between strangers.*

The word 'transaction' in S. 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons. Written statements filed in suits are not transactions within the meaning of the section. Where in the specified boundaries of

Evidence Act—(Continued).

an adjacent land the suit land is described as belonging to one of the parties, it is a transaction but not a transaction in which the right of the party is asserted, claimed or even recognised and hence not admissible in evidence under S. 18. *Saripalli Venkatarayagopala Raju v. Fota Narasayya*, (1914) M.W.N. 779.

AYLING and BESHAGIRI IYER, JJ.

(8) S. 18—*Thak map*—Evidentiary value. See *SALE*, No. 7, 22 Ind. Cas. 645.

(9) Ss. 13, 43, 90—Ancient documents—Proper custody—Interference with discretion as to custody by Appellate Court—Assertions of right—Admissibility in evidence. See *ACT VIII OF 1985 (BENGAL TENANCY)*, No. 24, 23 Ind. Cas. 773.

(10) S. 18—*Admission—Proof—Kabuliat—Title.*

In order to be a relevant admission, it is necessary to show that the person who made the statement had an interest at the time when he made the statement.

A *kabuliat* may be admissible as evidence of title as being an act of ownership, but its cogency depends upon whether it can be treated as evidence not only for that reason but also because it is an admission (a). *Jogeswar Gorain v. Akhoy Ghose*, 19 C.L.J. 1=22 Ind. Cas. 714.

JENKINS, C.J., and MOOKERJEE, J.

Reference:—(a) (1842) 3 Q.B. 622, R.

(11) S. 18—*Admission—Creditor admitting payment before transferring his debt to a third person—Power of High Court to decide a case on merits in Second Appeal*, O. XLI, r. 24 and O. XLII, r. 1 of Civ. Pro. Code (1908).

Held, that, an admission made by the creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he sold the claim, is not binding upon the vendee under S. 18 of Act I of 1872.

Held, also that, where the judgment of the lower appellate Court is reversed on a point of law in second appeal, the High Court is competent under the joint force of r. 14 of O. XLI and r. 1 of O. XLII to decide the case on the merits if the inquiry is completed. *Chanda Singh v. Wasawa Singh*, 108 P.W.R. 1914=202 P.L.R. 1914.

CHEVIS, J.

(12) S. 21—*Consideration—Recital in mortgage-deed—Admissibility in evidence against transferee of mortgagor—Finding based on such recital—Second appeal.*

A recital as to the passing of consideration contained in the mortgage-bond is admissible in evidence against the transferee of the mortgagor under S. 21 of the Evidence Act. A finding based on such recital is conclusive in

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second appeal. *Narain Singh v. Bhikha Ram*, 21 Ind. Cas. 841.

RYVES and PIGGOTT, JJ.

References:—18 Ind. Cas. 744=11 A.L.J. 221=35 A. 194, R.

(13) S. 21. See No. 26, *infra*.

(14) Ss. 21 (1), 32—*Sale certificate—Admissibility in evidence.* See *ACT VIII OF 1985 (BENGAL TENANCY)*, No. 68, 24 Ind. Cas. 283.

(15) S. 32—*Statements of deceased persons as to existence of custom if admissible when made after controversy arisen.* See *HINDU LAW (SUCCESSION)*, No. 6, 18 C.W.N. 1249.

(16) S. 32. See Nos. 5 and 14, *supra*.

(17) Ss. 32, 34 and 73—*Books of account—Entries in—Relevancy of—Comparison of signature—Judges, Powers of.*

Under S. 34 of the Evidence Act, entries made in a book of account regularly kept in the course of business are relevant, but they are not evidence to charge any person with liability.

Under S. 32, also, such entries are relevant. But the conditions mentioned in the section must be strictly satisfied.

S. 73 of the Evidence Act is mainly based on the English Law, on the subject, and it authorizes a Judge to compare a disputed signature with an undisputed signature. *Ramaswami Naick v. Ramanathan Chetty*, (1914) M. W. N. 240=22 Ind. Cas. 627.

WHITE, C.J., and TYABJI, J.

(18) Ss. 32, 67—*Certificate, admissibility of, without production of writer.*

In a suit on a bond, the defendant, in order to support the plea of limitation, produced a certificate from the Secretary of a Club at Rangoon stating that he was in the service of the Club on a certain date: *Held*, that the certificate was inadmissible in evidence without the writer of the certificate being produced in Court and examined as a witness. *Peter v. Mahomed Idoo Miah*, 22 Ind. Cas. 654.

CARNDUFF and RICHARDSON, JJ.

(19) Ss. 32 (3), 33, 114—*Letter sent by post—Endorsement on the cover of the registered letter—Refusal to take delivery—Tender—Presumption—Nature of presumption under S. 114.* See *TRANSFER OF PROPERTY ACT*, No. 89, 20 C.L.J. 455.

(20) Ss. 32 (6), 50, 90—*Burden of proof—Pedigree extracted from Settlement Record—Presumption—Legitimacy—Parenage as given in memorandum of appeal, whether proof of legitimacy—Reversioner, what must prove.*

Where the plaintiffs, denying the defendants' legitimacy, claimed as the nearest reversioners to the last male holder, the property in the defendants' possession, and the defendants,

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denying the plaintiffs' legitimacy and the pedigree filed by them, put them to proof of their entire case :

Held, (1) that the plaintiffs were bound to prove their own title and legitimacy to the satisfaction of the Court, before the defendants could be called upon to do so ;

(2) that the plaintiffs were bound to prove not only that they were reversioners to the last male holder, but that they were the only nearest reversioners living at the death of his widow (a).

Where the plaintiffs filed the family pedigree extracted from a Settlement Record and it was signed by some persons named in the pedigree :

Held, (1) that the document being more than thirty years old and produced from proper custody, the Court might, under S. 90, Evidence Act, have presumed its genuineness and more particularly that of the signatures appearing on it ;

(2) that, after such presumption, the document might be treated not as a "family pedigree" admissible under S. 32 (6), Evidence Act, but as a statement made by deceased persons likely to be acquainted with the facts as to the existence of certain relationship.

Where, in a previous suit, the plaintiffs' deceased predecessors-in-interest filed a pedigree but no final decision on the question of the pedigree was made therein :

Held, that the plaintiffs were entitled in a subsequent suit to rely on that pedigree as being the statement of their predecessors-in-interest as to the existence of the relationship set forth in the pedigree.

A memorandum of appeal substituting a person as the son of a deceased party is by itself no proof of the legitimacy of that person. **Bhaputi Singh v. Khetal Singh**, 21 Ind. Cas. 274.

PIGGOTT, J.C., and LINDSAY, A.J.C.

Reference :—(a) 14 Ind. Cas. 339=15 O. C. 364, R.

(21) S. 33. See Nos. 2, 19, *supra*.

(22) Ss. 33, 145. See COURT FEES ACT, No. 22, U.B.R. 1913 (3rd Qr.), 181.

(23) S. 34—*Evidence—Entries in books of account—Vague statement of plaintiff in support of entry not sufficient.*

Where the plaintiffs can easily produce independent and trustworthy evidence in support of entries in their account books, it would be unfair to defendants and wrong in principle to accept as sufficient proof the entries, uncorroborated by any evidence other than a somewhat vague statement by one of the plaintiffs to the effect practically that the books speak for themselves. A point not touched by the grounds of appeal and not raised independently in the grounds of appeal, cannot be taken up for the

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first time in further appeal. **Ganga Ram v. Kaka Ram**, 47 P.L.R. 1914=53 P.W.R. 1914=22 Ind. Cas. 403.

RATTIGAN and BEADON, JJ.

(24) S. 34—*Mere entry in books of account—Insufficiency to prove liability—Payment by debtor—Appropriation—Creditor's option—S. 60, Contract Act—Compound interest—Not at enhanced rate—No penalty—Contract Act, S. 74.*

In order to charge a defendant with liability, something more is required than mere entry in a book of account, however well and regularly kept (*Vide* S. 34, Evidence Act).

Because one item covering only a small fraction of the account has been proved, the mere inclusion of a number of other items in that same account is not in law sufficient to render the defendant liable.

Where a debtor has not proved that he intimated appropriation against a particular debt and has not shewn that circumstances point to such an appropriation having been intended, it follows, (S. 60, Contract Act, that the option rested with the creditor to make such appropriation against debts legally due as he might please.

A stipulation for compound interest—the rate at which compound interest was to be computed being the same as that promised for simple interest—is not by way of penalty, and S. 74, Contract Act, has no application (a).

Compound interest not at an enhanced rate is not a penalty. **Abdul Ali v. Pūran Mal**, 82 P.R. 1914=277 P.L.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

References :—(a) 25 A. 159 ; 14 Ind. Cas. 283 and 25 A. 284, R.

(25) S. 34. See No. 17, *supra*.

(26) Ss. 34, 21, 144, 157, 159—*Meaning and scope of the terms 'Book' 'Books of account' and regularly kept in the course of business—Private diary—Evidentiary value—Difference between private diary and book of account—'Unbound sheets of proper'—Whether 'book.'*

The admission of entries made in books of account under S. 34 of the Evidence Act on behalf of a person making them is an exception to the general rule laid down in S. 21 of the Act.

The principle is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered, for the purposes of a particular case.

Therefore when an entry of that kind is tendered, it must be shown to be in a book, that book must be a book of account, and that account must be one regularly kept in the course of business. The term 'book' in S. 34 signifies a collection of sheets of paper bound

Evidence Act—(Continued).

together with the intention that such binding shall be permanent and the papers used collectively in one volume (a).

Unbound sheets of paper in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of S. 34.

A book which contains successive entries of items may be a good memorandum book; but until those entries are totalled or balanced or both, as the case may be, there is no reckoning and no account.

A book which merely contains entries of items of which no account is made is not a "book of account" for the purposes of S. 34 (b).

A most regularly kept private diary containing records of facts contemporaneously made may be used for contradicting or corroborating a witness or refreshing his memory and the like under Ss. 144, 157, 159 of the Act, but such user does not make the document itself evidence. It would be excluded by S. 21 of the Act and S. 34 provides no exception in favour of it (c).

Differences between private diaries and books of account discussed. The question whether or not a book is regularly kept is one of fact, to be proved (if not admitted), according to the circumstances of each case (d). **Mukundram v. Dayaram**, 10 N.L.R. 44 = 23 Ind. Cas. 893.

STANYON, A.J.C.

References:—(a) 16 A. 157 (161), R. (b) 27 C. 118; 4 B. 576 (583), R. (c) 1 M.H.C.R. 168, R. (d) 6 M.L.J. 88 (98), R.

(27) S. 41—*Judgment—Conclusive proof—Probate proceeding—Refusal of probate—Taking away the legal character from the executor—Will in the mofussil—Probate and Administration Act* (V of 1881), Ss. 4, 83—*Probate proceedings—Suit—Res judicata—Civ. Pro. Code* (1908), S. 11.

The executors named in a will, executed in the mofussil, applied for probate of the will. The Court refused probate on the ground that the testator was not at the time of a sound disposing mind. The testator's widow filed a regular suit against the defendants as executors *de son tort*, to recover possession of testator's property. The defendants again set up the will and claimed to be invested under it with all the legal character of executors.

On these facts two questions were referred to a Full Bench for determination:—

(1) Whether S. 41, Evidence Act, is not applicable to the judgment of the probate Court and upon a right construction of its terms, does not make that judgment conclusive against the present defence of the executors?

(2) Whether the finding of fact of the probate Court that the testator was not of sound disposing mind when the alleged will was made is not *res judicata* between the same parties in the present litigation:

Evidence Act—(Continued).

Held, by the Full Bench, that (1) S. 41, Evidence Act, was not applicable to the judgment of the probate Court, for the finding of the Court that an attempted proof had failed was not a judgment such as was contemplated in that section. The only kind of negative judgment which was contemplated was that which expressly took away from a person the legal character which had up to that time subsisted.

(2) That the judgment operated as *res judicata* between the parties, inasmuch as contentious probate proceedings must take the form of a suit (S. 83 of the Probate and Administration Act); they constitute a suit within the meaning of S. 11 of the Civ. Pro. Code. **Kalyanchand Lalchand v. Sitabal Dhanasa**, 16 Bom. L. R. 5 = 38 B. 309 = 23 Ind. Cas. 325 (F.B.).

SCOTT, C.J., BATCHELOR and DAVAR, JJ.

(28) S. 43. See No. 9, *supra*.

(29) S. 44—*Confirmation of Court sale induced by fraud—Ejectment suit by auction-purchaser—Right of defendant in possession to prove plaintiff's fraud.*

Where the plaintiff in an ejectment suit relies on his title as a purchaser in a Court auction, it is open to the defendants in possession of the property to show that such purchase was procured by fraud and, therefore, passed no title to the plaintiff. **Guaniar Rowther v. Y. Krishna Aiyar**, 23 Ind. Cas. 1.

SANKARAN NAIR and BAKEWELL, JJ.

(30) S. 44—*Probate and Administration Act* (V of 1881), S. 59—*Probate—Grant of probate—District Court—Grant secured by fraud of executor—Application by caveator to revoke the grant—Dismissal of application—Executor filing a suit in the Subordinate Court to recover portion of testator's property from tenant's possession—Tenant and caveator pleading forgery of will and fraud in the grant—Defences not permissible to either defendants.*

The plaintiff, an executor under a will, applied to the District Court for probate of the will. The defendant No. 2, a relative of the testator, filed a caveat contending that the will was a forgery. An arrangement was then arrived at between the parties, under which, in consideration of the withdrawal of the opposition by defendant No. 2 to the grant of probate, the plaintiff agreed to restore the property of the deceased to him (the second defendant), or to pay the equivalent in cash directly the probate had been granted. The probate was accordingly granted to the plaintiff; but he failed to carry out the agreement. The defendant No. 2 then applied to the District Court for revocation of the probate, on the ground that in declining to carry out his part of the arrangement the plaintiff had committed a fraud on the one hand upon the Court and on the other on him (the second defendant).

Evidence Act—(Continued).

The Court rejected the application on the ground that the second defendant on his own showing was a party to a fraud upon the Court and that he had not come to the Court with clean hands. The plaintiff next filed a suit in the Court of the Subordinate Judge to recover possession of a field belonging to the testator from defendant No. 1 who was a tenant of the testator. Both defendants contended that the will was a forgery and the grant of probate was induced by fraud. The lower Courts upheld the contention and were of opinion that the probate granted by the District Court was of no avail to enable the plaintiff to recover from the first defendant the property of the testator. The plaintiff having appealed:

Held, (1) that the second defendant was barred by the decision of the District Court in the revocation matter from raising again the same question in the Court of the Subordinate Judge.

(2) That as regards the first defendant the title of the plaintiff was conclusively proved by the production of the probate in the Subordinate Judge's Court, which had no jurisdiction to deal with the question of probate, and that it was no valid defence on the part of the first defendant to join in the allegation of the defendant that the will was a forgery and that the probate had been obtained by fraud and deception.

Where a demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer, unless possibly he is sued in a Court having jurisdiction to revoke the probate. *Kishorbal Revadas v. Ranchhodia Dhulia*, 16 Bom. L.R. 459=38 B. 427.

SCOTT, C.J., and BATCHELOR, J.

(31) S. 44. See CIV. PRO. CODE (1882), No. 32, 16 Bom. L.R. 648.

(32) S. 44—Suit to set aside decree as fraudulent—Prior decision whether *res judicata*. See FRAUD, No. 3, 18 C.W.N. 661.

(33) S. 44—Entry in record of rights—Effect—Fraud—Burden of proof. See REGULATION III OF 1872 (SONTHAL PERGUNNAS SETTLEMENT), No. 5, 19 C.L.J. 29.

(34) S. 50. See No. 20, *supra*.

(35) S. 57 (1)—Courts must take judicial notice of provisions of S. 24, Paper Currency Act. See ACT III OF 1905 (PAPER CURRENCY), No. 1, U.B.R. (1914), 1st Qr., p. 13.

(36) S. 58. See PLEADINGS, No. 3, (1914) M.W.N. 893.

(37) S. 63 (5)—Secondary evidence—Meaning of the word "seen"—Evidence of illiterate person.

The oral account of the contents of a document given by some person who has merely seen it with his eyes but is unable to read it is not secondary evidence of the document; the word "seen" in S. 63 (5) of the Evidence Act means something more than the mere sight of the

Evidence Act—(Continued).

document, and the clause contemplates the evidence of a person who having seen and examined the document is in a position to give direct evidence of the contents thereof.

When, therefore, in a suit for redemption of an old mortgage, neither the original mortgage nor a copy was produced and the only person who testified to the execution and the terms of the deed was a marginal witness who was himself illiterate, *held* that the statement was not admissible in evidence. *Ghure v. Chatrapal Singh*, 12 A.L.J. 299=23 Ind. Cas. 11.

TUDBALL, J.

(38) S. 65—Statement by mortgagee in settlement proceedings that mortgage was redeemable—Record of such statement destroyed—Admissibility of secondary evidence thereof—Entry in Index to settlement proceedings—Settlement Officer's summary—Admissibility. See MORTGAGE (GENERAL), No. 42, 5 P.W.R. 1914 (N.W.F.P.).

(39) S. 65 (c)—Execution of deed admitted in written statement—Denial while making statement in Court—Subsequent denial altered—Pleadings—Secondary evidence, admissibility of—Loss of the original to be proved. *Muhammad Altaf Ali Khan v. Hamid-ud-din*, 11 A.L.J. 731=21 Ind. Cas. 81. See Final Part, 1913, Col. 565.

(40) S. 67. See No. 18, *supra*.

(41) Ss. 68, 69—Illiterate witness—Document marked by—Proof of document—Transfer of Property Act, S. 59—Mortgage—Two witnesses to a deed—Only one called—Effect.

A mortgage deed was witnessed by two witnesses one of whom Kamla was illiterate and had witnessed it by making a mark only. The other Kishori had signed it but he was dead at the time the suit was brought. Kamla was called as a witness and stated that the deed of mortgage was executed in his presence and the mortgagor had made her mark in his presence and that he had put his mark on it as a witness. The document was not shown to him. *Held*, that all that S. 68 of the Evidence Act required was that an attesting witness should be called, and by calling Kamla as a witness the requirements of that section were complied with.

Held, also, that a man who puts his mark on a mortgage deed as a witness is an attesting witness within the meaning of S. 69 of the Evidence Act. *Chiranjil Lal v. Poorna*, 12 A.L.J. 1114.

SUNDAR LAL, J.

Reference:—2 C.W.N. 603, F.

(42) S. 69. See No. 41, *supra*.

(43) S. 73. See No. 17, *supra*.

(44) S. 74.—Crim. Pro. Code—Notice under S. 107, Crim. Pro. Code, if a public document—Proof necessary for admission of such document in evidence.

Evidence Act—(Continued).

A notice under S. 107, Crim. Pro. Code, is a public document within the meaning of S. 74 of the Evidence Act, but it cannot come in without proof that the parties, mentioned in it are the parties concerned in the question at issue about which it is produced as evidence. **Sheikh Amjad v. Lachmi Kanta Jha**, 18 C. W.N. 644=23 Ind. Cas. 529.

HOLMWOOD and SHARFUDDIN, JJ.

(45) S. 90—Document not 30 years old when produced and found not to be genuine on evidence—Presumption—Genuineness.

In a suit for ejectment the defendant denied the plaintiff's title and the latter produced a *Kirayanamah* in support of his claim. That document when produced was not 30 years old but became so on the date when the case was heard on the merits. The plaintiff tendered evidence to prove the *Kirayanamah* which the Court disbelieved.

Held that the document not having been 30 years old when it was produced and having been found on evidence not to be genuine, there was no presumption as to its genuineness on the ground that it was 30 years old at the time when the case was tried and the evidence was recorded. **Chiraunji Lal v. Kailo**, 12 A.L.J. 507.

BANERJI, J.

(46) S. 90. See Nos. 9, 20, *supra*.

(47) Ss. 90, 4—Document—Proof of custody—Genuineness presumed by original Court—Right of appellate Court to reject document—Practice as to proof of document—Preliminary decree—Final decree—Appeal against former—Whether affected by latter. **Ramien v. Veerapudaiyan**, 11 M.L.T. 69=(1912) 1 M.W.N. 117=22 M.L.J. 217=(1912) M.W.N. 530=14 Ind. Cas. 394=87 M. 455. See Final Part, 1912, Col. 541.

(48) S. 91, *Hundis renewed from time to time—Last renewal of hundis on insufficiently stamped paper—Secondary evidence.*

When it is proved that certain *hundis* were renewed from time to time and were handed over to the drawers who held them at the time of the suit, but the last *hundis* were executed on insufficiently stamped paper and could not be admitted in evidence, *held* that the plaintiffs could fall back upon the *hundis* that were given prior to the last renewals, and secondary evidence could be admitted to prove them. **Jagan Prasad v. Indar Mal**, 12 A.L.J. 361=36 A. 259=23 Ind. Cas. 599.

RICHARDS, C.J., and BANERJI, J.

(49) S. 91—Application for mutation proceedings—Compromise without Court's permission—Terms of the compromise whether can be varied or altered. See CIV. PRO. CODE (1908), No. 395, 12 A.L.J. 998.

(50) S. 91—Pro-note on unstamped paper—Whether admissible—Whether there is any independent cause of action. See PROMISSORY NOTE, No. 6, 7 Bur. L.T. 95.

Evidence Act—(Continued).

(51) Ss. 91, 92—Execution of decree—Oral agreement between decree-holder and judgment-debtor to give time to judgment-debtor—Admissibility of oral evidence to prove the agreement. See CIV. PRO. CODE (1882), No. 24, 24 Ind. Cas. 391.

(52) S. 92—Written lease, evidence to very terms if admissible—Agreement to take reduced rent, not registered, if admissible—Want of consideration—Transfer of Property Act, S. 107—Evidence of negotiation, if admissible—Lease of land specified by boundaries—Evidence to prove that area stated did not exist, if admissible—Abatement of rent, tenant's claim of—Onus—Tenant deprived of a portion of land by form of injunction, erroneously decreed, in landlord's suit to restrain encroachment by tenant on khas lands—Effect—Tender of reduced rent when not good tender. **Raja Durga Prasad Singh v. Rajendra Narayan Bagchi**, 18 C.W.N. 66=(1914) M.W.N. 1=15 M.L.T. 68=19 C.L.J. 95=11 A.L.J. 1027=26 M.L.J. 25=16 Bom. L.R. 42=41 C. 493=21 Ind. Cas. 750 (P.G.). See Final Part, 1913, Col. 571.

(53) S. 92—Consideration, whether can be proved to be other than what is set forth. **Adityam Iyer v. Ramakrishna Iyer**, 14 M.L.T. 982=(1913) M.W.N. 847=25 M.L.J. 602=21 Ind. Cas. 458. See Final Part, 1913, Col. 571.

(54) S. 92—Parol evidence as to whether one of the contracting parties was acting for himself or on behalf of a principal—Admissibility. See CONTRACT ACT, No. 96, 27 M.L.J. 501.

(55) S. 92—Sale or gift—Extrinsic evidence to show real nature of transaction. See PRE-EMPTION, No. 4, 21 Ind. Cas. 60.

(56) S. 192. See No. 51, *supra*.

(57) S. 92, proviso (1)—Recital of amount of consideration and of receipt thereof in full—Oral evidence to vary the amount of consideration recited can be adduced by defendant in a suit for recovery of unpaid balance of consideration.

If one party to a deed alleges and proves that the whole of the consideration, the receipt of which was acknowledged in the deed, did not pass, the case falls within the first proviso of S. 92 of the Evidence Act and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the transaction. **Chunai Bibi v. Basanti Bibi**, 12 A.L.J. 969=36 A. 537=24 Ind. Cas. 661.

BANERJI and CHAMIER, JJ.

References:—33 A. 340 (P.C.), F.; 17 C. 176 (note); 12 M.L.A. 157; 11 C. 486; 3 B. 159; 18 A. 168; 5 C.W.N. 158; 15 C.W.N. 408; 27 A. W.N. 181; 25 M.L.J. 602, R.

(58) S. 92, proviso (1)—Promissory note—Gambling losses—Want or failure of consideration—Oral evidence—Part of consideration of a gambling nature—Dismissal of suit. **Balgobind v. Bhaggu Mal**, 11 A.L.J. 854=35 A. 558=21 Ind. Cas. 873. See Final Part, 1913, Col. 572.

Evidence Act—(Continued).

(59) S. 92, proviso (2) — *Compromise reduced to writing—Alleged oral agreement, part and parcel of the compromise—Written contract, document of considerable importance—Oral evidence of the agreement not admissible.* **Abdul Hamid v. Abdul Majid**, 11 A.L.J. 770 = 21 Ind. Cas. 305. See Final Part, 1913, Col. 573.

(60) S. 92 (2) — *Pro-note silent about interest—Oral agreement as to interest if provable—Defendant admitting lower rate of interest than that claimed by plaintiff—Effect.* See **PROMISSORY NOTE**, No. 7, 18 C.W.N. 1260.

(61) S. 92, provisos 2 and 3—*Oral contract—Breach—Damages.* **Ramakrishna Iyer v. Adityam Iyer**, 14 M.L.T. 335 = (1913) M.W. N. 850 = 21 Ind. Cas. 463. See Final Part, 1913, Col. 573.

(62) Ss. 92, 93, ill. (b) — *Document—Construction—Kabuliat—Promise to pay interest upon arrears of rent at rate of one anna per rupee—No mention as to whether interest payable at that rate per month or per year—Evidence, whether admissible to prove what was meant.* **Protap Chandra Saha v. Mohamed Ali Sarkar**, 20 Ind. Cas. 443 = 19 C.L.J. 65 = 18 C.W.N. 592 = 41 C. 342. See Final Part, 1913, Col. 573.

(63) Ss. 92, 99 — *Sale or mortgage—Extrinsic evidence to show real nature of transaction—Real nature of transaction how to be ascertained—Fraud—Public policy—Oudh Laws Act (XVIII of 1876), S. 10—Pre-emption—Sale clothed as mortgage—Pre-emptor can show it to be sale—Contract Act, S. 23—Barred debt—Consideration—Market value—Previous sales, value of.*

Extrinsic evidence is admissible to show the real nature of a transaction, both as against and as in favour of persons other than parties to the document evidencing the transaction, irrespective of the form in which the transaction may be clothed.

Fraud is not capable of being established by positive and express proof. Therefore, the Courts should not insist upon direct proof in every case.

Where an attempt has been made to disguise the real nature of a transaction under a mask, it cannot be ascertained only by reference to the document by which that transaction is evidenced. Along with the terms and conditions contained in the document, the Court should examine the surrounding circumstances and the previous and subsequent conduct of the parties.

The stringency of the terms of a document is by no means a certain test of the real nature of a transaction.

Where property is transferred with all the incidents which a sale ordinarily carries, the mere fact that the transfer masquerades under the cloak of a mortgage to defeat pre-emption will not prevent a pre-emptor from claiming pre-emption, if he can show that a sale was really effected.

Evidence Act—(Continued).

A device is something different from a mask. It would be contrary to public policy to allow a mask to conceal or shroud the real nature of a transaction, or to permit a party to hoodwink the public and defraud the Court by putting on a false disguise.

The essential feature of a sale is the transfer of ownership of the property sold from the vendor to the purchaser, and where an actual sale has taken place, the mere fact that it is not in the form prescribed by S. 54 of the Transfer of Property Act does not affect the right of pre-emption. In other words, a pre-emptor can show that a transaction which purported to be a mortgage was really a sale.

A property was mortgaged with possession for Rs. 5,594 for a period of forty years. Out of the mortgage debt, Rs. 2,054 were payable by the mortgagor personally with interest at 13 annas 4 pies per cent per mensem compoundable annually, that is, Rs. 98,279-5-9 after 40 years; while the market value of the property did not exceed Rs. 4,400 on the date of the mortgage. The mortgagee was authorized to cut trees and groves from the property and to appropriate the value of the same without setting it off towards the principal money. He was also empowered to make any improvements he liked on the mortgaged property and to claim the costs of the same with interest thereon at the stipulated rate by way of an additional charge. The mortgagor further bound himself not to redeem the property except from his own pocket and personal resources. All kinds of village dues were given to the mortgagee without any corresponding benefit to the mortgagor.

Held, that all these facts afforded sufficient indication that an out-and-out sale was intended.

A barred debt is a good consideration for a sale.

The sales of property effected in a certain year do not afford sufficient indication of what would be the market-value of other property in the same village some years later. **Baldeo Singh v. Puttu Lal**, 21 Ind. Cas. 69.

PIGGOTT, J.C., and KANHAYA LAL, A.J.C.

(64) S. 93, ill. (b). See No. 62, *supra*.

(65) S. 99. See No. 63, *supra*.

(66) Ss. 107, 108 — *Person leaving village and unheard of for 7 years—Presumption of his having been alive—Whether arises—Question of fact—Person having no title—Whether can tack on possession of another.* **Bana Veeramma v. Gungala Chinna Reddy**, 23 M.L.J. 443 = 37 M. 440. See Final Part, 1912, Col. 543.

(67) S. 108. See No. 66, *supra*.

(67-a) S. 110—*Scope—Whether controlled by S. 9, Specific Relief Act.* See **SPECIFIC RELIEF ACT**, No. 3 (a), 10 N.L.R. 188.

(68) S. 112 — *Illegitimacy—Litigation for custody of wife—No proof against legitimacy—Non-access to be conclusively shown to establish illegitimacy.*

Evidence Act—(Continued).

A was the married wife of S. In April 1897, S brought a criminal complaint under S. 498, Penal Code, against one J. The complaint was dismissed under S. 203, Crim. Pro. Code, on 17th April 1897. On 15th July 1897, S brought a suit against J and obtained an *ex parte* decree on 15th January 1898, for custody of his wife A. On 24th May 1898, A gave birth to a child at her parent's village and subsequently returned to S. and she and the child lived with S till his death.

Held, that illegitimacy could not be positively inferred merely from the litigation above noticed.

* In order to establish the illegitimacy of a person born during the continuance of a valid marriage between his mother and any man, it is necessary to show conclusively that the parties to the marriage had no access to each other at any time when he could have been begotten. *Dalipa v. Rala*, 49 P.L.R. 1914=22 Ind. Cas. 409=187 P.W.R. 1914.

RATTIGAN and BEADON, JJ.

(69) S. 112—*Presumption as to exact time of conception—Alienation by Hindu father—Son born within 276 days—Son's right to question alienation—Duty of purchaser.*

In this case the alienation was made by the first defendant, the undivided father of the 2nd defendant, 276 days before the birth of the 2nd defendant. The 2nd defendant contended that the alienation was made after he was conceived and at a time when he had acquired an interest in the property, and that it was therefore not binding on him.

Held that, under S. 112, Evidence Act, the presumption is that a child born within 280 days after possibility of access shall be deemed to be the legitimate child of the father. It is not that such a child was conceived 280 days before its birth. The 280 days chosen in the section was no doubt the average period of gestation, but the medical authorities show that it is only an average and that the period is often longer or shorter in individual cases.

There is therefore no strong reason for raising a presumption that the particular child was conceived 276 days before his birth (a).

The burden is on the 2nd defendant to prove that he was conceived before the date of the alienation in question.

Quere:—Whether a purchaser for value is bound to enquire whether the wife of the seller is *eniente*. *Sri Datia Yenkata Subba Rajugaru v. Gatham Venkatrayudu*, 27 M.L.J. 580=16 M.L.T. 508.

WALLIS, O. G. J. and HANNAY, J.

Reference:—(a) 8 M. 89, R.

(70) S. 114—Confirmation of proprietary rights under a patta—Presumption as to continuance of possession of such rights. See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), No. 1, 7 S.L.R. 169.

Evidence Act—(Concluded).

(71) S. 114. See No. 19, *supra*.

(72) S. 115—Alienation by childless proprietor—Reversioner attesting deed of exchange—Estoppel. See ACT I OF 1900 (PUNJAB ALIENATION OF LAND), No. 1, 66 P.W.R. 1914.

(73) S. 115. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(74) S. 115—Daughters taking estate of father under will from mother whether estopped from claiming as heirs. See HINDU LAW (PARTITION), No. 7, 16 M.L.T. 592.

(75) S. 116—No estoppel against an Act of Legislature. See BOM. ACT I OF 1880 (KHOTI SETTLEMENT), No. 1, 16 Bom. L.R. 586.

(76) S. 117—Licensee of trade marks if may question title of the licensor—Burden of proof of merger of good will. See TRADE MARKS, No. 1, 19 C.W.N. 1.

(77) S. 144. See No. 26, *supra*.

(78) S. 145. See No. 22, *supra*.

(79) Ss. 145, 155—Witness when can be contradicted by his previous statement. See TAKIA, No. 1, 9 P.W.R. 1914.

(80) S. 155. See No. 79, *supra*.

(81) S. 157—*Register of births and deaths kept by village Chowkidar—Entries written to his dictation—Corroboration—Evidence.*

Where an illiterate village Chowkidar, whose duty it is to keep a register of births and deaths, deposes to the birth or death of a certain person, the entries in that register written up to his dictation under their proper date can be produced in corroboration of the Chowkidar's deposition as containing the record of a statement made by the witness referring to the same facts at or about the time when the facts took place. *Baldev v. Abhey Ram*, 12 A.L.J. 945=24 Ind. Cas. 540.

PIGGOTT, J.

Reference:—(a) 14 O.C. 68, Doubled.

(82) S. 157. See No. 26, *supra*.

(83) S. 159. See No. 26, *supra*.

(84) S. 165—Examination of witness without notice to parties or pleaders—Legality. See CIV. PRO. CODE (1908), No. 117, 22 Ind. Cas. 407.

Exchange.

Registration—Deed of exchange (Tabadla Namah) of immoveable property of or more than Rs. 100 in value executed by a sonless land owner—Decree given thereon on the admission of his widow—Right of his reversioners to object.

Where a sonless landowner executed a deed of exchange of ancestral holding of the value of or more than Rs. 100 which was not registered, and on his death a decree on its strength was passed on admission of the widow:

Held, the reversioners of her husband could challenge the decrees by a usual declaratory suit.

Exchange—(Concluded).

Held, also, that as the exchange was invalid for want of registration, the decree based thereon on the admission of the widow could not affect the rights of the reversioners, whether the exchange was for necessity or not. **Dalip Singh v. Munshi**, 74 P.W.R. 1914 = 176 P.L.R. 1914 = 24 Ind. Cas. 894.

JOHNSTONE, J.

Execution.

(1) Document reciting that it was executed by three persons—Actual execution by two alone—Liability of executants. See DOCUMENTS, No. 1, 16 M.L.T. 102.

(2) Pro-note alleged to have been executed by two persons, but found not to have been executed by one of them or with his consent—Admission of the other that both executed—Liability of person admitting. See PROMISSORY NOTE, No. 9, 16 M.L.T. 185.

Execution of Decree.

(1) *Execution of joint and several decree—Sale of portion of judgment-debtor's property—Sale statement, sale proclamation and sale certificate, not showing proportionate shares of judgment debtors—Auction-purchaser entitled to whole portion.*

In execution of their joint and several decree against the defendant and his co-sharers, the plaintiffs applied for sale of their joint property, only a portion of which was sanctioned for sale. The plaintiffs bought it. Subsequently, all the co-sharers but the defendant losing their shares in the property, the latter contended that, so far as he was concerned, the plaintiffs had only acquired under the sale his share out of that portion. But there was nothing in the sale statement or the sale proclamation or the sale certificate to show whether the property belonged to the defendant alone or to all the co-sharers jointly;

Held, that the plaintiffs had purchased the whole portion of the property and were entitled to make up that portion from the defendant's share. **Mahendra Nath Dat Singh v. Jadunath Singh**, 21 Ind. Cas. 262.

LINDSAY, J.C.

(2) *Civ. Pro. Code (1908)—Execution proceeding—O. XXIII, r. 1, cl. (3)—Not applicable—Limitation Act (1908), S. 8—Applicable.*

O. XXIII, r. 1, cl. (8), Civ. Pro. Code (1908), does not apply to execution proceedings.

S. 8 of the Limitation Act (1908) applies to execution proceedings, and the question will have to be determined under the section when one of several persons entitled to execute a decree can give a valid discharge without the concurrence of others. **Palanandi Pillai v. Papathi Ammal**, (1914) M.W.N. 159 = 15 M.L.T. 100 = 29 Ind. Cas. 76.

SADASIVA IYER and SPENCER, JJ.

Reference :—35 M. 481, Diss.

Execution of Decree—(Continued).

(3) *Surety bond to produce judgment-debtor on work's notice or in default to pay certain sum—Application for execution dismissed for default—Decree-holder's attempt to execute decree against surety—Liability of surety—Civ. Pro. Code (1908), Ss. 55, 145 (c).*

If a bond for the production of a judgment-debtor is to apply not only to the particular proceedings in execution in which the security is given but to all future proceedings, the bond must say so.

The conditions of a surety bond were that on receiving a week's notice the surety would produce the judgment-debtor in Court and in default would pay a sum of money; in the recitals at the commencement of the bond, particular reference made to the number of the execution case. The execution case having been dismissed for default of the decree holder the latter sought in a subsequent application to execute the decree against the surety.

Held, that the bond was only in force during the pendency of the application for execution during the course of which it was executed and that the liability did not continue to exist after the decree-holder's application for execution had been dismissed. **Nirus Narayan v. Pearl Dai Debi**, 21 Ind. Cas. 612.

RICHARDSON and NEWBOULD, JJ.

Reference :—14 C. 757, F.

(4) *Civ. Pro. Code—Execution application—Non-compliance with formalities—None the less in accordance with law to save limitation—Power of attorney to execute decrees and collect outstandings—Power to collect decree debts and file execution applications therefor.*

A power of attorney to execute decrees and collect outstandings gives also power to collect decree debts.

Non-compliance with certain formalities regarding execution application might disable the petitioner from successfully carrying on execution through the agency of that petition. But it would none the less be an application presented in accordance with law to save limitation. **K. R. Srinivasa Iyengar v. Tirumalai Chetty**, (1914) M.W.N. 372 = 15 M.L.T. 297 = 23 Ind. Cas. 99.

SESHAGIRI IYER, J.

(5) *Execution—Mortgage decree—Death of the judgment debtor—Decree holder aware of the death—Omission to bring on record his legal representatives—Sale—Purchase of property by decree holder—Sale a nullity—Application to set aside sale—Limitation Act (1908), Art. 166.*

Where the holder of a mortgage-decree who had notice of the death of the judgment-debtor got the mortgaged properties sold in execution of his decree without bringing on record the legal representatives of the deceased judgment-debtor, and purchased the properties himself :

Execution of Decree—(Continued).

Held, that the omission to bring the legal representative on record was not a mere irregularity and that it rendered the sale a nullity as against such legal representative (a).

• If such a sale is a nullity, then an application by the legal representative to set aside the sale is not governed by the thirty days' rule of limitation. **Samandan Karkat Edathil Rayarappan Namblar v. Malikandi Akith Nayan**, 26 M.L.J. 267 = 29 Ind. Cas. 251.

SANKARAN NAIR and AYLING, JJ.

References:—(a) 22 M. 119; 15 M. 399; 6 M. 180, F.; 25 B. 337, D.

(6) *Order by first Court upon defendant to pay money to plaintiff within fixed time—Expiry of time in consequence of appeal—Dismissal of appeal—Admission of appeal to Privy Council—Stay of execution refused by Appeal Court—Application by plaintiff to primary Court for order upon defendant to pay money, if in order.*

In a decree passed by a single Judge sitting on the Original Side, a fortnight from the date of the completion of the decree was fixed within which the defendant was to pay certain sums of money to the plaintiff, but in consequence of an appeal and of the order of the Appeal Court for a stay of execution, that time went by and no date was substituted for it. The appeal was dismissed and an appeal to His Majesty in Council was admitted, but an application by the defendant for a stay of execution was refused by the Appeal Court. The plaintiff then asked the primary Court to fix a day within which the defendant should be ordered to pay the sums of money into the Court.

Held, that it was a proceeding in execution and the application was, therefore, properly made to the Court of first instance and not to the Appeal Court; and that the Court should fix a day within which the defendant was to pay before the execution was issued. **Hashim Ebrahim Saleji v. Ahmed Masaji Saleji**, 22 Ind. Cas. 368.

CHITTY, J.

(7) *Sale—Confirmation of sale—Appeal by judgment-debtor—Compromise in appeal—Promise to pay decretal amount in instalments or in default sale to be confirmed—Default by judgment-debtor—Confirmation of sale when to be considered to take place—Application for delivery of possession—Limitation—Limitation Act (1903), Sch. I, Art. 180—Appeal—Civ. Pro. Code (1908), S. 47.*

An execution sale was confirmed in April 1908. The judgment-debtor appealed and the appeal was compromised on these terms; the judgment-debtor was to pay the agreed decretal amount in certain instalments, the first being payable in June 1910, and if the judgment-debtor paid the whole amount due in time, the

Execution of Decree—(Continued).

sale was to be set aside, but if he failed in any instalment the sale was to stand good. He paid nothing, and in July 1912 after preliminary proceedings which took about a year and a half, the decree-holder applied for delivery of possession. The judgment-debtor objected that the application was barred by Art. 180 of the Limitation Act, being presented more than three years after the date of the confirmation of the sale. The objection was overruled by the Court below and the judgment-debtor appealed to the High Court.

Held, (1) that the appeal lay (a).

(2) That, by the compromise on appeal, it was agreed between the parties that on a certain contingency the sale should be set aside; that that agreement had the effect of suspending the confirmation of the sale which did not become absolute until June 1910 when the judgment-debtor first defaulted, and that, therefore, the application for delivery of possession was not barred. **Janak Prasad v. Net Ram**, 22 Ind. Cas. 497.

COXE and CHATTERJEE, JJ.

References:—(a) 20 Ind. Cas. 874 = 18 C.W.N. 27, F.

(8) *Decree, execution of—Limitation—Step-in-aid of execution—Accompanying serving peon to identify judgment-debtor—Ex parte order that execution not barred—No notice to judgment-debtor—No adjudication—Judgment-debtor, if estopped in pleading bar of limitation—Limitation Act (1908), Art. 182, cls. (5) and (6)—Civ. Pro. Code (1882), S. 248—Notice, date of—Time, running of.*

The mere fact that the decree-holder went along with the serving peon to identify the judgment-debtor is not of itself a step-in-aid of execution.

The limitation commences to run from the date when the notice under S. 248 of the Code of Civil Procedure of 1882 (corresponding to O. XXI, r. 22, of the Code of 1908) was directed to be issued.

An *ex parte* order passed without giving notice to the judgment-debtor to the effect that the execution of the decree was not barred, will not estop the judgment-debtor from raising the bar of limitation in a subsequent application for execution. **Jugal Kishore v. Chintamani**, 20 C.L.J. 15 = 18 C.W.N. 1288 = 24 Ind. Cas. 80.

FLETCHER and RICHARDSON, JJ.

(9) *Application by decree-holder for continuance of sale to secure more bidders—Whether a step-in-aid of execution—Art. 182, Limitation Act (1908)—Construction.*

An application by the decree-holder for the continuance of the sale in order to secure the attendance of more bidders is a step-in-aid of execution (a).

The Courts have always placed a wide construction on the words 'step-in-aid of execution'.

Execution of Decree—(Continued).

in Art^s 182, Limitation Act. **Desireddy Yellamandar v. Sitakolli Chinna Pitchayya**, 16 M.L.T. 103.

OLDFIELD and NAPIER, JJ.

Reference :—(a) 30 C. 761, R.

- (10) *Execution—Declaratory decree—Award fixing rate of maintenance—Decree in terms of—Failure to pay—Relief not available by process of execution—Declaratory decrees and executory decrees—Difference between.*

Where an award declared that the plaintiff should get a monthly allowance of Rs. 12 for her maintenance out of the rents of two houses which were to be managed by her two sons, and also that the sons were to pay from their own property, if the rent was not sufficient for the maintenance, and where the plaintiff applied to the Court for execution asking that her two sons should be ordered to pay the arrears of maintenance.

Held, that the decree in terms of the award was only declaratory and not executory and that she could not obtain relief by process of execution.

The term 'declaratory decree' covers not only declaratory decrees properly so called, but also those which in effect create new rights and obligations, e.g., those which embody a family arrangement or an agreement between tenants-in-common and joint tenants as to the enjoyment of property; but, in every case the work of the Court is executed on the pronouncement of the decree, and no order is issued which the Court contemplates enforcing by execution. In an executory decree, there is a definite order to a definite person to do or refrain from doing a definite thing. The order may be one that is to be carried into effect either forthwith or at a given future date, or it may be conditioned on the happening of a certain event, but in every case there is a definite order which the judgment-creditor can take to the execution department and call on the administrative officers to enforce it by execution. **Lalibai v. Yaliram**, 7 S.L.R. 192=24 Ind. Cas. 861.

HAYWARD, J.C., and CROUCH, A.J.C.

- (11) *Execution of decree—Application, suspension or postponement of, by an order—Application for continuation of suspended proceeding—Execution proceeding struck off by an order, effect of.*

An application which is in substance an application made with the object of moving the Court in the matter of a former application which has been postponed, suspended or otherwise stayed by reason of some order, is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years, from the date when the right to apply accrued, that is, when the order for postponement, suspension or stay was withdrawn or became inoperative, even though the execution proceeding

Execution of Decree—(Continued).

may have been struck off by that order. **Girdhari Lal v. Damodar Dass**, 17 O.C. 169.

PANDIT KANHAIYA LAL, A.J.C.

References :—27 A. 334; 31 M. 71; 36 M. 553; 8 C.W.N. 382, R.

- (12) *Execution of decree—Decree, application of, to description of property—Conflicting descriptions of the same property, grounds for selection out of.*

Where a decree describes the mortgaged property in more ways than one, and one description applies to one set of existing facts and another to another set of existing facts, the duty of the Court executing the decree is to ascertain, by a reference to the record or other evidence, to which description the decree was intended to apply.

When two descriptions of the same subject-matter conflict with each other or where two parts of the same description are in conflict, that which is more certain, stable, and the least likely to have been mistaken or inserted inadvertently, must prevail if it sufficiently identifies the subject matter. **Ganga Prasad v. Subhag Chand**, 17 O.C. 256.

PANDIT KANHAIYA LAL and KENDALL, A.J.CS. *

- (13) *Execution—Application by subsequent transferee of decree—Objection by judgment-debtor—Court's duty to inquire.*

Where a subsequent transferee of a decree applies for the execution of the decree, and the judgment-debtor contends that the transfer is fraudulent, that the prior transferee owes him a sum of money and that the subsequent transferee took the assignment with the notice of his claim, the Court should inquire into the contentions and find upon them and should not summarily refuse to recognise the assignment. **Kothandapani Naidu v. Kuppusawmy Naicker**, 23 Ind. Cas. 951.

SANKARAN NAIR and AYLING, JJ.

- (14) *Decree, execution of—Civ. Pro. Code (1908), S. 47, O. XXI, r. 60—Relating to execution of decree—Legal representative—Objection to attachment—Property, if assets in the hands of legal representative.*

An objection, taken by a person who has become the representative of the judgment-debtor, in the course of the execution of a decree, to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative, is a matter cognizable only under S. 47 of the Code, as the question arises whether such property is assets in the hands of the representative and is liable to be seized in execution of the decree. **Ajo Keer v. Gorak Nath**, 20 C.L.J. 481.

MOOKERJEE and BEACHROFT, JJ.

References :—17 O. 711 (F.B.), F.; 39 C. 298 (F.B.), Expl.

- (15) *Decree—Execution—Payment ordered to be made within six months—Confirmation*

Execution of Decree—(Continued).

of decree by appeal Court—Payment can be made within six months of the date of the appellate decree.

A lower Court of appeal directed the plaintiff to pay a sum of money to defendants within six months of the date of its decree, and that, if he failed to do so, he should forfeit his right to recover possession of the land in dispute. This decree was confirmed by the High Court on appeal. The plaintiff made the payment within six months from the date of the High Court decree, though the period of six months from the first decree had elapsed. The lower Court held that the payment not having been made within six months from the decree of the lower Court of appeal, the plaintiff had forfeited his right to recover possession of the land. The plaintiff having appealed :

Held, that the plaintiff had complied with the terms of the decree inasmuch as he had made the payment within six months of the date of the High Court decree, which confirmed the first decree. **Satvaji Balajirao Deshmukh v. Sakharlal Atmaramshet**, 16 Bom.L.R. 778.

SCOTT, C.J., and HAYWARD, J.

- (16) *Execution of decree, proceedings in—Judicial proceedings—Jurisdiction of Court—Crim. Pro. Code, S. 476.*

Proceedings in execution of decree are 'Judicial proceedings' and therefore a Court has jurisdiction to pass an order under S. 476, Crim. Pro. Code, with reference to matters which have come to its knowledge in execution proceedings. **Shahamat Khan v. Gulab Khan**, 17 O.C. 309.

KENDALL, J.C.

Reference :—37 C. 642, R.

- (17) *Decree, execution of—Decree, validity of, if can be questioned in execution proceedings—Principle—Execution, stay of—Interlocutory order—Civ. Pro. Code (1908), S. 47.*

It is not open to a party, in proceedings in execution of a decree, to challenge the validity of the decree. A decree, even though it is not according to law, is binding and conclusive between the parties till it has been set aside in appropriate proceedings (a).

When a Court has refused to stay execution of a decree on application made on the ground that, as a proceeding to test the validity of the decree is still pending, no execution should be allowed till its determination, the order is of an interlocutory character and does not involve directly or indirectly an adjudication of the rights and liabilities of the parties (b). **Rama Prosad Roy Chowdhury v. Anukul Chandra Roy Chowdhury**, 20 C.L.J. 512.

MUKERJEE and BEACHCROFT, JJ.

References :—(a) 23 I.A. 35=19 M. 249, R.; 27 I.A. 110=27 O. 951 (1967); 8 A. 377; 11 A. 314, Diss. (b) 21 O. 478; 24 M. 358; 14 C.L.J. 489, R.

Execution of Decree—(Continued).

- (18) *Privy Council decree—Execution—Jurisdiction of First Court distributed among three Courts—Execution of appellate decree.*

Where the Godavari District Court had jurisdiction at the institution of a suit, and when the appeal was decided that Court ceased to have jurisdiction and the jurisdiction was distributed between three other Courts, *held* that any one of the new Courts has jurisdiction to execute the decree. The principle applying to pending execution proceedings laid down in (1914) M. W. N. 205 is applicable also to execution proceedings at their institution. **Sri Rajah Parthasaradhi Appa Rao Bahadur, Zemindar v. Sri Rajah Maka Venkatadri Appa Rao Bahadur, Zemindar**, (1914) M. W. N. 896.

OLDFIELD and TYABJI, JJ.

- (18-a) *Execution of decree, questions relating to—Civ. Pro. Code, S. 47—Civ. Pro. Code, O. XXI, r. 53, sub-rule (3), applicability of—Decree, objection to attachment of, in execution.*

The appellant obtained a decree against two persons IH and AH. IH and AH along with two other persons held a decree against MM and MZ. The appellant applied for execution of his decree by attachment of the interest of IH and AH in the decree which they along with two other persons held against MM and MZ. This application was refused.

Held, that MM and MZ being no parties to the appellant's decree, the questions arising between them and the appellant could not be taken as questions relating to the execution of the decree held by the appellant. The order refusing the application did not therefore fall under S. 47, Civ. Pro. Code, and was not appealable.

Held further, that the provisions of O. XXI, r. 53, sub-rule (3), refer to the stage at which execution of the attached decree is being sought, and not to a case where the application for attachment of the decree has been disallowed. **Piara Lal v. Mohammad Mahmud**, 17 O.C. 374.

LINDSAY, J.C.

- (19) *Execution—Declaratory decree—Decision as to executability of—Whether decree—Appealability—First order deciding executability—Appeal against, in time—Subsequent order appointing commissioner to carry out former order—No appeal—Effect. Lakshmi v. Marudevi*, 10 M.L.T. 437=21 M.L.J. 1063=37 M. 29. See Final Part, 1911, Col. 503.

(20) *Decree transferred to another Court for execution—Jurisdiction to execute the decree—Concurrent or simultaneous execution when may be allowed—Limitation—S. 89, Civ. Pro. Code (1908). Maharajah of Bobbili v. Sree Raja Narasaraaju Peda Boliar Sinhulu Bahadur Garu*, 12 M.L.T. 119=(1912) M.W.N. 721=28 M.L.J. 236=15 Ind. Cas. 738=37 M. 231. See Final Part, 1912, Col. 551.

Execution of Decree—(Continued).

(21) *Execution of decree—Sale—Non-service of notice on judgment-debtor—Civ. Pro. Code (Act XIV of 1882), S. 248—Sale bad. Sham Sundar Singh v. Jhumat Shah, 11 Ind. Cas. 893=20 O.L.J. 337. See Final Part, 1912, Col. 552.*

(22) *Limitation—Execution of decree—Mortgage decree—Attachment of properties other than those mortgaged—Amendment of petition—Application for improper reliefs—Res judicata—Notice to judgment-debtor—Limitation Act (1908), Art. 182—In accordance with law—Step-in aid of execution. T. Yaradiah v. Kumara Venkata Perumal, 14 M.L.T. 530=21 Ind. Cas. 782=26 M.L.J. 83=(1914) M.W.N. 157. See Final Part, 1913, Col. 577.*

(23) *Transferee—Decree-holder—Petition for recognition alone—Incompetent—Leaves to amend. Alagappa Chetty v. Ramasawmi Chetty, (1913) M.W.N. 1003=14 M.L.T. 513=21 Ind. Cas. 609. See Final Part, 1913, Col. 578.*

(24) *Execution—Application for—Order without notice to judgment-debtor—Direction to reduce amount claimed to be due under decree—Adjudication that method of calculation was wrong—No appeal—Binding character of order. Yyapuri Koundan v. A. C. Chidambaram Mudaliar, 24 M.L.J. 26=18 Ind. Cas. 607=37 M. 314. See Final Part, 1913, Col. 582.*

(25) *Decree, execution of—Decree against alleged adopted minor son—Adoption proved invalid—Guardian-ad-litem real representative—Guardian-ad-litem, if can be proceeded against. Ashi Bhushan Das v. Pelaram Mandal, 18 C.L.J. 362=19 C.W.N. 173=21 Ind. Cas. 519. See Final Part, 1913, Col. 585.*

(26) *Joint family consisting father and five sons—Decree obtained by father—Eldest son's right to execute the decree as managing member after father's death—Security when to be demanded from him—Payment to junior sons—Validity—O. XXI, r. 2, Civ. Pro. Code—Applicability to payments in kind. Kristna Hande v. Padmanabha Hande, 14 M.L.T. 293=(1913) M.W.N. 802=25 M.L.J. 442=21 Ind. Cas. 177. See Final Part, 1913, Col. 588.*

(27) *Execution of decree—Limitation—Execution by sale of land suspended by injunction obtained by judgment-debtor—Dissolution of injunction—Second application by decree-holder for attachment of moveables—Application dismissed for default—Third application for sale of identical land as in first application—Continuation of first application—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6. Tilakdhari Lal v. Bikram Singh, 20 Ind. Cas. 244=18 C.W.N. 539. See Final Part, 1913, Col. 589.*

(28) *Execution of decree—Default—Dismissal of execution proceeding—Previous attachment whether subsists. Krishna Subhuddhi v. Janaki Ram, 20 Ind. Cas. 149=19 C.L.J. 248. See Final Part, 1913, Col. 589.*

(29) *Execution of decree—Payment out of Court—Suit to declare that the decree cannot be*

Execution of Decree—(Continued).

executed—When cause of action arises—Limitation—Arts. 97 and 115 of Act IX of 1908. Mt. Jamna v. Bell Ram, 190 P.W.R. 1918=330 P.L.R. 1913=21 Ind. Cas. 557. See Final Part, 1913, Col. 589.

(30) *Property in the hands of the manager of ward's estate whether attachable. See ACT IX OF 1879 (BENGAL COURT OF WARDS), No. 1, 19 C.L.J. 406.*

(31) *Decree incapable of execution—Amendment of decree—Limitation for execution—Time if runs from date of amendment. See ACT VIII OF 1885 (BENGAL TENANCY), No. 103, 18 C.W.N. 266.*

(32) *Property attached by Court of Wards in—Whether property of the ward—Certain persons objecting to the attachment and suing for declaration of their right—Whether notice necessary before suit. See ACT III OF 1899 (U.P. COURT OF WARDS), No. 2, 12 A.L.J. 485.*

(33) *Execution proceedings—Second appeal—Party not allowed in second appeal to contest order setting off decree—Practice. See APPEAL (SECOND APPEAL), No. 9, 23 Ind. Cas. 923.*

(34) *Oral agreement between decree-holder and judgment-debtor to give time to judgment-debtor—Admissibility of oral evidence to prove the agreement. See CIV. PRO. CODE (1882), No. 24, 24 Ind. Cas. 391.*

(35) *Money paid into Court by judgment-debtor on application for execution—Whether 'realized' in execution. See CIV. PRO. CODE (1882), No. 36, (1914) M.W.N. 309.*

(36) *Decree against Hindu daughter—Direction that decretal amount be recovered from estate of father—Decree whether personal or effectual against reversion. See CIV. PRO. CODE (1882), No. 54, 22 Ind. Cas. 240.*

(37) *Question whether a compromise decree is against S. 375, Civ. Pro. Code, and is erroneous, to be raised in appeal and not in execution—Decree passed without jurisdiction—Question not to be raised in execution proceedings. See CIV. PRO. CODE (1882), No. 50, 15 M.L.T. 415.*

(38) *Sale in—Sale subject to mortgage lien—Mortgagee suing on mortgage—Defence that mortgage was fraudulent—Limitation. See CIV. PRO. CODE (1882), No. 32, 16 Bom. L.R. 648.*

(39) *Sale of specified undivided share in a house in execution of a decree—Effective possession how to be given. See CIV. PRO. CODE (1908), No. 826, 12 A.L.J. 259.*

(40) *Certificate of payment how to be made—Decree-holder certifying part payment in an unusual place in the application for execution—Effect. See CIV. PRO. CODE (1908), No. 308, 12 A.L.J. 387.*

(41) *Sale without attachment—Irregularity. See CIV. PRO. CODE (1909), No. 358, 21 Ind. Cas. 46.*

Execution of Decree—(Continued).

(42) Pre-emption decree—Non-payment of purchase-money within time whether relates to execution. See CIV. PRO. CODE (1908), No. 5, 21 Ind. Cas. 193.

(43) Decree erroneous—Duty of executing Court. See CIV. PRO. CODE (1908), No. 71, (1914) M.W.N. 152.

(44) Effect of sale made after stay order by High Court—High Court order—Date of taking effect. See CIV. PRO. CODE (1908), No. 351, (1914) M.W.N. 46.

(45) Executing Court—Jurisdiction of Court passing the decree cannot be questioned in execution. See CIV. PRO. CODE (1908), No. 316, 16 Bom. L.R. 30.

(46) Decree for possession on condition of paying an amount of money—Extension of time for payment—Objections of judgment-debtor disallowed—Appeal. See CIV. PRO. CODE (1908), No. 90, 12 A.L.J. 12.

(47) Order of Privy Council—High Court transmitting it to original Court for execution—Original Court's power to permit transferee decree-holder to execute it. See CIV. PRO. CODE (1908), No. 65, 15 M.L.T. 143.

(48) Fraudulent execution—Suit for damages—Maintainability—Measure of damages. See CIV. PRO. CODE (1908), No. 70, (1914) M.W.N. 174.

(49) Rateable distribution—Summary enquiry as to whether decree fraudulent—Power of Court. See CIV. PRO. CODE (1908), No. 117, 22 Ind. Cas. 407.

(50) Decree passed and attachment ordered by one Court—Jurisdiction transferred to another Court—No formal order of transfer to latter Court—Right of latter to continue execution proceedings—Applicability of O. IX, r. 13, Civ. Pro. Code, to order in execution. See CIV. PRO. CODE (1908), No. 66, 26 M.L.J. 189.

(51) Applications for execution after new Code came into operation—Bar of fresh application for execution after 12 years from date of decree—Applications for execution after 12 years in continuation of previous execution within that time, whether barred—Theory of continuation—Interruption by circumstances beyond decree-holder's control. See CIV. PRO. CODE (1908), No. 91, 21 Ind. Cas. 923.

(52) Assignee of decrees applying for execution—Notice to judgment-debtor—No objection by judgment-debtor—Subsequent application for execution—Judgment-debtor, not entitled to object to execution. See CIV. PRO. CODE (1908), No. 317, 12 A.L.J. 206.

(53) Adjustment out of Court not certified—Failure of judgment-debtor to apply within time—Remedy by regular suit. See CIV. PRO. CODE (1908), No. 82, U.B.R. (1913), 4 Qr., p. 191.

(54) Razinama—Decree in term thereof—Validity of terms not impeachable in execution proceedings. See CIV. PRO. CODE (1908), No. 85, 15 M.L.T. 208.

Execution of Decree—(Continued).

(55) Transfer of decree for execution to another district—Sending decree direct to Subordinate Court in that district instead of through proper channel—Dismissal of petition by the Subordinate Court whether legal. See CIV. PRO. CODE (1908), No. 315, 22 Ind. Cas. 682.

(56) Uncertified payment or adjustment—cannot operate to prolong the limitation applicable for execution—Decree-holder's right to certify payment made out of Court after decree is time-barred. See CIV. PRO. CODE (1908), No. 311, 12 A.L.J. 825.

(57) Decree passed by Sub-Judge—Addition of Court of Wards as party after decree—Execution proceedings can be entertained by the Sub-Judge. See CIV. PRO. CODE (1908), No. 64, 16 Bom. L.R. 527.

(58) Limitation for execution—Certificate of part-payments—Separate petition other than application for execution if necessary—Limitation within which decree-holder must certify. See CIV. PRO. CODE (1908), No. 303, 20 C.L.J. 131.

(59) Execution proceedings transferred to the Collector—Sale of property and purchaser put in possession—Dispossession of third party—Third party applying to Court to be restored to possession—Jurisdiction of Court. See CIV. PRO. CODE (1908), No. 367, 16 Bom. L.R. 637.

(60) Decree against wrong representative—Execution—Property recovered—Rightful representative substituted—Property restored to person who had been in possession—Order not appealable. See CIV. PRO. CODE (1908), No. 375, 222 P.L.R. 1914.

(61) Court when should refuse to release judgment-debtor. See CIV. PRO. CODE (1908), No. 328, 7 Bur. L.T. 242.

(62) Execution started against deceased judgment-debtor—Sale if may be set aside—Purchaser of occupancy holding if may apply—Limitation—Fraud—Abuse of processes of Court—Onus. See CIV. PRO. CODE (1908), No. 73, 18 C.W.N. 1266.

(63) Obstruction to execution—Suit to remove obstruction—Temporary injunction whether may be granted. See CIV. PRO. CODE (1908), No. 426, 16 Bom.L.R. 676.

(64) Order cancelling order for delivery of possession—Question whether relates to execution—Appeal whether lies. See CIV. PRO. CODE (1908), No. 80, 20 C.L.J. 433.

(65) Execution against endowed property—Decree against shabait if binding against succeeding shabait—Death of judgment-debtor pending execution—Objection of succeeding shabait as private property—Applicability of S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 85, 20 C.L.J. 485.

(66) Meaning of 'date of decree sought to be executed' in S. 48, cl. (a), Civ. Pro. Code—Application for execution to be treated as

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pending, until validly disposed of—Interpretation of decree—*Res judicata*. See CIV. PRO. CODE (1908), No. 93, 16 M.L.T. 399.

(67) Foreign judgment—Decree of Cochin Court—Transfer to British Indian Court for execution—Executing Court whether can question jurisdiction of foreign Court—Submission to jurisdiction when voluntary. See CIV. PRO. CODE (1908), No. 48, 27 M.L.J. 535.

(68) Execution Court cannot go behind decree. See CIV. PRO. CODE (1908), No. 296, 24 Ind. Cas. 206.

(69) Uncertified payment whether can save limitation—Mere mention of payment whether amounts to certificate. See CIV. PRO. CODE (1908), No. 310, 24 Ind. Cas. 215.

(70) Probate case—Decree that costs should come out of estate—Mode of execution. See COSTS, No. 4, 24 Ind. Cas. 214.

(71) Execution proceedings—Wrongful intervention—Loss by—Suit for damages—Maintainability. See DAMAGES, No. 2, 7 S.L.R. 104.

(72) Suit for injunction and damages—Damages if can be ordered to be ascertained in execution. See DAMAGES, No. 4, 23 Ind. Cas. 595.

(73) Sequestration of property by attachment—Effect—Right of creditor—Personal liability of heir-at-law—Right of heirs to profits. See DEBTOR AND CREDITOR, No. 3, 17 O.C. 207.

(74) Joint family—Interest of a co-parcener attached in execution of decree against him—Death of judgment-debtor before order for sale—Effect on accrual of title by survivorship. See HINDU LAW (JOINT FAMILY), No. 6, 16 M.L.T. 123.

(75) Decree against a non-resident foreigner—Execution—Voluntary submission to jurisdiction—Effect. See JURISDICTION (GENERAL), No. 1, 16 Bom. L.R. 620.

(76) Application for execution—Law applicable—Whether right to apply for execution is substantive right. See LIMITATION, No. 2, 21 Ind. Cas. 113.

(77) Order of Privy Council dismissing appeal for want of prosecution—Such an order is not an affirmation of the decree appealed from—Decree nisi for sale—Application for order absolute for sale—Limitation. See LIMITATION ACT (1877), No. 29, 16 Bom. L.R. 395.

(78) Amount wrongfully paid in execution—Right to recover during subsistence of decree. See LIMITATION ACT (1908), No. 84, 88 P.L.R. 1914.

(79) Application for—Suit against several defendants decreed against some and dismissed with costs against others—Appeal by former set—Application for execution against plaintiff by latter set made 3 years after original decree but within 3 years of disposal of appeal—Whether application barred. See LIMITATION ACT (1908), No. 261, 22 Ind. Cas. 655.

Execution of Decree—(Continued).

(80) Application for—Acknowledgment of liability in writing by one of several judgment-debtors—Whether gives fresh start against all. See LIMITATION ACT (1908), No. 44, 22 Ind. Cas. 709.

(81) Oral application for adjournment to enable decree-holder to produce encumbrance certificate—Step-in-aid of execution. See LIMITATION ACT (1908), No. 162, 26 M.L.J. 433.

(82) Application to set aside sale of plots not specified in the mortgage-deed—Limitation. See LIMITATION ACT (1908), No. 147, 17 O.C. 94.

(83) Application for execution against a person whose whereabouts are not known—Application for execution of joint decree made against any of the judgment-debtors—Whether in accordance with law. See LIMITATION ACT (1908), No. 158, 12 A.L.J. 830.

(84) Decree attached in execution—Application for execution of attached decree—Step-in-aid of execution—Decree passed when Limitation Act (1877) was in force—Application governed by the new Act—Issue of notice to judgment-debtor. See LIMITATION ACT (1908), No. 163, 12 A.L.J. 1006.

(85) No decree absolute passed—Execution ordered after notice to judgment-debtor—Failure to take objection as to absence of decree absolute—Effect—Judgment-debtor cannot raise the plea at a later stage. See MORTGAGE (GENERAL), No. 10, 26 M.L.J. 255.

(86) Mortgage decree—Execution—Satisfaction of part of decree. See MORTGAGE (GENERAL), No. 33, 23 Ind. Cas. 848.

(87) Attachment of occupancy holding in execution of money decree—Burden on decree-holder to show transferability of holding. See OCCUPANCY, No. 6, 23 Ind. Cas. 939.

(88) Vakil empowered to execute decree—Power to execute decree implies power to receive money outside Court. See PLEADER AND CLIENT, No. 1, (1914) M.W.N. 220.

(89) Paper possession of banjar land in—Whether sufficient possession—Limitation. See RES JUDICATA, No. 6, 19 P.W.R. 1914.

(90) Suit to set aside a decree and order for sale in execution thereof on the ground of fraud—Applicability of S. 244, Civ. Pro. Code (1882). See SHEBAIT, No. 2, 16 M.L.T. 210.

(91) Execution—Money decree—Judgment-debtor's interest in family property—Partly immoveable—Attachment and sale of "half share out of whole estate"—Void on ground of uncertainty—Jurisdiction of Small Cause Court. See SMALL CAUSE COURT, No. 1, 10 N.L.R. 17.

(92) Order in execution proceedings if may be revised. See Act XXXVII OF 1855 (SONTHAL PERGANAS), No. 2, 18 C.W.N. 662.

(93) Withdrawal of application for execution with permission to bring fresh application—Not allowed. See CIV. PRO. CODE (1882), No. 49, 12 A.L.J. 235.

Execution of Decree—(Concluded).*

(94) Effect of attachment—Insolvency of judgment-debtor after attachment—Effect—Official Assignee how to be bound by execution proceedings—Substitution of Official Assignee for judgment-debtor if necessary—Stay of execution proceedings when judgment-debtor declared insolvent—Sale without serving notice—Effect. See *INSOLVENCY*, No. 4, 18 C.W.N. 1058.

Execution Sale.

- (1) *Sale-certificate, if may be amended by inserting property not included in the schedule of attached properties—Case, if one of misdescription and irregularity—Correct description in notification in Government gazette but differing from that in schedule of attachment, effect of—Wrong property sold, proper remedy—Proof that other property intended to be sold, if relevant—Court's authority to sell, how limited.*

That which is sold in a judicial sale of immoveable property in execution of a decree for money can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers.

Where an existing property is accurately described in the schedule, a certificate of sale cannot be issued in respect of a different property, treating the matter as a case of misdescription, and as such to be viewed as a mere irregularity.

If by mistake the wrong property was attached and an order made to sell it, the only course open to the decree-holders, on the discovery of the mistake, was to commence proceedings over again.

Documents in other judicial proceedings tending to show that a mistake had been made in drawing up the schedule and that some property other than that included in the schedule was intended to be inserted in it, were irrelevant.

Although an advertisement in the *Calcutta Gazette* purporting to be a description of the attached property and correctly describing the other property was relevant, yet, since it differed from the description in the schedule, it could not be relied on to validate the sale of property which was not the property to which the attachment related. *Raja Thakur Barmha v. Jiban Ram Marwari*, 19 C.W.N. 313 = 12 A.L.J. 156 = (1914) M.W.N. 118 = 26 M.L.J. 89 = 15 M.L.T. 137 = 19 C.L.J. 161 = 21 Ind. Cas. 936 = 16 Bom. L.R. 156 = 41 C. 590 (P.C.).

LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

- (2) *Realisation, date of—Confirmation of sale, date of—Interest on decretal amount—Application to set aside sale by another bidder—Stay of proceeding—Sale confirmed.*

The appellant obtained a decree against the respondent for the sum of Rs. 6,900 odd with interest at 6 per cent. per annum until realisation. In execution, the properties of the

Execution Sale—(Continued).

judgment-debtor were sold and purchased by A on the 10th July, 1911, for Rs. 15,000. The auction-purchaser deposited the earnest money on the 11th July and paid in the balance on the 19th of the same month. Meanwhile another bidder at the sale contending that the property had already been knocked down to him for the sum of Rs. 9,000, applied to have the sale set aside and on the 31st July obtained a rule from the High Court staying all proceedings pending the hearing and disposal of his application. The Rule was discharged on the 1st December, the order being communicated and the record returned to the Subordinate Judge on the 1st February. On the following day the sale to A was confirmed. The decree-holder thereupon applied that he should be allowed interest on the decretal amount from the day following the date of sale to the date of confirmation, that is, from the 11th July, 1911, to the 2nd February, 1912:

Held, that, under the circumstances of the case, the decree-holder was entitled to interest up to 2nd February, 1912. *Nafar Chandra Pal Chaudhuri v. Gopal Chandra Mookerjee*, 19 C.L.J. 358 = 22 Ind. Cas. 946.

TEUNON and BEACHCROFT, JJ.

- (3) *Sale proclamation—Settlement of terms—Notice to judgment-debtors—Failure to appear and object—Objection petition put in long time after dismissal of petition—Conclusion and confirmation of sale—Objections to sale proclamation on ground of misdescription—Material irregularity—Substantial injury—Ground for setting aside sale—Order—Res judicata—Appeal.*

Where, on the date fixed for the settlement of the terms of a sale proclamation of several items of immoveable property ordered to be sold in execution of a decree, the judgment-debtors did not appear and object, though notice was served upon them, but allowed the properties to be sold, it is not open to them to subsequently raise objections to the sale proclamation on the ground of misdescription, after the sale has been confirmed and concluded (a).

Where some of the objections raised to the sale proclamation on the ground of misdescription were impossible of compliance, and others trivial in themselves, but no substantial injury was caused thereby to the judgment-debtors, but, on the other hand, the properties were sold at a fairly good price:

Held, that there was no reason for setting aside the sale on the ground of a misdescription in the sale proclamation.

Where, without appearing on the date fixed for the settlement of the sale proclamation, the judgment-debtors appeared subsequently and objected by a review petition, which was dismissed:

Held, that the order operated as *res judicata* in subsequent proceedings and was not

Execution Sale—(Continued).

appealable (b). **Subbaraya Rowthe Minda Nainar v. Muthammal**, 22 Ind. Cas. 780.

SADASIVA AIYAR and SPENCER, JJ.

References:—(a) 12 M. 19 (P.C.)=15 I.A. 171; 21 Ind. Cas. 389=25 M.L.J. 198=14 M. L.T. 320, F. (b) 27 M. 259=14 M.L.J. 57 (F.B.), F.; 23 M. 568=10 M.L.J. 314; 30 C. 617, Diss.

(4) *Suit—Return of purchase money—Sale in execution of decree.*

Held, following the Full Bench decision of **Munna Singh v. Gajadhar Singh**, 5 A. 577, that a suit lies to recover the purchase money on the ground that the judgment-debtor had no saleable interest in the property sold. The correctness of the decision was, however, doubted. **Muhammad Najib Ullah v. Jai Narain**, 12 A.L.J. 908=36 A. 529.

RICHARDS, C.J., and TUDBALL, J.

References:—5 A. 577; 13 A. 383, F.; 5 I.A. 126; 11 A.L.J. 606, R.

(5) *Restitution — Execution sale — Decree, reversal of—Defendant-purchaser—Sale to be set aside—Mortgaged property, sale of—Fund representing mortgaged property—Mortgage-decree—Appropriate remedy—Civ. Pro. Code (1908), O. XXXIV, r. 4—Inherent power.*

An execution sale must be set aside upon reversal of the decree, in case of purchase by the decree-holder in execution of his own decree or by a person not a stranger to the suit but a defendant therein. It is otherwise, if the purchaser at the execution sale is a stranger, who is entitled to retain his purchase. The reason is that the stranger purchaser cannot be expected to go behind the judgment, to enquire into irregularities in the suit; it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order on the faith of which he purchased was made and did authorise the sale.

* In a proceeding for the reversal of the execution sale, the person whose property has been sold must be a party.

R. 4 of O. XXXIV of the Code contemplates a sale of the mortgaged properties, but the decree must be suitably modified in exceptional circumstances, where a sale of the mortgaged properties may be impossible. The Court is competent, in the exercise of its inherent power, to give appropriate directions for the disposal of the fund which represents the mortgaged property. **Narendra Chandra Mondul v. Jogendra Narain Rai**, 20 C.L.J. 469.

MOOKERJEE and BEACHROFT, JJ.

(6) *Court-sale—What was intended to be sold and purchased—Question of mixed law and fact—State of law at time of sale—Evidentiary value—View of Privy Council—Effect—Weight to be attached.* **Virutharoyar Neechi Yaerapattam Egupariyadeya Yallavattu Tirumala Ragurama Immudi Kanaka Ramaya**

Execution Sale—(Continued).

Alagaraya Gounder v. Minakshi Naidu, (dead), 10 M.L.T. 298=(1911) 2 M.W.N. 328=37 M. 22. See Final Part, 1911, Col. 511.

(7) Land purchased in execution in adverse possession of third person—Symbolical delivery of such land whether effective in saving limitation. See ADVERSE POSSESSION, No. 2, 21 Ind. Cas. 765.

(8) Saleable interest none or small—Whether sale may be set aside. See CIV. PRO. CODE (1908), No. 861, 21 Ind. Cas. 774.

(9) Setting aside auction sale on ground that judgment-debtor had no saleable interest—Fraud of decree-holder concealing his knowledge—Effect. See CIV. PRO. CODE (1908), No. 362, 7 Bur. L.T. 18.

(10) Insufficient notice of auction-sale—Loss to judgment-debtor—Sale when to be set aside. See CIV. PRO. CODE (1908), No. 359, 48 P.W. R. 1914.

(11) Whether sale of some of the properties sold can be set aside—Substantial loss with regard to some if vitiates sale as to whole. See CIV. PRO. CODE (1903), No. 352, 18 C.W.N. 947.

(12) Insufficient amount deposited by judgment-debtor or wrong information received from chief ministerial officer of the Court—Sale whether may be set aside on depositing the balance. See CIV. PRO. CODE (1908), No. 347, 22 Ind. Cas. 842.

(13) Sale set aside on account of fraud between auction-purchaser and decree-holder—Fraud—Abuse of the process of the Court—Application to executing Court by judgment-debtor for mesne profits if maintainable—Right to compensation. See CIV. PRO. CODE (1908), No. 4, 22 Ind. Cas. 839.

(14) Sale of immoveable property in execution of money-decree—Holder of another decree against the same judgment-debtor whose application for execution had been dismissed for non-prosecution prior to sale, if entitled to apply for setting aside the sale. See CIV. PRO. CODE (1908), No. 353, 18 C.W.N. 1311.

(15) Person not entitled to rateable distribution whether may apply for setting aside the sale on ground of fraud. See CIV. PRO. CODE (1908), No. 355, 27 M.L.J. 302.

(16) Application to set aside sale—Dismissal for default—Application for restoration dismissed—No appeal. See CIV. PRO. CODE (1908), No. 360, 19 C.W.N. 25.

(17) Proceedings to set aside sale—Real owner not necessary party. See CIV. PRO. CODE (1908), No. 363, 24 Ind. Cas. 44.

(18) Sale contrary to the terms of decree—Application to set aside—Limitation. See CIV. PRO. CODE (1908), No. 217, 27 M.L.J. 605.

(19) Power of Court to adjourn sale after partially holding it—Judgment-debtor's right to adjourn sale by tendering balance. See CIV. PRO. CODE (1908), No. 842, (1914) M.W.N. 873.

Execution Sale—(Concluded).

(20) Application to set aside sale dismissed by first Court—Sums deposited by auction-purchaser withdrawn by decree-holder and judgment-debtor—Sale set aside on appeal—Inherent power of Court to order restitution. See CIV. PRO. CODE (1908), No. 220, 24 Ind. Cas. 384.

(21) Rent decree—Sale in execution—Suit for possession by representative of purchaser—Judgment-debtor in possession—Judgment-debtor out of possession—Effect—Limitation. See LIMITATION ACT (1908), No. 128, 19 C.L.J. 209.

(22) Person aggrieved kept out of knowledge of right to have relief by reason of fraud—Execution sale—Fraud of decree-holder and collusion with Court Officers—Suppression of notices—Judgment-debtor kept out of knowledge of sale—Applicability of S. 18, Limitation Act—Fraud subsequent to sale, if necessary to be proved. See LIMITATION ACT (1908), No. 39, 24 Ind. Cas. 249.

(23) Whether Court gives warranty of title in execution sales. See MORTGAGE (BY CONDITIONAL SALE), No. 3, 23 Ind. Cas. 871.

(24) Sale for arrears of rent relied on as title in redemption suit—Burden of proof—Nature of evidence. See MORTGAGE (REDEMPTION), No. 6, 22 Ind. Cas. 17.

(25) Sale proclamation—Upset price based not on value of lease-hold interest, but on annual net income—Inadequacy of price—Material irregularity—Sale to be set aside. See SALE PROCLAMATION, No. 1, 21 Ind. Cas. 592.

Executor.

(1) *Executor, powers of—Settling the claim with the Bank—Legatee cannot sue the executor if his action bona fide—Whether a suit lies.*

Certain legacies were given by a will to certain persons out of a certain sum of money kept in fixed deposit with a certain Bank. It appeared that the testator had agreed that that deposit should be security to the Bank for a certain sum advanced by the Bank to the testator's daughter. On the death of the testator, his executor having satisfied himself as to the truth of the allegations made by the Bank, allowed it to deduct the money advanced from the fixed deposit. The legatees sued the executor and the Bank for the money thus deducted.

Held, that the suit could not be maintained by the legatees against the Bank, as the Bank was entitled to look to the executor and to settle all questions with him so long as there was no fraud.

Held, further, that the power of executor acting *bona-fide* to settle claims in respect of the estate of his testator cannot be disputed and he was justified in settling with the Bank and in the way he did. **Herbert Archibald Pecoock**

Executor—(Concluded).

v. The Delhi and London Bank, Limited, Mussoorie, 12 A.L.J. 274=36 A. 217=23 Ind. Cas. 143.

RICHARDS, C.J., and BANERJI, J.

(2) Executor if liable to pay income-tax for income of estate—Suit for declaration that such income is not liable to be taxed if lies. See ACT II OF 1886 (INCOME-TAX), No. 1, 19 C.W.N. 198.

(3) Sale of devised property by executor along with some other beneficial owners—Interpretation of sale deed—What passes under the sale. See SALE, No. 9, 27 M.L.J. 93.

(4) Executor—Appointment by implication. See WILL, No. 14, 7 L.B.R. 266.

Ex parte Decree.

(1) *Fraud—Misrepresentation that a particular method of service would supply notice of suit to defendant—Decree ex-parte—Liable to be re-opened on ground of fraud—Allegation of fraud in plaint—Sufficiently indicating fraud proved.*

On the date on which a notice of suit was to be issued by the Court, A, falsely represented that B, the defendant was away from home in a distant part of the country and that notice should go to him in the form of advertisement in a newspaper of that part, and thus obtained an *ex parte* decree against the defendant. B sued A on the allegations that A had fraudulently obtained an *ex-parte* decree by concealing the real facts and fraudulently secured execution of the decree in B's absence and without his knowledge:

Held, that the *ex parte* decree was secured by fraudulent misrepresentation, that the method of service adopted would supply B, with notice of suit, and this fraud was sufficiently indicated by the allegations in the plaint.

That A's action was clearly fraudulent within the terms of S. 17 of the Contract Act, and B was entitled to re-open the issues decided in the previous suit. **Mela Ram v. Ralla Ram**, 75 P.L.R. 1914=40 P.W.R. 1914=22 Ind. Cas. 549=65 P.R. 1914.

REID, C.J., and KENSINGTON, J.

(2) *Order setting aside ex parte decree—Revision whether lies—Practice of Madras High Court—S. 115, Civ. Pro. Code (1908).*

The practice of the Madras High Court has been to entertain revision petitions under S. 115, Civ. Pro. Code (1908), against an order setting aside an *ex parte* decree.

Such being the practice, the reasons for abandoning that practice call for careful scrutiny, when its abandonment will entail in many cases the holding of a trial on the merits which will ultimately turn out to have been unnecessary. **Karupayee v. Chinnammal**, 16 M.L.T. 101.

OLDFIELD, J.

References:—26 M. 604; 34 A. 592; 18 B. 35, R.

Ex parte Decree—(Continued).

- (3) *Ex parte decree, cancellation of, suit for—Decree obtained by fraud—Claim, falsity of, effect of plaintiff's knowledge as to—Fraudulent conduct—Estoppel.*

If a plaintiff knowing his claim to be baseless puts a defendant into Court and succeeds in getting an *ex parte* decree, he cannot, in a subsequent suit brought by the latter for cancellation of the decree on the ground of its being obtained by fraud, plead that he was not guilty of fraudulent conduct. That very knowledge of the plaintiff amounts to fraud. *Medari Singh v. Ram Ratan*, 23 Ind. Cas. 976.

LINDSAY, J.C.

(4) Conditional order setting aside decree—Condition not fulfilled—Extension of time—Appeal from order—Effect of conditional order. See CIV. PRO. CODE (1908), No. 287, 12 A.L.J. 38.

(5) Service of summons—Declaration as to service when not justified—*Ex parte* decree when may be set aside. See CIV. PRO. CODE (1908), No. 255, (1914) M.W.N. 79.

(6) Application to first Court to set aside—Application to District Court for transfer of case—Rule issued—Case decided by first Court pending hearing of Rule—Effect—Material irregularity—Revision. See CIV. PRO. CODE (1908), No. 175, 19 C.L.J. 258.

(7) Failure of defendant to appear in the course of the hearing after plaintiff has closed—Court, if may proceed to pass judgment on the materials before it—Application to set aside judgment as made *ex parte*—Maintainability. See CIV. PRO. CODE (1908), No. 281, 18 C.W.N. 775.

(8) Adjournment of case—Non-appearance of defendants on the date fixed—Procedure to be followed—*Ex parte* decree—Application to set it aside if can be entertained. See CIV. PRO. CODE (1908), No. 280, 19 C.L.J. 535.

(9) *Ex parte* decree—Pleas raised in subsequent suit—*Res judicata*. See CIV. PRO. CODE (1908), No. 40, 226 P.L.R. 1914.

(10) *Ex parte* decree against several defendants—Application to set it aside made by some—Power of Court to set aside decree against non-applying defendants. See CIV. PRO. CODE (1908), No. 288, 246 P.L.R. 1914.

(11) *Ex parte* decree against debtor and his surety—Surety alone applying for setting aside of decree—Decree set aside against both. See CIV. PRO. CODE (1908), No. 289, 24 Ind. Cas. 115.

(12) Perjured evidence whether a ground for setting aside *ex parte* decree. See FRAUD, No. 2, 18 C.W.N. 447.

(13) How far operates as *res judicata*—*Ex parte* decree against Hindu widow declaring plaintiffs to be reversioners—Right of subsequent transferees from widow to deny their right. See *RES JUDICATA*, No. 13, 12 A.L.J. 1011.

Ex parte Decree—(Concluded).

(14) *Ex parte* decree—Order setting aside—Revision against—Petition presented after long delay—Acquiescence—No revision. See REVISION, No. 1, 27 P.R. 1914.

Ex parte Order.

(1) *Res judicata*—*Ex parte* order in execution—O. IX, r. 13. Civ. Pro. Code, applicability of. See CIV. PRO. CODE (1908), No. 66, 26 M. L.J. 189.

(2) *Ex parte* order that execution is not barred—No notice to judgment-debtor—Judgment-debtor is estopped from pleading bar of limitation. See EXECUTION OF DECREE, No. 8, 20 C.L.J. 15.

Explosives Act.

See ACT VI OF 1908.

Ex-proprietary Tenancy.

(1) Right acquired by adverse possession—Whether proprietary right or right of ex-proprietary tenant. See ADVERSE POSSESSION, No. 14, 12 A.L.J. 1153.

(2) See LANDLORD AND TENANT.

Family Arrangement.

Meaning of—Test of. See HINDU LAW* (WIDOW), No. 8, 17 O.C. 108.

Famine.

Borrowing money for expenses during famine—Legal necessity. See HINDU LAW (WIDOW), No. 7, 22 Ind. Cas. 669.

Fatal Accidents Act.

See ACT XIII OF 1855.

Father and Son.

(1) Misappropriation by father—Suit against sons—Limitation. See LIMITATION ACT (1908), No. 87, 16 M.L.T. 614.

Father-in-law and Son-in-law.

Nature of relation between. See LIMITATION ACT (1908), No. 23, 22 Ind. Cas. 936.

Fazendari Tenure.

(1) *Fazendari*—Incidents of the tenure—Subletting by a *Fazendari*.

The expression "*Fazendari* tenure" is to be referred, historically and in its inception, to the relations existing between the original *Fazendari*s and the Government.

All true *Fazendari*s are persons holding plots of land, probably acquired before the advent of the British Government, upon perpetual tenure subject only to the payment of a nominal rent to the Government. Every such *Fazendari* might deal with the land, he so held, as he pleased and might sub-let it just as any other owner of land or buildings might sub-let his property, and it would not necessarily follow that any element of the original tenure was introduced into those sub-contracts. The relations so created are purely contractual.

Where a tenant takes from a *Fazendari*, and it is expressed in the lease that the tenant takes

Fazendari Tenure—(Concluded).

on "Fazendari tenure, and the terms of the lease are not in themselves inconsistent with such an expression, it may be safely assumed that the real intention of the parties was that the Fazendar intended to transfer to the tenant upon the agreed rent exactly the same relations, as between them, in which he in turn as Fazendar stands to the Government, that is to say, that, in all these sub contracts, where the Fazendar designedly gives them upon Fazendari tenure, the term "Fazendari" must be read between the parties, in the sense in which it has always been understood to denote the character of the tenure of the true Fazendar as between himself and the Government, that is to say, a permanent tenure. **Yeshvant Vishnoo Nene v. Keshavrao Bhaiji**, 16 Bom L.R. 252 = 23 Ind. Cas. 880.

BEAMAN, J.

(2) Incidents of. See LANDLORD AND TENANT, No. 33, 16 Bom. L.R. 720.

Fictitious Entries.

Of property with a view to give jurisdiction—Effect. See REGISTRATION, No. 2, 18 C.W. N. 817.

Financial Commissioner, Punjab.

Powers of revision. See ACT XVI OF 1887 (PUNJAB TENANCY), Nos. 5 and 17, 1 P.R. 1914 (Rev.) and 4 P.R. 1914 (Rev.).

Firm.

(1) Suit against firm—Names of partners not disclosed in plaint—Application for service of summons on certain person as partner—Representation made at the time of service—Effect—Refusal to accept—Service on outer door of firm office—No written notice as to capacity in which summons was served—Duty of person served. See CIV. PRO. CODE (1908), No. 81, 19 C.L.J. 581.

(2) Suit in the name of a firm—Verification of plaint. See CIV. PRO. CODE (1903), No. 393, 12 A.L.J. 1029.

Fishery.

(1) *Jalkar rights in a river—Bed of a river—Meaning of—Hunter's Statistical Accounts, if can be referred to for establishing existence of private rights.* **Mussamut Bibi Ahmodi Begum v. Mahasay Tarakdath Ghose**, 17 C.W.N. 1173 = 18 C.L.J. 399 = 21 Ind. Cas. 233. See Final Part, 1913, Col. 601.

(2) See JALKAR.

Foreign Court.

(1) *Foreign Court—Submission to jurisdiction—Conditions necessary to constitute—Mere residence whether sufficient—Employment of agent with power to sue in such Court—Effect—Service on agent—Judgment against firm upon such service—Not personally enforceable against partners—Civ. Pro. Code, O. XXX, r. 1.* **Ramanathan Chettyar v. Kalimuthu Pillay**, 24 M.L.J. 619 = 18 Ind. Cas. 189 = 37 M. 163. See Final Part, 1913, Col. 602.

Foreign Court—(Concluded).

(2) Decree passed by Court in British India—Not *res judicata* in suit pending in Court in Native State. See CIV. PRO. CODE (1908), No. 43, 12 A.L.J. 1074.

(3) Decree against a non-resident foreigner—Execution—Voluntary submission to jurisdiction—Effect. See JURISDICTION (GENERAL), No. 1, 16 Bom. L.R. 620.

Foreigner.

Public trust—Non-resident foreigner whether can claim to be hereditary trustee. See TRUST, No. 3, 16 M.L.T. 104.

Foreign Judgment.

(1) Decree of Cochin Court—Transfer to British Indian Court for execution—Executing Court whether can question jurisdiction of foreign Court—Submission to jurisdiction when voluntary. See CIV. PRO. CODE (1908), No. 48, 27 M.L.J. 535.

(2) Foreign judgment—Defendant's failure to answer interrogatories—Defence struck out—Judgment for plaintiff—Judgment whether given on the merits—Right to sue on the foreign judgment—Cause of action. See CIV. PRO. CODE (1908), No. 47, 27 M.L.J. 670.

Foreign Law.

Extension of, to India to be permitted under what safeguards. See JALKAR, No. 2, 18 C.W. N. 1217.

Forest Right.

Lease of—Money payable in respect of—Suit for money—Jurisdiction of Small Cause Court. See ACT VIII OF 1885 (BENGAL TENANCY), No. 75, 20 C.L.J. 227.

Fraud.

(1) *Right to sue—Fraud—Compromise—Ex parte decree obtained without mentioning compromise—Decree obtained by fraud—Proper remedy.*

Where a plaintiff suppresses a compromise from the knowledge of the Court and obtained against the defendant an *ex parte* decree, the proper remedy for the defendant, though there may be other remedies open to him, is to bring a suit to set aside the decree as one obtained by fraud. **Subbaiyar v. Kallapiran Pillai**, 22 Ind. Cas. 500.

SADASIVA IYER and SPENCER, JJ.

References :—3 M.I.A. 91 = 4 W.R. (P.C.) 47 = 19 Eng. R.p. 464, Rel.

(2) *Ex parte decree, perjured evidence, whether a ground for setting aside—Fraud—Plaintiff knowing evidence to be perjured—Court imposed upon.*

If the case which was placed before the Court was a false one, the Court has jurisdiction in a subsequent suit to set aside the decree which was obtained in the previous suit by fraud

Fraud—(Continued).

practised on the Court. **Kedar Nath Das v. Hemanta Kumari Debi**, 18 C.W.N. 447=22 Ind. Cas. 709.

FLETCHER and CHATTERJEE, JJ.

References :—(1882) 10 Q.B.D. 295; (1890) 25 Q.B.D. 310; 38 C. 936=15 C.W.N. 1010, F.; 16 C.W.N. 1002; (1898) 67 L.J.R. Q.B.D. 301, D.

(3) *Fraud—Decree, suit to set aside, as fraudulent—Pleading—Onus—Kind of fraud to be proved when decree contested—Contrivance, misleading of Court by—Res judicata—Evidence Act, S. 44.*

Per Jenkins, C.J.—The jurisdiction to impugn a previous decree for fraud should be exercised with care and reserve, so as not to encourage in litigants the idea that the final judgment in a suit is to be merely a prelude to further litigation.

Fraud must be established by proof before the propriety of the prior decree can be investigated.

Decrees whether made *ex parte* or by consent or after contest, apparent or real, are equally liable to be attacked for fraud, the character of the fraud varying with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on himself a very heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous.

A prior judgment cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where, and in what way, the fraud was committed (a).

The fraud must be actual positive fraud, a meditated and intentional contrivance, to keep the parties and the Court in ignorance of the real facts of the case and obtaining a decree by that contrivance (b).

Per Curiam.—The decision in the previous suit *res judicata* in the present case. **Nanda Kumar Howladar v. Ram Jiban Howladar**, 18 C.W.N. 681=19 C.L.J. 457=23 Ind. Cas. 337=41 C. 990.

JENKINS, C.J., and CHATTERJEE, J.

References :—(a) 1 Macqueen 535 (1854), R. (b) L.R. 3 Ch. App. 203 (1867), F.

(4) *Fraud—Misrepresentation—Identifying witness—Liability of broker and identifier for false representation.*

The purchaser of a house sued to recover its price from the broker who had arranged the sale and the attesting witness who had also identified the vendor before the registration officer on the ground of false representation by the broker and false identification by the witness. The lower Court decreed the claim against both defendants but its finding against the identifier was only this that, though he pointed out the false man as the real owner, he did not know that the representation was false.

Fraud—(Continued).

Heid, that the finding is defective, and that, for the plaintiff to succeed as against the identifier, it was necessary to prove that he presented the false man to be the owner of the property sold and that he made this representation knowing it to be false or made it without belief in its truth or recklessly without caring whether it was true or false and also that the plaintiff was intended to act and did in fact act in reliance on the said representation. **Haji Sadulla v. Jawahir Karim Bux**, 22 Ind. Cas. 818.

TWOMEY, J.

References :—37 Ch. D. 541=57 L.J. Ch. 347=59 L.T. 78=33 W.R. 899, *Rel.*

(5) *Fraud—Decree obtained by fraud—Contract Act, S. 17.*

A Court shall not declare a decree to be a nullity on the ground of fraud, unless, it can define in clear terms, the fraudulent act or acts by which the decree was obtained. But it will not take "fraud" in the narrow sense in which it is defined in S. 17 of the Contract Act. **Shin-homal valad Jialdas v. The Manager, Encumbered Estates in Sind**, 8 S.L.R. 3=25 Ind. Cas. 789.

HAYWARD, J.C., and CROUCH, A.J.C.

References :—2 Sm. L. Cas. 731; 20 How. St. Tr. 537; 94 H. L. Jo. 655; 1 Leach. C. C. 146; (1867) 3 Ch. 203; 18 L. T. 134; 16 W.R. 441; 21 C. 612 (617), R.

(6) *Fraud not actually carried into effect—Borrow mortgages effected to shield property from creditors—Decree by creditor—Attachment of property—Mortgage claim recognized and mentioned in proclamation—Debtor satisfying claim before sale—Suit by mortgagees—Plea by mortgagor that the mortgages were without consideration.* **Girdharilal v. Manikamma and Girdharilal v. Yeshodabal**, 15 Bom. L. R. 805=21 Ind. Cas. 50=38 B. 10. See Final Part, 1913, Col. 605.

(7) *Fraud—Suit for declaration of title and possession—Fictitious suit, decree and sale—Agreement to execute release—Specific performance—Limitation—Fictitious conveyance—Fictitious vendee, if defrauded—Relief—Civ. Pro. Code of 1832, S. 307.* **Akhil Prodhan v. Manmatha Nath Kar**, 15 C.L.J. 616=18 C.W.N. 1331=22 Ind. Cas. 86. See Final Part., 1913, Col. 607.

(8) *Creditors—Fraud of—Assignment—in validity.* See ASSIGNMENT, No. 2, 26 M.L. J. 473.

(9) *Order recording satisfaction of decree—Order obtained by fraud on Court—Power to vacate order—Revision.* See CIV. PRO. CODE (1908), No. 218, 27 M.L.J. 172.

(10) *Suit by decree holder against judgment-debtor—Defence that decree was collusively obtained whether available to defendant.* See CIV. PRO. CODE (1908), No. 339, 23 Ind. Cas. 755.

Fraud—(Concluded).

(11) **Fraud—Ground for extending limitation—Insertion of new plea—Amendment—Not to be allowed.** See CIV. PRO. CODE (1908), No. 263, 8 S.L.R. 69.

(12) **Fraud—Suit to set aside decree on the ground of—Maintainability.** See DECREE, No. 1, 8 S.L.R. 81.

(13) **How to be proved.** See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

(14) **Confirmation of Court sale induced by fraud—Ejectment suit by auction purchaser—Right of defendant in possession to prove plaintiff's fraud.** See EVIDENCE ACT, No. 29, 23 Ind. Cas. 1.

(15) **Decree obtained by fraud—Suit for cancelling *ex parte* decree—Effect of plaintiff's knowledge as to falsity of claim—Fraudulent conduct—Estoppel.** See EX PARTE DECREE, No. 3, 23 Ind. Cas. 976.

(16) **Person aggrieved kept out of knowledge of right to have relief by reason of fraud—Execution sale—Fraud of decree-holder and collusion with Court Officers—Suppression of notices—Judgment-debtor kept out of knowledge of sale—Applicability of S. 18, Limitation Act—Fraud subsequent to sale, if necessary to be proved.** See LIMITATION ACT (1908), No. 39, 24 Ind. Cas. 249.

(17) **Fraud and collusion—More suspicion—Distinct allegation and proof.** See MORTGAGE (GENERAL), No. 16, 23 Ind. Cas. 510.

Fraudulent Preference.

How determined. See ACT III OF 1907 (PROV. INSOLVENCY), No. 35, 19 C. W. N. 157.

Fraudulent Transfers.

(1) **Fraud—Dishonest alienation and dishonest acquisition—No difference—In *pari delicto* applies—Clear issue—Right by birth and right by survivorship—Hindu Law—Practise—Onus—Whole evidence.**

When the whole evidence on both sides has been let in, it is not legally sound to lay stress on the burden of proof, and the Court should weigh the evidence let in and the probabilities as a whole and then arrive at its findings on the facts.

The question of construction of documents is a question of law.

There is no distinction on principle between the fraud by which a dishonest debtor alienates his properties nominally to another or by which he buys properties nominally in the name of another. In either case the maxim '*In pari delicto*' applies.

Sadasiva Iyer, J.—Where a Hindu Mitakshara father has purchased property in the name of another with a view to defraud his creditors and has partially succeeded in gaining his object, the property cannot be allowed to be recovered on behalf of the family by another co-purchaser for reasons of public policy.

Fraudulent Transfers—(Continued).

Right by birth and right of survivorship are customary rights recognised by Mitakshara but are inconsistent with the progress of the community and with the rule of the more ancient and authoritative shastras.

Where the pleadings raise an issue with sufficient clearness, it is not necessary that it should be put forward in a particular form. **Ramasubba Aiyar v. Avuadi Ammal**, (1914) M.W.N. 595.

SADASIVA AIYER and TYABJI, JJ.

(2) **Civ. Pro. Code (1908), S. 100—Second appeal—Findings of fact—Erroneous view of law—Interference by High Court.**

Findings of fact of a Lower Appellate Court are conclusive in second appeal. But if those findings have been arrived at on an erroneous view of the law, the High Court will interfere.

One A, who was carrying or about to carry on a business, made over the whole of his properties, including even his homestead, to his wife, the plaintiff, by a *hibbanamah*; and it was asserted in answer to the claim of the wife that this was done either with the intention of defrauding or with the effect of defrauding A's creditors. The Lower Appellate Court said that, in the absence of a single word by the witnesses of A that the gift by him was not a *bona fide* transfer, it could not hold that it was a fraudulent transfer.

Held, that the facts to which the witnesses could depose were facts from which an inference might, or might not, be drawn upon the issue raised in the case; and the fact that they did not state in so many words that the document was fraudulent made no difference.

Held, further, that it was sufficient to show that the *hibbanamah* was executed with the intention or with the effect of defrauding creditors generally, that is, creditors whose debts were not in existence at the time of the execution of the *hibbanamah* but might subsequently accrue, and it could not be said that the *hibbanamah* was not fraudulent, because it was not devised with the intention of defrauding creditors whose debts were not in existence at the date of its execution. **Ram Kanai Shaha Bhunia v. Chandra Balli Dasi**, 23 Ind. Cas. 796.

WOODROFFE and WALMSLEY, JJ.

(3) **Fraudulent conveyance—Bona fides and adequate consideration—Burden of proof—S. 110 of the Evidence Act—Relationship of the parties—Presumption.** **Ma Kyin v. Ram Pershad**, 6 Bur. L.T. 185=21 Ind. Cas. 333. See Final Part, 1913, Col. 609.

(4) **Transfer to defraud creditors—Creditors not defrauded—Estoppel—Rights to transferor.** See BENAMI TRANSACTIONS, No. 5, 23, Ind. Cas. 620.

(5) **Sale by debtor to defeat creditor—Purchaser aware of fraudulent intention of vendor—Effect.** See CIV. PRO. CODE (1908) No. 340, 253 P.L.R. 1914.

Fraudulent Transfers—(Concluded).

(6) Defeating future creditors—Fraud—Burden of proof—Knowledge of creditor. See TRANSFER OF PROPERTY ACT, No. 39, 12 A. L.J. 1098.

(7) Suit to avoid—Frame of Suit—Intent must be to defraud creditors generally—One creditor securing payment of his debt—Purchaser for present consideration—Difference in their liability—Proof required of each—Relationship—Presumption. See TRANSFER OF PROPERTY ACT, No. 32, 23 Ind. Cas. 341.

Garnishee.

Decree—Execution—Attachment of debt—Garnishee claiming set-off—Set-off can be claimed by garnishee—Payment of Court fees not necessary—The claim must be made within a year of the disallowing of the garnishee's objection by the executing Court. See CIV. PRO. CODE (1882), No. 27, 16 Bom. L.R. 520.

General Clauses Act.

See ACT X OF 1897.*

Ghattuthumulu Cess.

Ghattuthumulu cess—Inamdar—Liability to pay to Zemindar even after enfranchisement.

Act VIII of 1869 makes it clear that pre-existing rights of Zemindars are not to be disturbed by the fact of enfranchisement.

Ghattuthumulu cess is not a revenue within the meaning of Ss. 4 and 12 of Reg. XXV of 1802. Where Ghattuthumulu cess has been paid before enfranchisement, the Inamdar is bound to pay the Zemindar the cess even after enfranchisement. *Gogineni Yenkatanarasimhanarayudu v. Sri Rajah Yenkata Rangayya Appa Row Bahadur*, (1914) M.W.N. 373=22 Ind. Cas. 972.

SESHAGIRI IYER, J.

Ghatwali Mahal.

Part of—Suit for ejectment—Court fee payable. See COURT FEES ACT, No. 9, 19 C.L.J. 342.

Gift.

(1) Property purchased in name of wife and children—Presumption—Presumption when rebutted. See BENAMI TRANSACTIONS, No. 6, 24 Ind. Cas. 10.

(2) Memorandum of an already completed oral gift—Registration whether necessary. See CUSTOMS (PUNJAB—ALIENATION), No. 6, 92 P.L.R. 1914.

(3) Donee's lineal descendants in female line present—Alienation of gifted property by widow—Right of donor's descendants to contest. See CUSTOM (PUNJAB—GIFT), No. 2, 99 P.L.R. 1914.

(4) Gift in favour of wife—Intention to defraud future creditors—Validity of gift. See FRAUDULENT TRANSFERS, No. 2, 23 Ind. Cas. 796.

(5) Transaction whether sale or gift—Test to be applied. See SALE, No. 2, 19 C.L.J. 239.

Goods.

Sale of grain—Delivery to be made according to 'office terms' in Karachi—Due date falling on Sunday—When delivery to be completed—Time for sampling and analysis of goods. See CONTRACT ACT, No. 37, 7 S.L.R. 141.

Good will.

Of business, what is. See TRADE MARKS No. 1, 19 C.W.N. 1.

Government.

(1) Public pathway—Suit against Government—Possession by plaintiff for 12 years—Onus on Government to prove possession within 60 years. See ADVERSE POSSESSION, No. 9, 27 M.L.J. 299.

(2) Digwari tenure—Powers of Government to determine fitness of heir—Effect of sanction of Government—Sanction whether may be withheld—Action of Government if open to review by Courts. See DIGWARI TENURE, No. 1, 18 C.W.N. 1066.

(3) Right of Government to distribute water—Use of channel by villagers—Appeal by Government or parties interested. See WATER, No. 1, (1914) M.W.N. 788.

Government of India Act (1858).

S. 64. See LIMITATION ACT (1908), No. 30, 18 C.W.N. 1066.

Government of India Act (2 and 3, Geo. V, c. 6).

Position of Government of India towards the Calcutta University—Nature of University lectureship. See MANDAMUS, No. 1, 18 C.W.N. 430.

Grant.

(1) *Settlement-deed—Grant for maintenance—Construction—Powers of grantor—Distinction between conditional grants and grants containing directions for enjoyment—Lease by guardian in excess of his powers—Validity—Right of minor—Ss. 10, 11, Transfer of Property Act—Grant for maintenance—Whether alienation by grantee may be prevented under Hindu Law—Suit for rent after Estates Land Act came into force—Non tender of patta whether a good defence.*

Z executed a settlement-deed in favour of his wife M and his minor son R, which ran as follows:—"I have given to the said M this day for herself and minor R and left in her enjoyment the buildings, gardens and other immoveable properties, for the maintenance, clothing and other expenses of the said M and...R."

There was a further provision that, after the lifetime of M, R should enjoy all the said villages; and the grantees were not to alienate by sale, mortgage, etc., as the properties were intended for the maintenance of the grantees.

M executed a lease for a period of 15 years to the present plaintiff and died soon after the execution of the lease. The lessee sued for rents from the ryots.

Grant—(Continued).

Held, on the construction of the grant, that the document cannot be regarded as merely creating a right of management in favour of M, but that the grant was to both M and R and that M was to hold possession on behalf of herself and her son. Her right was to cease with her life and afterwards the son was to enjoy the whole. Both the mother and the son were created tenants-in-common during the lifetime of the mother after which the son was to hold the whole (a).

Held, also, that, by the terms of the grant, the enjoyment of the property was not restricted to the grantee personally. The provision that M herself should give pattas and take *muchillikas* and collect the kist was not intended to restrict the right of enjoyment, but to make it clear that she was to have powers with respect to the management which might otherwise be doubtful with respect to the provisions of Act XII of 1865.

The fact that the grant was for the maintenance of the grantees is not sufficient to show that the enjoyment of the property was restricted to the grantees personally. Maintenance might be derived out of the property by the grantees without enjoying the property personally.

Though a grant may prescribe the mode in which the grantee is to enjoy the property, such a provision would not be binding on him. (See S. 11, Transfer of Property Act, S. 125, Succession Act) (b).

A grant may, no doubt, be conditional on the grantee enjoying it in a particular manner; but where it cannot be construed to be conditional and there is a mere direction or request that the enjoyment should be in a certain manner, such a provision would not be binding (c).

Held, also that the clause preventing alienation by the grantees must be construed as preventing alienations absolutely, and such restriction was invalid.

S. 10, Transfer of Property Act, is applicable to Hindus unless any rule of Hindu Law be affected by it, and there is no rule of Hindu Law that alienations may be prevented in the case of grants for maintenance, though the alienation, of course, would not be valid beyond the time that the grant itself enures (d).

The validity of even limited restraints on alienation is doubtful (e).

Held, also that the settlement-deed constituted M as the guardian of minor R and that the lease by M could not be objected to on the ground that M, had no right to deal with the son's properties at all.

Held, also that the lease cannot be treated as void because it was to last for 15 years which would extend to about 5 years beyond the minority of the son.

A lease executed by a guardian beyond his powers must be held to be not void altogether

Grant—(Continued).

against the minor, but only as voidable by him (f).

The party who is entitled to avoid may do so by an unequivocal act repudiating the transaction and not necessarily by getting a decree of Court setting it aside (g).

The right to avoid appears to be a personal privilege. No doubt a suit may be instituted by the minor through a next friend to set aside a transfer by a guardian even during the time of minority, but the suit should be by the minor himself and the setting aside of the transaction would be the act of the Court.

In suits for rent instituted after the coming into operation of the Estates Land Act, the non-tender of proper pattas is not a valid objection to the suit. *Held* therefore that the plaintiff in this suit was entitled to recover the rent sued for. **Muthukumara Chetty v. Anthony Udayan**, 15 M.L.T. 361 = 24 Ind. Cas. 120.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 13 M.I.A. 209, R. (b) 16 C.W.N. 99, R. (c) 34 M. 7; 32 C. 683; 3 B.H.C. R. App. 63, R. (d) 25 C. 869; 7 A.L.J. 406, R. (e) 16 C.W.N. 99; R. (f) 4 C. 523; 13 C.L.J. 277; 28 A. 30; 32 A. 392; 14 M. 26; 34 C. 329, R. (g) 9 A.L.J. 215, R.

(2) *Grant burdened with service—Hereditary grant—Inheritance, omission of words of—Services not required—Land, if can be assessed—Bengal Tenancy Act (VIII of 1885), S. 106.*

The omission of words of inheritance in a *sanad*, which confirmed a previous grant of the lands being held for purposes of service, is not sufficient proof *per se* that such grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from father to son for more than 100 years (a).

Where lands are held on a grant, subject to a burden of service, and did not constitute a mere grant in lieu of service as long as the holders of those grants are willing and able to perform the services, the grantor or his representative has no right to put an end to the tenure, whether his services were required or not (b). **Mahadeo Lal v. Kalanand Singh**, 19 C.L.J. 241.

MOOKERJEE and BEACHCROFT, JJ.,

References:—(a) 14 M.I.A. 247 = 11 B.L.R. 71, F. (b) 13 B.L.R. 124 = L.R. I.A. Sup. 181, F.

(3) *Hindu widow—Holding life-estate as legatee—Enlargement of estate by grant from Government subsequent to expiry of original mustajiri lease—Effect of such grant—S. 51, Transfer of Property Act.*

A farming lease of some tracts of waste land in the Kumaon Province was granted in 1844 by the Government to T.S. for a period of 20 years. The exact terms of the lease could not

Grant—(Continued).

be ascertained but it appeared from records that it was the settled and declared policy of the Government in the case of such leases to confer proprietary title on the lessee at the end of the period of the lease if the Government was satisfied with the efforts of the lessee to bring the land under cultivation.

In 1851 T.S. executed a will bequeathing his property to his wife R for her life and after her death to his daughter G for her life and the remainder to the plaintiff. T.S. died in 1852, and thereafter the land remained in the possession of R up to 1871. In that year the Government conferred proprietary title on R and she then sold the land to the defendants. After the death of R and G, the plaintiff as remainderman claimed the land.

Held, that the original lease having expired in 1864, R's possession after that date was in her own personal right and not as a legatee of her husband's estate, that the grant by the Government of proprietary rights was therefore not an enlargement of the original leasehold estate, and the plaintiff had no claim.

Held, also, that, if R's possession up to 1871 had been in her capacity as legatee under the will, the enlargement of the estate must have operated as an enlargement of the estate of her husband for the benefit of the remainderman under the will; and in that case S. 51 of the Transfer of Property Act would not have any application, and the defendants would not have been entitled to be re-imbursed for the expenses incurred by them in making improvements on the land. *Raj Kishore Das v. Jaiot Singh*, 12 A.L.J. 717=36 A. 387=23 Ind. Cas. 364.

TUDBALL and RAFIQ, JJ.

- (4) *Nankar grant—Land subject to burden of service—Right of grantor to put an end to tenure when grantee is willing to perform service—Ejectment.*

Where a grant of land is subject to a burden of service, that is to say, is *nankar*, and not a mere grant in lieu of wages, the grantor has no right to put an end to the tenure, whether the services are performed or not, as long as the grantee is willing and able to perform the services (a).

The defendants and their ancestors had been dwelling upon the land in dispute for more than half a century, being inducted into the land by the plaintiff's predecessor in permissive possession, owing to the facts that the parties were on very friendly terms and the defendants were *kavirajs* by profession. This good feeling led the plaintiff's ancestor to allow the defendants' ancestor to occupy the land and raise huts on it for habitation without payment of rent. The Lower Appellate Court held that this evidence amounted to a proof of presumed *nankar* grant to the defendants' ancestor. The defendants were still holding the profession of *kavirajs* and did not decline to render any service to the plaintiff.

Grant—(Continued).

Held that the plaintiff was not entitled to eject the defendants. *Jogendra Narain Sirkar v. Ram Chandra Adhikari*, 23 Ind. Cas. 300.

HOLMWOOD and CHAPMAN, JJ.

References:—(a) 29 M. 52=3 C.L.J. 1=10 C.W.N. 161=3 A.L.J. 55=8 B.M. L.R. 1=16 M.L.J. 1=1 M.L.T. 3 (P.C.)=33 I.A. 46, F.; 21 C. 938, R.

- (5) *Grant, Moghohi Brahmattar—Tenure, held for more than 100 years at a fixed rent—Evidences of terms of the grant, absence of—Minerals, right to.*

Where a grant was proved to be a Moghohi Brahmattar grant held at a fixed rent for more than 100 years, but there was no document evidencing the grant, and it was not proved that there were mines opened on the property at the date of the grant, or that the grantee, for his successors in interest had a prescriptive right to work any of the minerals under the property:

Held, that the inference that could be drawn from these facts was that, although the Brahmattar was a permanent tenure, the grant did not transfer the minerals to the grantee. *Kunja Behari Seal v. Raja Durga Prasad Singh*, 20 C.L.J. 304=19 C.W.N. 203.

FLETCHER and RICHARDSON, JJ.

References:—37 C. 723; 38 C. 845; 39 C. 696, F.

- (6) *Mining lease—Maintenance grant—Grant for life—No express provisions authorising grantee to open mines—Grantee, if can grant mining lease—Grant, construction of—Oral evidence—Conduct of parties—Mine when open—Intention—Damages, measure of.*

Where a deed was one for maintenance for the life of the grantee and did not contain any express provision authorising the grantee to open new mines and to appropriate the minerals therefrom:

Held, that, under the grant, the grantee had no right to grant a mining lease for the purpose of opening and working new mines.

Cases on the subject reviewed.

The conduct of the parties can be relied on to ascertain the intention of the grantor, in the case of ancient grants whose terms are ambiguous.

A mine is said to be open when it has been devoted, by a person lawfully entitled to do so, to the purpose of making a profit by the working and sale of the minerals therein (a).

Whether a mine is open or not is a question of intention and the intention may be evidenced in various ways (b).

Instances of mines when open and when not open, discussed.

The measure of damages is the value of the minerals wrongfully abstracted at the date of abstraction, less the expenses of converting them into chattel and of carrying them to the

Grant—(Continued).

pit's mouth (c). **F. F. Christian v. Tekaltini Narbada Koeri**, 20 C.L.J. 527.

MUKERJEE and BEACHCROFT, JJ.

References :—(a) (1878) 8 Ch. D. 521, R. (b) (1902) 87 L.T. 33, R. (c) (1879) 13 Ch. D. 574 (586); 2 C.L.J. 20 (44); (1880) 5 A.C. 89 (40), R.

(7) Service grant—Resumption—Grant for public or private services.

Ayling, J.—Where a grant was made having reference to past service, and a small kattubadi was also reserved, and where the grantee was to enjoy from son to grandson and so on in succession, it is a grant burdened with service. In such a case so long as the holders of the grant are willing and able to perform the services, the Zemindar has no right to put an end to the tenure whether the services were required or not. The nature of the services makes no difference in the case of such a grant where lands are enjoyed in lieu of wages. The power of arbitrary resumption would largely turn on whether the services were public or private.

Sadas'va Iyer, J.—The nature of a tenure has to be decided upon the evidence in each case, and in the case of a grant subsequent to the permanent settlement, to which, services of a personal as opposed to a public character are attached, the burden of proving that it is not resumable is on the grantee. Whether the grant is resumable or not has to be decided on a consideration of all the evidence including the nature of the service, the terms of the grant, the question whether the service is attached to any office known by any particular designation and so on. Where the services are such as are reserved to the zemindar personally, there can be very little doubt that the inam was a resumable grant. **Mrutyanjudu v. Raja of Pittapuram**, (1914) M.W.N. 936.

AYLING and SADASIVA IYER, JJ.

(8) Jurisdiction—Burden of proof—Agraharam grant—Grantee owner of kudivaram—Presumption.

It is for the party who wants to oust the jurisdiction of Civil Courts to prove the existence of facts which oust jurisdiction.

No presumption arises that the person to whom the agraharam had been granted was not the owner of the kudivaram at the time of the grant. **Ramala Yenkaataswami v. Kanumalla Narasimhayya**, 16 M.L.T. 596=26 Ind. Cas. 357.

KUMARASWAMY SASTRI, J.

References :—22 Ind. Cas. 399=15 M.L.T. 268=26 M.L.J. 99; 25 Ind. Cas. 891=27 M.L.J. 233, D.; 8 Ind. Cas. 365=8 M.L.T. 376=(1910) M.W.N. 639; 20 Ind. Cas. 769=(1913) M.W.N. 782=24 M.L.J. 659, F.

(8-a) Government grant free of payment of land revenue, sale of, in execution of a mortgage decree—Government refusing

Grant—(Continued).

sale—Suit against Secretary of State, the judgment-debtor and the subsequent transferee, maintainability of—Specific Relief Act, S. 42—Jurisdiction of a Civil Court—Hearing of case on merits, necessity of.

The plaintiff-appellant obtained a mortgage decree entitling him to bring to sale certain lands held by the mortgagor under the terms of a Government grant free of payment of land revenue. In execution of the mortgage decree the plaintiff-appellant applied for sale of the land, but the Local Government refused sanction to the sale on the ground that in view of the terms of the grant the property was inalienable. The plaintiff-appellant then instituted the present suit against the Secretary of State, the judgment-debtor and a subsequent transferee praying for a decree against the Secretary of State declaring that the right, title and interest of the other defendants in the land in question was liable to sale in execution of his decree, and that the judgment-debtor had an alienable interest in the property. The Subordinate Judge dismissed the suit holding that the Civil Court had no jurisdiction to take cognizance of such a suit, that the suit was not maintainable and that he should not in the exercise of his discretion give such a declaration.

Held, that, although the Local Government as an executive authority had an unfettered discretion to refuse sale in such a case, yet the declaration made by it in the same order as to the terms of the grant must be treated to have been made in its capacity of a grantor and could be challenged, and the suit was maintainable in respect thereof.

Held further, that the Civil Court had jurisdiction to hear the suit.

Held, also, that the question of discretion possessed by the Court in the matter of granting declarations could not be considered until the case had been heard upon its merits. **Amar Chand v. Secretary of State**, 17 O.C. 369.

STUART and KANHAIYA LAL, A J.C.S.

(9) Jagir—Grant, if conditional—Tenure created by document—Construction—Presumption—Contract with qualification made with other persons, admissibility of—Alienation of tenure when permissible. **Bhagwat Buksh v. Sheo Pershad**, 18 C.L.J. 277=18 C.W.N. 297=21 Ind. Cas. 481. See Final Part, 1913, Col. 615.

(10) Grant by Government for political considerations—Interpretation of sanad—Opinion of the Revenue officers as to the terms of the grant whether relevant. See CIV. PRO. CODE (1908), No. 105, 12 A.L.J. 437.

(11) Government grant of exclusive fishery—Proof, when original grant not forthcoming, by secondary evidence and evidence of user. See **JALKAR**, No. 2, 18 C.W.N. 1217.

(12) Rent-free grant—Long possession without payment of rent—Presumption. See **LANDLORD AND TENANT**, Nos. 39, 41, 42 and 44, 24 Ind. Cas. 286, 319, 354 and 424.

Grant—(Concluded).

(13) **Shrotriam grant** whether includes Poramboke—Enfranchisement of the village—Effect—Right to minerals in the village. See **SHROTRIAM GRANT**, No. 1, 15 M.L.T. 277.

(14) **Original grant** not forthcoming—Subsequent conveyances through which title derived whether title deeds. See **TITLE DEEDS**, No. 1, 18 C.W.N. 898.

Grazing Right.

Shamilat land—Right of shopkeepers—Permissive grazing whether confers right. See **WAJIB-UL-ARZ**, No. 2, 223 P.L.R. 1914.

Grove.

(1) **Land let out for grove**—Suit for possession—Jurisdiction of Civil Courts. See **ACT II OF 1901 (AGRA TENANCY)**, No. 5, 12 A.L.J. 1080.

(2) **Grove planted by proprietor** with consent of general body of proprietors—Subsequent loss of status as proprietor—Effect. See **LANDLORD AND TENANT**, No. 32, 24 Ind. Cas. 81.

Guardian ad litem.

(1) **Fraud**—Suit to set aside decree for fraud—Mis-statement that there was no fit person to act as guardian ad litem for minor—Negligence in conducting suit by guardian ad litem. **Maruthamall Gownden v. Palani Gownden**, 16 Ind. Cas. 182=37 M. 535. See Final Part, 1913, Col. 620.

(2) **Certificated guardian**—Absence of formal order appointing him guardian ad litem whether fatal to the suit. See **CIV. PRO. CODE (1882)**, No. 54, 22 Ind. Cas. 240.

(3) **Lunatic**—Guardian ad litem not appointed—Effect. **CIV. PRO. CODE (1908)**, No. 46, 22 Ind. Cas. 673.

Guardian and Minor.

(1) **Evidence**—Recital in documents—Onus—Infant—Setting aside deed of guardian—Consideration—Presumption.

The recital in a deed cannot be accepted as evidence sufficient to establish the facts so recited. It would be some evidence on behalf of the party on whom the burden of proof lay to establish the existence of a legal necessity.

The question on whom the onus of proof lies in suits brought by an infant to recover property improperly sold or mortgaged is one not capable of a general or inflexible answer. Whether the onus is shifted in any particular case is a question of fact. Where a great portion of the consideration is satisfactorily proved, strict proof need not be required with reference to every rupee making up the transaction for the debt claimed. **Krishna Rao v. Alvasami Padayachi**, (1914) M.W.N. 490=27 M.L.J. 138=24 Ind. Cas. 426.

TYABJI and SPENCER, JJ.

(2) **Minor**—Guardian—Bond for ancestral debt, executed by mother as guardian of minor son—Liability of son or mother.

Guardian and Minor—(Continued).

Where the mother of a minor son executed a bond purporting to be on behalf of the minor, to pay a debt of his deceased father by instalments, but did not describe herself as his guardian.

Held, (1) that the son was liable for the repayment of the debts as it was his pious obligation to pay that debt and as it could have been recovered by the creditor out of the assets in his hand (a);

(2) that no decree could be given against the mother. **Siva Narayan Ghosh v. Kamakhya Ghose**, 23 Ind. Cas. 877.

MOOKERJEE and BEACHCROFT, JJ.

Reference :—(a) 26 M. 330, F.

(3) **Minor**—Previous suit—Gross negligence of guardian—Decree against minor—Not binding on minor—No res judicata—Hindu Law—Widow—Representative of estate—Suit by her—Decree—Not binding on reversioners—No strangers party to suit—Each member litigating for himself—Decree in favour of widow as representing estate—Suit by reversioner against widow—No res judicata.

Where a guardian deliberately sets up a false plea of adoption and fails to set up the claim of the minor under a will of which also he must have been aware, and a decree is passed against the minor.

Held, that the minor is not bound by the decree passed against him, and that the decree would not operate as res judicata against him. A minor is not bound by a decree passed against him if he shows that his guardian is guilty of gross negligence.

Per **Spencer, J.**—While the widow lives, the reversioners do not represent the estate. Therefore they are not bound by any decision obtained for or against her acting in her capacity as representative of the estate. Moreover in a suit to which no strangers are parties, each member of the family must ordinarily be considered to be litigating for his own benefit and not for the benefit of the estate (a). **Goteapati Subban v. Goteapati Narasamma**, 27 M.L.J. 486.

SANKARAN NAIR and SPENCER, JJ.

Reference :—(a) 30 C. 556 (P.C.), F.

(4) **Parent and child**—Duties—Delegation of guardianship—Right to revoke—Father best Judge—Jurisdiction of High Court—Minors temporarily resident in England—Guardian and Wards Act—Not applicable to High Court—Power to supplement judgment by minute before actual decree is drawn up—Cl. 13 of the Letters Patent—Powers of High Court in suits transferred to its Extraordinary Original Jurisdiction. **G. Narayaniah v. Mrs. Annie Besant**, (1913) M.W.N. 906=21 Ind. Cas. 545. See Final Part, 1913, Col. 621.

Guardian and Minor—(Continued).

(5) *Release executed by mother as guardian—Whether binding on minor—Family arrangement.* *Yiswanathaswami Nalaker v. Kamummal*, 24 M.L.J. 271=21 Ind. Cas. 724. See Final Part, 1913, Col. 622.

(6) *Jurisdiction—Waiver of objection, effect of—Objection may be taken at any stage—Special remedy—Common law right—Guardians and Wards Act (VIII of 1890)—Regular suit for custody of minor, whether lies—Suit originally instituted in District Court—Subsequently transferred to High Court—Extraordinary Original Civil Jurisdiction—Ordinary Original Civil Jurisdiction—Letters Patent, 1865, Cls. 13, 17, 18, 20—Jurisdiction conferred by Cl. 17, exercise of—“Within the Presidency of Madras,” effect of—Domicile of minor to be taken into consideration—Minor in England—Power of High Court to appoint guardian in India—Means of enforcing judgment of High Court—Effective judgment—Civ. Proc. Code, 1908, S. 20, O. XXI, r. 32, O. XXXII, r. 5—Suit for appointment of guardian—Minor, whether to be impleaded as party—Various portions of S. 20 are alternative—Action in personam—Defendant resident or present within jurisdiction—Subject of suit absent from jurisdiction—Welfare of minor—Rights of father—Surrender of custody of minor by father—Recovery of custody—Waiver of paternal rights—Re-assertion of rights—Delegation of paternal rights—Revocation of delegation—Minor nearly of 18, whether guardian should be appointed. *Mrs. Annie Besant v. Narayaniah* 25 M.L.J. 661=21 Ind. Cas. 789=15 M.L.T. 1 (1914) M.W.N. Sup. 1. See Final Part, 1913, Col. 625.*

(7) *Jurisdiction of District Court and High Court in respect of infants—Application by father for custody of infants if by suit or application—Infants when to be represented in an application for custody of their person—Hindu father if may appoint another as guardian of his sons—Authority so given if may be revoked—Father if may be appointed guardian—Common law powers of High Courts and District Courts over infants. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 19 C.W.N. 1089.*

(8) *Application for appointment of guardian of a minor—Directions to third party for depositing the minor's money in Court—Legality. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 1, 12 A.L.J. 788.*

(9) *Returns filed by certificated guardian of minor if admissible in favour of minor. See ACT IX OF 1880 (BENGAL CESS), No. 1, 18 C.W.N. 1076.*

(10) *Prior suit to establish right to property—Guardian ad litem of minor defendant—Later suit by such guardian to establish his own right to the property—Omission to plead personal title in former suit—No bar to subsequent suit. See ESTOPPEL, No. 2, 1 P.R. 1914.*

Guardian and Minor—(Concluded).

(11) *Lease by guardian in excess of his powers—Validity—Rights of minor. See GRANT, No. 1, 15 M.L.T. 361.*

(12) *Suit by a minor after attaining majority for possession of land sold by his guardian during his minority—Limitation. See LIMITATION ACT (1908), No. 65, 17 O.C. 52.*

(13) *Alienation by mother as guardian—Alienation not for legal necessity but consideration applied for benefit of minor—Suit brought to set aside alienation more than three years after attainment of majority—Limitation. See LIMITATION ACT (1908), No. 76, 24 Ind. Cas. 110.*

(14) *Minor's property—Alienation by guardian de facto but not de jure—Effect—Minor's right to recover possession—Limitation—Void contract whether can be ratified. See LIMITATION ACT (1908), No. 140, 10 N.L.R. 133.*

(15) *Lease by de facto guardian who could not be de jure guardian whether valid. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 21 Ind. Cas. 128.*

Guardian and Ward.

(1) *Minor daughter, a ward of Court—Selection of bridegroom—Right of mother and step-brother.*

The right of selection of a bridegroom for the minor ward is in the mother and should not be interfered with by the Court except in very exceptional circumstances. *In the matter of Mani Bai*, 15 M.L.T. 146=22 Ind. Cas. 831.

WALLIS, J.

Reference:—10 M.L.T. 57, F.

(2) *Court's power to re-call the previous order appointing guardian—Minor attaining majority before application for appointing guardian—Effect. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 33, 20 C.L.J. 213.*

Guardians and Wards Act.

See ACT VIII OF 1890.

Guzarat Talukdars Act.

See BOM. ACT VI OF 1888.

Habeas Corpus.

High Courts in India if may order person within jurisdiction to take possession of infants residing in England at the risk of Habeas Corpus. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.

Handwriting.

Comparison of—Powers of Court. See EVIDENCE ACT, No. 17, (1914) M.W.N. 240.

Heir.

(1) *Séquestration of property by attachment—Effect—Right of creditor—Personal liability of heir-at-law—Right of heir to profits. See DEBTOR AND CREDITOR, No. 9, 17 O.C. 207.*

(2) *Heir taking under a trust deed—His liabilities not affected. See HINDU LAW (GENERAL), No. 1, 27 M.L.J. 694.*

Hereditary Offices Act.

See BOM. ACT III OF 1874.

High Court.

- (1) *High Court, Power of—Self-contradictory decrees of lower Court—Proper order—Order passed more than 3 years ago—High Court, when can interfere.*

In the case of two self-contradictory decrees made by the lower appellate Court in the same matter, the High Court set aside the whole proceedings and remanded the case to the lower Court for fresh decision.

The High Court will not revise an order made more than three years ago, unless it feels that by interference complete justice can be done to both the parties. *Asita Mohan Ghose Maulik v. Syed Saha Habibur Rasul*, 19 C.L.J. 9 = 22 Ind. Cas. 801.

MOOKERJEE and BEACHROFT, JJ.

(2) *Jurisdiction of District Court and High Court in respect of infants—Limitations as to jurisdiction—High Courts in India if may order person within jurisdiction to take possession of infants residing in England—Conflict of jurisdiction between Indian Courts and English Courts—Common law powers of Chartered High Courts over infants—Power of Indian High Court to declare infant ward of Court for extending minority—High Court's powers when case transferred from District Court.* See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.

(3) *Omission of qualified candidate's name from election roll—Right to mandamus—Interference of High Court.* See ACT VI OF 1914 (BENGAL MEDICAL), No. 1, 19 C.W.N. 129.

(4) *Suit instituted in the original side of the High Court—Application to stay the suit when entertainable—Abuse of process of Court—Inherent powers of Court.* See CIV. PRO. CODE (1908), No. 55, 27 M.L.J. 645.

High Court (Bombay).

Parsi husband and wife—Jurisdiction of High Court to order permanent alimony without order for judicial separation. See ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE), No. 1, 16 Bom. L.R. 211.

High Court (Calcutta).

Sonthal Pergannahs—Suit valued over Rs. 1,000—Proceedings therein if subject to High Court's superintendence—Order in execution proceeding if may be revised. See ACT XXXVII OF 1855 (SONTHAL PERGANNAS), No. 2, 18 C.W.N. 662.

High Court (Madras).

(1) *Appeal—Admission Court excusing delay—Order subject to objection—Practice.* See APPEAL (GENERAL), No. 10, 23 Ind. Cas. 446.

(2) *Power of High Court to make rules for Presidency Small Cause Court.* See SMALL CAUSE COURTS RULES (PRESIDENCY), No. 1, (1914) M.W.N. 216.

High Courts Act (24 and 25 Vic., c. 104).

(1) S. 15—*Superintendence vested in High Court when can be exercised and over what Courts—Court of Revenue officer in Chota Nagpur—Proceedings for settlement of fair rent—Appeal—Revision.* See BENGAL ACT VI OF 1908 (CHOTA NAGPUR TENANCY), No. 3, 19 C.L.J. 900.

(2) S. 15—*Sub-Deputy Collector of Sonthal Parganas—Appellate jurisdiction of High Court.* See BENGAL ACT XXXVII OF 1855 (SONTHAL PARGANAS), No. 1, 19 C.L.J. 294.

(3) S. 15—*High Court's powers of superintendence.* See REGULATION V OF 1893 (SONTHAL PARGANAS), No. 2, 22 Ind. Cas. 848.

(4) See CHARTER ACT.

High Court Rules.

1.—BOMBAY.

2.—MADRAS.

—1.—Bombay.

- (1) *Bombay High Court Rules (Original Side). r. 107—Summons, service of—Service through registered post—Civ. Pro. Code, 1908, Ss. 129, 131—General Clauses Act (X of 1897), S. 27.*

Where a summons forwarded by registered post, under r. 107 of the Bombay High Court Rules (Original Side), is tendered to, and refused by, the defendant, he refuses it at his own risk. Where he disputes the actual delivery or tender of delivery, it is a mere question of fact, and the onus is on him. *Roopchand v. Hajee Hussain*, 16 Bom. L.R. 204 = 24 Ind. Cas. 437.

BEAMAN, J.

- (2) *Civil Circulars of the Bombay High Court (Appellate Side), Chap. VI, r. 2—Arbitration—Reference to arbitrator—Claim against military officer—Award—Decree in terms of award—Interference by High Court—Civ. Pro. Code (1908), Ss. 115, 151.*

On the 9th July 1913, the plaintiff, a money lender, obtained from the defendant, a Military Officer, a promissory note for Rs. 4,931. On the 11th idem, both the parties signed a reference to arbitration whereby they agreed to refer the matter of money dealing between them to a pleader named, and nominated him arbitrator to settle the accounts and pass a judgment against the officer in favour of the plaintiff on the strength of the promissory note. At the same time, the defendant signed a *vakiltipatra* authorising another pleader to appear in Court and admit the award that may be passed against him. The arbitrator made his award on the 16th July directing that the defendant should pay the plaintiff Rs. 4,931 in cash by instalments and Rs. 30 for the pleader's fees. The plaintiff filed a suit on the same day for obtaining a decree in terms of the award. The Court passed a decree accordingly. The proceedings having come to the notice of the High Court—

High Court Rules—(Concluded).**—f.—Bombay—(Concluded).**

Held, setting aside the decrees under Ss. 115 and 151 of Civ. Pro. Code, that the lower Court disregarded High Court Civil Circulars, Chap. VI, r. 1. **Velchand Chhaganlal Shah v. Lieut. R. C. C. Liston**, 16 Bom. L.R. 517=38 B. 638.

SCOTT, C.J., and BATCHELOR, J.

(3) *High Court Civil Circular 96, (cl.) 1—Decree—Execution—Sale—Condition of sale that interest of only named defendants pass by sale—Interest of grandsons not parties to suit does not pass—Mortgage by the father of family property.* **Timmappa Devarabhatta v. Narasingh Timmaya Hebar**, 15 Bom. L.R. 794=37 B. 631=21 Ind. Cas. 123. See Final Part, 1913, Col. 629.

—2.—Madras.

(1) *Original side—Counsel's fees when instructed by party or by vakil.*

When counsel is instructed by the party in person, the latter is entitled to claim as part of the costs decreed to him the reasonable fee paid to his counsel. And when he is instructed by a vakil, the Taxing officer or the Judge may certify for his fee. **Srinivasa Aiyengar v. Cannippa Chetty**, 26 M.L.J. 567=15 M. L.T. 411=24 Ind. Cas. 895.

SANKARAN NAIR, J.

(2) *Pleadings—Issues framed throwing onus on one side—Cannot be questioned in appeal—Power of an admission Judge to excuse delay in Original Side Appeal—Irregularity in procedure—Original Side r. 335—Appellate Side r. 1.* **Ruthna Gramany v. Yeerabadra Iyer**, (1913) M.W.N. 751=25 M.L.J. 281=21 Ind. Cas. 96. See Final Part, 1913, Col. 631.

Hikimall Tenure.

Hikimall tenure—Lease—Invalid grant—Rent, acceptance of—Occupancy right, acquisition of, under trespasser—Bengal Rent Recovery Act (X of 1859)—Grant, nature of—Adverse possession. **Radha Madhab Narain Hikim v. Milan Mahato**, 18 C.L.J. 23=21 Ind. Cas. 204. See Final Part, 1913, Col. 632.

Hindu Law.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—AFFILIATION.
- 4.—ALIENATION.
- 5.—DEBTS.
- 6.—EXCLUSION FROM INHERITANCE.
- 7.—GIFT.
- 8.—GUARDIANSHIP.
- 9.—IMPARTIBLE ESTATES.
- 10.—INHERITANCE.
- 11.—JOINT FAMILY.
- 12.—MAINTENANCE.
- 13.—MARRIAGE.
- 14.—PARTITION.

Hindu Law—(Continued).

- 15.—RELIGIOUS ENDOWMENTS.
- 16.—RELIGIOUS OFFICES.
- 17.—RESTITUTION OF CONJUGAL RIGHTS.
- 18.—RE-UNION.
- 19.—REVERSIONERS.
- 20.—SELF-ACQUISITION.
- 21.—STRIDHANAM.
- 22.—SUCCESSION.
- 23.—TEXTS.
- 24.—WIDOW.
- 25.—WILL.
- 26.—WOMEN'S ESTATE.

—1.—General.

(1) *Zemindari—Annuity agreed to be paid to a person and his heirs—Whether a charge on the estate—Charge how created—Rule against perpetuities—Meaning of 'santhathi paramaryamayi'—Whether includes collateral heirs—S. 40, Transfer of Property Act—Heir taking estate under a trust deed—His liabilities not affected—Remedies open to annuitant.*

A suit was filed by one S in 1853 against P, the then Zemindarini of Ramnad, for the recovery of the Zemindari on the ground that he was entitled to it in preference to P, the widow in possession. The parties eventually compromised and S agreed to receive a sum of Rs. 700 monthly for herself and his heirs (*Santhathi paramaryamayi*) from the Zemindar of Ramnad in consideration of his having given up his claim to the Zemindari.

Held that this grant of the monthly allowance enured for the benefit of the heirs of S and was enforceable against the successors of P in the Zemindari (a).

Held also per Wallis, C. J.:—that the words of the razinama were not sufficient to impose a charge, but the annuity might be properly made a charge on a part of the Zemindari.

The words '*Santhathi paramaryamayi*' indicated that the annuity was descendible to the heirs of S generally and was not limited only to his lineal descendants.

Assuming that the grant was merely of an annuity payable to S and his heirs, such a grant did not offend against the rules of English Law or Hindu Law.

Per Seshagiri Aiyar, J.:—The remedy open to a person in whose favour an annuity is created is not to bring an administration action only. If assets are admitted, a suit to recover arrears will lie. No special language is necessary to create a charge. It depends upon the intention of the parties. The language of the razinama in this case amounts to creating a charge on the Zemindari.

A grant of this kind is covered by the second clause of S. 40 of the Transfer of Property Act.

There is nothing repugnant to Hindu Law in making such a perpetual grant.

Hindu Law—(Continued).**—1.—General—(Concluded).**

The fact that the present Rajah of Ramnad took the estate as a gift under a trust deed from his father will not take away the liability which would have devolved on him if he had succeeded to the property as son and heir.

Where property is given by will to a person who would otherwise be entitled to it as heir, the character of the property is not changed. The same principle should be extended to transfer *inter vivos*.

The words '*Santhathi paramaryamayi*' convey a heritable estate from generation to generation. They are even stronger than the words '*Putra Pouthra Paramarya*.' They mean the heirs in general. Any person in the line of heirs to S is entitled to recover the allowance and his assignee has the same rights to it. **Rajah of Ramnad v. Sundarapandiaswami Thevar**, 27 M.L.J. 694.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

(2) Interpretation of rules of Hindu Law. See HINDU LAW (INHERITANCE), No. 2, 18 C.W. N. 1154.

—2.—Adoption.

- (1) *Conditional adoption—Widow stipulating for continuing her powers over property—Agreement unreasonable.*

A Hindu widow made, at the time of adopting a boy, an agreement with the natural father of the boy, that she was to retain all the rights she had of managing her husband's property as long as she lived, and that the adopted boy was to get those rights only after her death. The widow having sued for her rights under the agreement:

Held, that the agreement could not be given effect to, as its terms were either fair nor reasonable. **Purshottam Mukund Samant v. Rakhmabai Mukund**, 16 Bom. L.R. 57=23 Ind. Cas. 599.

HEATON and SHAH, JJ.

- (2) *Adoption—Consent of reversioners—Bona fide.*

Where a document simply authorized the adoption of any boy at any time, it is useless to base an adoption upon it. Where the consent is limited to the adoption of the son of the consenting sapinda, it would lose its validity after lapse of time during which circumstances had changed. Where a widow did not consult the nearest reversioner but obtained the consent of three comparatively remote sapindas of whom two were interested directly in approving her project, it cannot be said to be a *bona fide* attempt to take the opinion of the sapindas or a majority of them as the law requires. **Yeera Basavaraju v. Balasurya Prosadarao**, (1914) M.W.N. 502.

WHITE, C.J., and OLDFIELD, J.

- (3) *Adoption of a Brahmin boy by a man of a lower caste—Inheritance—Adoption within the same caste.*

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

Held, that an adoption of a Brahmin boy by a man of a lower caste is not authorised by the Hindu Law.

For the purposes of inheritance each primary caste (varna) must adopt from within its own limits. **Narain Singh v. Musammatt Shiam Kali Kunwar**, 17 O.C. 186.

STUART and PANDIT KANHAIYA LAL, A.J.CS.

- (4) *Adoption—Limit to exercise—Consent of reversioner sapindas—Nearest reversioner—Resusing leave on unreasonable grounds.*

The dictum in **Suryanarayana v. Venkatraman**(a) only lays down that an authority given in general terms cannot be relied upon as validating the adoption made several years afterwards, when several of the sapindas who gave that authority had died, where other sapindas interested in the estate and the affairs of the widow had come into existence and when other similar circumstances had intervened before the adoption actually takes place. It does not lay down that, merely because the sapindas had such confidence in the widow's good sense and good faith as to give her the widest discretion as to the time of adoption and the boy to be adopted, the authority cannot be availed of by the widow when she made the adoption almost immediately after she got the authority and when the sapindas who gave the authority were alive and had not withdrawn their authority.

Whether a further power to make successive adoption is valid or not? Where a nearest reversioner unreasonably refuses to give permission to the adoption, the consent of remote reversioners is quite sufficient to validate the adoption. **Nagarampalli Kamesam v. Nagarampalli Batchamma**, (1914) M.W.N. 620=24 Ind. Cas. 257.

WALLIS and SADASIVA IYER, JJ.

Reference :—(a) 26 M. 681, *Expl.*

- (5) *Adoption—Twice-born class—Datta Homam if necessary—Boy adopted of same gotra.*

Among the twice-born classes, *Datta Homam* is not necessary when the adoptive father and the adopted child belong to the same *gotra*.

Quere, whether *Datta Homam* is at all an essential ceremony for the validity of an adoption. **Katki v. Lakpati Pujari**, 20 C.L.J. 319.

MOOKERJEE and BEACHCROFT, JJ.

- (6) *Authority to adopt—Construction of document—Rule as to—Use of the term 'a son'—Effect—Legality of second adoption—Extrinsic evidence—How far admissible to construe the power—Impartible estate—Whether joint family property governed by Mitakshara Law—Rule as to survivorship—How far applicable—Adoption to last male owner—Rule as to—Existence of adopted son's widow—Bar to second adoption—Intermediate holder in possession of*

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

estate—Divesting by preferential heir—'Vesting of property'—Meaning—Custom of Puro Brahmin.

A, the Zamindar of Chinnakimidi, an impartible Zamindari, died in 1868. Prior to his death, he gave authority to his wife K, to adopt 'a son' to him. K was then pregnant and subsequently gave birth to a daughter. In 1870, K adopted B. Between the death of A and the adoption of B, the Zamindari vested in R, the undivided younger brother of A. R questioned the authority to adopt, and B, the adopted son, sued to recover the Zamindari and having succeeded in the suit divested R. B died in 1908 leaving his widow D him surviving. R succeeded B and died 16 days after accession leaving his sons P and Q. K, purporting to act on the authority given to her by A, adopted M. On behalf of M the present suit was brought to recover the Zamindari from P and Q.

Held that, in the present case, the power to adopt given to K was not exercisable by reason of the fact that B's widow was alive at the time when plaintiff's adoption took place (a).

Per Seshagiri Iyer, J.—(White, C.J., *doubting*). The estate taken by survivorship by a member of a joint Hindu family is a conditional estate subject to defeasance on the coming into existence by adoption or otherwise of a new member into the co-parcenary. The rule of law that, in order that an estate once vested may be divested, adoption should be made to the last male holder is not applicable to co-parcenary property. An impartible Zamindari is a joint family property subject to an exception.

The use of the words 'a son' in the authority to adopt was not intended to be restrictive of the number of adoptions which K was authorised to make.

Held, also, that the authority to adopt in the present case did confer a power to make a second adoption (b).

Per Seshagiri Iyer, J.—From the mere facts that a priest known as the *Puro Brahmin* is generally appointed by these Zamindars to perform their obsequies and *shraahas* and that he also takes the *gotram* of the deceased, it cannot be argued that this hired priest exhausts all the spiritual benefits which a son is expected to confer upon a Hindu father. The performance of these two ceremonies is not the only object of having a son.

The term 'vesting of property' as applied to a Mitakshara joint family is liable to be misunderstood; all that is connoted by the phrase is that, in the absence of preferential heirs, the presumptive heir is entitled to possession of the estate without prejudice to the rights of others which may accrue at some future time. He takes the surviving interest conditionally. He takes no absolute property in it (c).

Held, that the heir to a Zamindari is to be found by regarding the estate as co-parcenary

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

family property and that the Zamindar of Chinnakimidi is governed by the rule of survivorship (d).

The theory that the adoption should be made to the last male holder does not apply to joint Hindu families living in co-parcenary (e).

Where property had passed by inheritance and had vested in a full owner, subsequent adoptions would not divest his property (f).

Quare.—Whether a co-parcenary comes to an end when there are no male members in the family and whether the property then passes to the widow of the surviving member of the joint Hindu family by inheritance (g).

Per White, C. J.—The only safe rule is to try and ascertain the true intention of the donor of the power from the terms in which the authority is given, viewed in the light of such extrinsic evidence as would be admissible if the question for consideration were the construction of a will (h).

Per Seshagiri Iyer, J.—The canon of construction regarding powers to adopt is not different from that of ordinary testamentary dispositions; the intention of the testator has to be gathered from the language employed by him and from the circumstances existing at the time of the grant of the power (h). *Sree Sree Sree Madana Mohana Ananga Deo Kesari Gajapati v. Sree Sree Purushothama Ananga Bheema Deo*, 27 M.L.J. 306=16 M.L.T. 413=24 Ind. Cas. 999.

WHITE, C.J. and SESHAGIRI IYER, J.

References.—(a) 26 B. 526; 23 B. 320; 10 M. 205 (P.C.) and 32 C. 861. R. (b) 39 I.A. 142; 22 W.R. 121, R. (c) 9 M. 64; 29 B. 51. R. (d) 9 M. 64; 18 C. 385; 29 B. 51; 32 M. 429; 35 M. 108; 23 M.L.J. 79; 10 A. 272 (P.C.). R. (e) 3 I.A. 174; 4 I.A. 1; 29 M. 382; 31 B. 373=34 I.A. 107; 10 M.I.A. 279; 39 I.A. 142; 25 B. 306; 18 C. 385. (f) 8 I.A. 229; 12 I.A. 137; 10 M. 205=14 I.A. 67; 8 M.L.J. 173; 10 M.I.A. 279; 22 M.L.J. 85, R. (g) 14 B. 463; 17 B. 164; 33 O. 1906, *Cited*, (h) 29 M. 382; 10 M.I.A. 279, R.

(7) *Adoption—Divesting of estate—Adoption by widow of pre-deceased son—Estate vested in mother-in-law—Assent of mother-in-law to adoption.*

Under Hindu Law, the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir. *Shidappa Bapu Biradkar v. Ningangauda Siddangauda*, 16 Bom. L. R. 663=38 B. 724.

HEATON and SHAH, JJ.

Reference.—23 B. 327, F.

(8) *Adoption by widow—Consent of reversioners—Test of bona fide refusal.*

A sapinda who is called upon to exercise his discretion for an adoption by his co-parcener's

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

widow ought not to be guided by reasons personal to himself, but ought to act with a deliberate consideration of what is for the benefit of the family which the widow represents. Where a widow obtained the consent of other reversioners while the nearest reversioner, her husband's brother, withheld his consent from improper and personal motives, *held*, the adoption is valid. *Kallapalli Yenkatarama Raju v. Kallapalli Bapamma Raju*, 27 M.L.J. 638 = (1914) M.W.N. 911.

SANKARAN NAIR and SPENCER, JJ.

(9) *Adoption by widow—Death of the adopted son—Vesting of the property in a reversioner—Second adoption by the widow—Competency to make the adoption—Divesting the estate—Vatan Act (Bom. V of 1886), S. 2. Bhimabai Krishnappa Desai v. Tayappa Murarao Nadgauda*, 15 Bom. L.R. 783 = 37 B. 598 = 21 Ind. Cas. 107. See Final Part, 1913, Col. 635.

(10) *Mitakhara—Bombay school—Adoption of wife's brother—Validity—The prohibition styled 'Viruddha sambandha'—Not mandatory—'Dattaka Mimamsa'—Authority of—Binding on Courts. Pralhad v. Mahadeo*, 9 N.L.R. 130 = 21 Ind. Cas. 266. See Final Part, 1913, Col. 635.

(11) *Adoption—Presumption—Amendment of plaint—Wide powers of Court—Suit based on adoption whether can be treated as suit for partition. D. Venkata Samba Sadasiva Devara v. D. Papayya Devara*, (1913) M.W.N. 828 = 21 Ind. Cas. 737. See Final Part, 1913, Col. 636.

(12) *Adoption—Father's sister's son—Viruddha Sambandha. Ramkrishna Gopal Joshi v. Ohimnaji Vyankatesh*, 15 Bom. L.R. 824 = 21 Ind. Cas. 31. See Final Part, 1913, Col. 636.

(13) *Invalid adoption—Adoptee's rights in natural family—Not destroyed per se—Test—Estoppel—Giving away in adoption—Competency of none but parents. Yaithilinga Mudali v. Murugian alias Natasa Mudali*, 23 M.L.J. 189 = 15 Ind. Cas. 299 = (1912) M.W.N. 1127 = 37 M. 529. See Final Part, 1912, Col. 597.

(14) *Hindu son adopted in another family—Right to succeed his natural brother—Occupancy holding. See ACT II OF 1901 (AGRA TENANCY), No. 6, 12 A.L.J. 1231.*

(15) *Adoption—Promise to pay bribe for bringing about adoption—Legality—Public policy—Arrangements made for benefit of adopting widow, nature of. See CONTRACT, No. 5, 27 M.L.J. 416.*

(16) *Validity of affiliation—Effect of subsequent adoption. See HINDU LAW (AFFILIATION), No. 1, (1914) M.W.N. 919.*

(17) *Right of adopted grandson on partition. See HINDU LAW (PARTITION), No. 2, 16 Bom. L.R. 263.*

(18) *Senior and junior widows—Right of adoption—Effect of junior widow adopting with consent of sapindas. See HINDU LAW (WIDOW), No. 27, 16 M.L.T. 612.*

Hindu Law—(Continued).**—2.—Adoption—(Concluded).**

(19) *Adoption—Possession of widow—Adverse possession—Belief that the possession was mere life-estate and not absolute—Widow's possession not, adverse to adopted son—Alienation by widow—Deed of adoption reversing life-estate to the widow—Registration. See LIMITATION ACT (1908), No. 100, 16 Bom. L.R. 111.*

(20) *Property alienated by adoptive mother before adoption—Suit by adopted son for recovery—Limitation—Position of reversioner and adopted son compared. See LIMITATION ACT (1908), No. 141, 16 M.L.T. 435.*

(21) *Joint power of adoption given to two wives—Joint discretionary power to donees persona designata, it may be exercised by survivor alone—Power to adopt when discretionary, whether given for secular or religious purpose—Joint powers to co-wives to adopt if legal and how to be interpreted—Child, if may be received in adoption by more than one wife—Custom if may override logic. See WILL, No. 4, 18 C.W.N. 554.*

—3.—Affiliation.**(1) Affiliation—Validity—Subsequent adoption—Effect.**

By affiliation is meant that a person is adopted, without performing the adoption ceremony in the usual sense understood among Hindus, into another family and is given half the property by the man that affiliates. Such a transaction is not illegal or inoperative and is not affected by any subsequent adoption by the last male owner's widow. *Challa Narai Reddi v. Yudumula Vera Reddi*, (1914) M.W.N. 919.

AYLING and HANNAY, JJ.

—4.—Alienation.**(1) Suit by son to set aside alienation by father—Burden of proving antecedent debt or justifying necessity—Only part of consideration found to be binding on son—Proper decree to be passed—Alienation by widow, guardian of Dharmakarta of larger property than was necessary—Alienation how to be set aside.**

Where the son sues to set aside an alienation of ancestral property by the father, he who asserts that the alienation was made for an antecedent debt or for a beneficial purpose is bound to prove it (a).

Where the alienation is held to be not binding on the son, the alienee at any rate acquires the quantum of interest of the alienor at the time of the alienation; where the alienation is only partially binding, it is in any event binding to the extent of the alienor's share as it existed at the date of the alienation, without any liability to increase or diminution by virtue of subsequent changes in the joint family (b).

If the alienation were made by a widow or guardian or Dharmakarta, to a much greater extent, than was necessary, such alienation would be set aside on payment to the alienee of the amount which was held binding.

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

In this case, only a portion of the consideration for the alienation by the father was found to be for purposes binding on the son. *Held* that the alienee was entitled absolutely to the father's share in the property, and the son's share should be subjected to a charge in favour of the alienee to the extent of his proportionate share of consideration which is found to be for binding purposes (c). **Seetharam Naidu v. Balakrishna Naidu**, 15 M.L.T. 78=22 Ind. Cas. 638=26 M.L.J. 604.

WALLIS, J.

* *References*:—(a) 29 M. 200; 31 A. 176; (1913) M.W.N. 751; 25 M.L.J. 27, R. (b) 35 M. 47 (F. B.), F. (c) 12 M.L.T. 192, F.; 23 M. 89, Diss.

- (2) *Joint family—Minor, suit against—Manager of joint Hindu family, party to suit—Proper representation of the minor.*

A Hindu father executed a mortgage in lieu of a just debt binding on the joint family. After the death of the father, the mortgagees brought a suit on the basis of the mortgage against A and B, the two sons of the mortgagor.

B was a minor at the time and was represented by his elder brother A, who was also the managing member of the family. A decree was passed in favour of the mortgagee; the decree was not obtained by fraud:

Held, (1) that the minor A was properly represented in the suit; and (2) that the decree was binding on A. **Lachmi Shankar v. Ram Agyan Missir**, 21 Ind. Cas. 192.

BANERJEE and RAFIQUE, JJ.

- (3) *Joint family consisting of brothers—Some of them minors—Transfer by adult brother as manager and for benefit of the family—Binding on minor brothers.*

Where a brother of some Hindu minors, although not a natural guardian of those minors, was the manager of the joint family consisting of himself and the minors, and he transferred certain joint family property with a view to give away their sister in marriage as well as carry on a business belonging to the joint family, *held*, that the brother being the manager of the property and the sale being to the advantage of the minors, it was binding on the latter. **Ram Charau v. Mihin Lal**, 12 A.L.J. 189=22 Ind. Cas. 639=36 A. 158.

RICHARDS, C.J., and BANERJI, J.

References:—6 M.I.A. 393 (412); 26 C. 820, R.

- (4) *Joint family—Suit on mortgage—Managing member not party to suit—All members of joint family are necessary parties—Non-joinder.*

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

Where a mortgage suit is brought against a joint Hindu family, all the members of the family are necessary parties to the suit if it is not against the managing member of the family. **Jugal Kishore v. Ganga Singh**, 21 Ind. Cas. 712.

RICHARDS, C.J., and BANERJI, J.

References:—15 Ind. Cas. 126=34 A. 549=, 9 A.L.J. 819, D.

- (5) *Mitakshara—Joint family—Alienation by a co-parcener of his share—Increase of such share by the subsequent death of other members—Alienee's right—Co-parcener deemed still to be member of family—Alienee not a tenant in common—Subsequent alienation by the co-parcener of such increased share not valid—Limitation—Exclusion from enjoyment for twelve years.*

Where a member of a Hindu co-parcenary, governed by the *Mitakshara* School of law, alienates his share in the co-parcenary properties, it cannot be said that, by the mere act of alienation, he becomes a separated member, and his alienee a tenant-in-common, invested with rights as such; the alienation, at most, gives the alienee a mere right in *personam* against his own alienor to compel him to sue for partition, but the alienor himself still remains a member of the co-parcenary, and his share in the family properties fluctuates according as there are births or deaths in the family subsequent to the alienation; so, where, on the date not of the alienation but when alienation takes effect, the alienor's share in the family properties is increased by the death of some members, that increased share passes *co-instanti* to his first alienee, and the alienating co-parcener cannot, by a subsequent conveyance, confer upon another person any title to such increased share (a).

The alienee cannot have any interest in any specific property and the alienation creates merely an equity in his favour (b).

The alienee cannot sue for partition and allotment to him of his share of the property alienated. His remedy is a suit for partition of the whole of the family properties (c).

Nor can the alienee be entitled to possession of the property alienated (d).

The members of a Hindu co-parcenary are entitled to sue for possession of the whole of the alienated properties, as joint family property, subject to the alienee's right to demand partition (e).

Where a member of the Hindu co-parcenary becomes an outcaste, and is excluded from enjoyment of the co-parcenary properties for more than twelve years, his right in the family properties becomes extinguished, and he has none to convey to others, on the lapse of that period.

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

Nanjaya Mudali v. Shanmuga Mudali, 15 M. L.T. 186=22 Ind. Cas. 555=(1914) M.W.N. 356=26 M.L.J. 576.

SANKARAN NAIR and BAKEWELL, JJ.

References:—(a) 7 Ind. Cas. 559=34 M. 269=(1910) M.W.N. 380=8 M.L.T. 269=20 M. L.J. 743; 15 Ind. Cas. 354=(1912) M.W.N. 379=11 M.L.T. 312, Diss. (b) 20 C. 533; 24 A. 483=A.W.N. (1902) 137; 28 B. 201=5 Bom. L.R. 945; 11 B.H.C. 72; 11 B.H.C. 70, R. (c) 13 M. 275; 20 M. 243; 16 Ind. Cas. 698=(1913) M.W.N. 96=24 M.L.J. 79, R. (d) 4 I.A. 247 (255)=3 C. 198=1 C.L.R. 49; 5 C. 148=4 C.L.R. 226=6 I.A. 88; 10 C. 626=11 I.A. 26, R. (e) 20 Ind. Cas. 958=14 M.L.T. 168=(1913) M.W.N. 661=17 C.W.N. 1189=18 C. L.J. 237=15 Bom. L.R. 867=11 A.L.J. 865=25 M.L.J. 512=40 C. 966=40 I.A. 213=10 N.L.R. 1 (P.C.), R.

- (6) *Sale for meeting expenses of defending the head of the family in criminal prosecution—Whether binding on other members—Similar principles apply to charges and sales.*

Money spent in meeting the necessary expense of defending the head of a joint Hindu family in a criminal prosecution is money spent for legal necessity and for the benefit of the members of that family. And a sale by the father for raising the necessary funds is binding on the other members of the family (a).

In *Hanuman Pershad's case* (b), their Lordships of the Privy Council were dealing with a mortgage, but similar principles would apply with the necessary changes to a sale. **Ramalingam Pillay v. Muthayan**, 26 M.L.J. 528=16 M.L.J. 76=24 Ind. Cas. 356.

TYABJI and SPENCER, JJ.

References:—(a) 33 A. 472; 34 A. 4, F.; 27 M. 71; 29 M. 200, D. (b) 6 M.I.A. 393, Appl.

- (7) *Joint ancestral family property—Mortgage by father as manager of joint Hindu family—Decree against the father alone—Execution of decree against the sons after the father's death—No legal necessity nor antecedent debt—Debt not tainted with immorality—Mortgaged property or the father's interest therein not saleable.*

A father as manager of a joint Hindu family mortgaged a joint ancestral family property. The mortgagee brought a suit against the father alone and obtained a final decree for sale of the property. Before execution of the decree, however, the father died. The mortgagee decree-holder applied for execution of the decree against the sons who objected on the ground that joint ancestral property could not be sold in execution of the decree against the father alone. It was found that the mortgage was not made to meet any family necessity or to pay off an antecedent debt. It was also found that the loan was not tainted with immorality.

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

Held that, under the circumstances, the decree-holder was not entitled to sell the property. When a money-lender offers cash consideration to the father of a joint Hindu family in return of an alienation by way of sale of mortgage of joint ancestral family property in his hands, he is asking the father to do that which the latter has no right to do except for family necessity, and a decree obtained against the father alone is therefore not binding on the sons (a).

Held, further, that the sons not being parties to the suit on the mortgage or the decree passed thereon, and no steps by way of execution of the decree against the father having been taken with respect to the mortgaged property during his life-time, no charge was created on the property to the extent of the father's undivided share and interest in the property.

Held, also, that a decree for sale upon a mortgage passed against a Hindu father does not create a charge upon the property even to the extent of the judgment-debtor's share, which could not, therefore, be sold after his death. A decree based on a mortgage and passed during the father's life-time is not analogous to an attachment made during his life-time which could create a charge on the property so far as his share and interest in it were concerned (b). **Ali Ahmad v. Sohan Lal**, 12 A.L.J. 613=24 Ind. Cas. 6.

PIGGOT, J.

References:—(a) 14 A. 179, R.; 13 C. 21, R.; 31 A. 507, R; 11 C. 396, R.; 31 A. 176; 8 A.L.J.R. 1022, Applied; 8 A.L.J.R. 649, F. (b) 5 C. 148, R; 3 A.L.J.R. 127, Dist.

- (8) *Debt—Joint Hindu family—Debt incurred by managing member to pay the price of property purchased for and with the consent of the members—Legal necessity.*

Where a purchase of property was made by and for the benefit of a joint Hindu family and with the consent of every adult member thereof, and with a view to raise money for the purpose of paying the price of that property a mortgage of joint property was made by the managing member of the family alone, *held* that the mortgage was a debt incurred for legal necessity for which the family property was liable. **Pitamber Lal v. Sital**, 12 A.L.J. 641.

RICHARDS, C.J., and BANERJI, J.

- (9) *Joint Hindu family property—Sale and mortgage by father of ancestral property—Objection by son—His acquiescence—Immoral debt—Additional District Judge subordinate to the District Judge—Power of District Judge to transfer or make over case to Additional District Judge—Punjab Courts Act (XVIII of 1884) as amended, Ss. 24 and 75—Non joinder of party—Suit when not to be defeated—O. I, r. 9, of Civ. Pro. Code, 1908—What person can be made defendant—Power of Appellate Court to add*

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

respondent after time—Interest at 15 p. c. p. a. not much—Hindu son's duty to pay father's debt—Promise to pay barred debt—Act IX of 1872, s. 25—Incompetency of a party to use document not printed in paper-book—Power to use other evidence on this point—When right in a will is not abandoned—Hindu son's right in the family property—Unfriendliness of father does not exclude son—Effect of division of property by private arrangement—When in completion of mortgage is immaterial—Whether allowing father to alienate property does not require registration—Trust by a Hindu—Trusts Act (II of 1882)—Revocation of trust—Withdrawal of revocation—Interpretation of deed—Right of assignee of a mortgage—Estoppel—S. 115 of Act I of 1872.

Held, that :—

1. Under S. 24 (3), Civ. Pro. Code (1908), the Court of the Additional District Judge is subordinate to that of the District Judge, and the latter has full power to transfer a suit pending before him to a Subordinate Court competent to try it. Sub-S. (2), S. 75, of the Punjab Courts Act (1884), is intended merely to invest the District Judge with power of control over the distribution of business, and it by no means implies that the Additional District Judge has no powers until the District Judge confers them on him—the Additional District Judge obtains his powers when he is appointed and gazetted.

But even if to give the Additional District Judge jurisdiction there must be an assignment of "functions" by the District Judge transferring or making over a case to the Additional by the District Judge amounts to such an assignment (a).

2. As laid down in O. I, r. 9, Civ. Pro. Code (1908), no suit is to be defeated by reason of the misjoinder or non-joinder of parties; the Court should, in every suit, deal with the matter of controversy so far as regards the interest of the parties actually before it.

But if a Court finds that a person is a necessary party and directs him to be made one and the plaintiff thereafter refuses to implead him, the Court is then justified in dismissing the suit or rejecting the plaint.

3. A person can be made a defendant if he is interested in the result of the litigation, although no relief is asked for directly against him.

4. Where an appellate Court does implead a person interested in the result of an appeal, the higher Court is not competent to upset its order on the score of limitation.

The lower appellate Court may perhaps decline to add a respondent after time for that or any other reason, but if it chooses to act under O. XLI, r. 20. (old S. 559), Civ. Pro. Code (1908), and it appears that the person added is a

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

person interested, then no plea of bar—by reason of lapse of period of limitation can be entertained (b).

5. The interest at 15 p. c. p. a. is moderate on the loan advanced to a person who is spending money in debauchery and extravagance and who is already under heavy debt, although he may be possessing a good deal of property.

6. To a Hindu the payment of father's debt, though time barred, is a pious duty and such a debt is a just antecedent debt.

7. Under S. 25, Contract Act, a promise to pay a barred debt is valid.

8. A person does not abandon his right under a will if he enforces it within the limitation prescribed therefor (c).

9. No party can refer to any document which is not included in the printed paper-book of a first appeal, but other evidence thereon on the point dealt with by that document cannot be excluded.

10. (a) Under Hindu Law a son has from birth an indefeasible right as a co-parcener in the family property and mere unfriendliness on the part of his father cannot destroy that right, unless and until he is regularly separated off and given his share of the family estate. He is therefore competent to contest the alienation of ancestral property if opposed to the principles of Hindu Law.

(b) But he loses his competency under S. 115 of Act I of 1872 where he has condoned all what his father has done and he himself gains considerable benefit out of his father's objectionable transactions.

11. The mere fact that a son is living separate from his father does not amount to his exclusion from the joint family property, particularly if he has all along been maintained off and has never been told that he is excluded from the family estate. Consequently art. 127, Limitation Act, does not apply to such a case.

12. A division of the joint property which is neither based upon Hindu Law or custom, nor on the terms of the will made by the common ancestor, is in the nature of a family arrangement and the property does not lose its original character.

13. Where a mortgagor has fully condoned all defaults and defects in connection with and in the mortgage, he cannot insist upon its completion and is estopped from contesting its validity on the ground that the mortgagee has failed to complete it.

14. A letter written by the son to the alienee that he intends to raise no objection to the alienations to be made by his father is, admissible in evidence against him even if the property alienated is of the value of Rs. 100 or more (d).

15. A trust authorizing the trustees to take over all the estates of the trust creator, collect rents and outstandings, pay debts, bring and

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

defend suits, raise loans and so forth, at the same time paying certain maintenance allowance to that person and his family, is a lawful one which is neither opposed to the principles of Hindu Law, nor is repugnant to the provisions of the Trusts Act (e).

Such a trust is no doubt revocable at any time by its creator, but the acts of the trustees are binding on him up to revocation. A revocation can also be withdrawn either expressly or by implication.

16. The interpretation of a deed depends mainly, if not entirely, on the actual words therein. So where a mortgagee assigns clearly all his rights, title and interest in a mortgage to another person, the mortgage is not extinguished and the assignee is entitled to recover from the mortgagor the whole of the amount due according to the terms of the mortgage-deed, but is not obliged to accept from the mortgagor what the assignee has actually paid as consideration for the assignment (f).

A debtor is ordinarily incompetent to object to the act of his creditor transferring his claim to a third party. *Diwan Shib Nath v. The Alliance Bank of Simla, Ltd., Lahore*, 215 P.L.R. 1914=110 P.W.R. 1914.

JOHNSTONE and RATTIGAN, JJ.

References:—(a) 32 C. 875, *Disappr.* (b) O. A. 340 of 1911; 13 A.W.N. 35; 12 C.W.N. 625; 31 M. 442, R. (c) 85 P.R. 1892 (F.B.); 51 P.R. 1898; 30 P.R. 1901; 43 P.R. 1908, R. (d) 82 P.R. 1884; 12 W.R. 163; 48 P.R. 1905=33 P.L.R. 1905=51 P.W.R. 1905, D. (e) 101 P.R. 1912=189 P.L.R. 1912=158 P.W.R. 1912; 9 B.L.R. 377; 32 C. 143; 5 B. 154, R. (f) 10 C. 1035 (P.C.); 29 C. 154; 38 P.R. 1894; 71 P.R. 1898; 30 P.R. 1904=139 P.L.R. 1904, R.

(10) *Alienation of undivided share—Position of alienee—Whether a tenant-in-common—Alienee's right to mesne profits.*

A purchaser of an undivided share of one of the co-parceners in a joint Hindu family is not entitled to mesne profits as against the other co-parceners from the date of his purchase up to the date of the plaint.

An alienation of an undivided share by a member of a joint family does not put an end to the joint tenancy and the alienee does not become a tenant-in-common with the other co-parceners, but he is only entitled in equity to enforce his rights in a suit for partition.

The right of the alienee to enforce partition does not rest on any text of the Hindu Law but on the equitable doctrine that a purchaser for value should be allowed to stand in his vendor's shoes and work out his rights by a partition, and the doctrine need not be extended beyond what is absolutely necessary to enable the vendee to work out his rights.

The mere fact of a person purchasing a share of a co-parcener in joint family properties would

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

not entitle him to mesne profits as against such other members of the family, and the purchaser would be in no higher position than his alienor, who under Hindu Law would not under ordinary circumstances be entitled to demand an account of the past profits. *Maharaja of Bobbili v. S. Venkataramanjulu Naidu*, 16 M.L.T. 181=27 M.L.J. 409.

WALLIS, OFFG. C.J., and KUMARASWAMI SASTRI, J.

References:—(1914) M.W.N. 956=15 M.L.T. 186, F.; 25 M. 690; 35 M. 47; 23 M.L.J. 64, Diss.; 5 C. 148; 10 C. 626; 40 C. 966; 28 B.. 201, R.

(11) *Widow—Alienation—Partial or total—Consent of next reversioner—Bona fides of such consent.*

In order to validate an alienation of property by a widow with the consent of the next reversioner, that consent should have been given *bona-fide*. The principle is the same whether the alienation covered the entire property which the widow succeeded to after her husband's death or a portion only of such property. *Rama Kavandan v. Kuruthaswami Naik*, 16 M.L.T. 251=(1914) M.W.N. 797.

AYLING and SESHAGIRI IYER, JJ.

Reference:—31 M. 366, R.

(12) *Mitakshara—Alienation by father—Suit by son for possession—Limitation to run from possession by vendee—Possession, how taken.*

In a suit under the *Mitakshara* law for possession of land by annulment of illegal sales by his father, the son's only cause of action is the taking of possession by the vendee of what was the son's joint share of the family property, and his suit ought to be brought within 12 years of such adverse possession.

It is not necessary in order to obtain possession that the purchaser should step on to the land at all. The physical possibility of the buyer dealing with the thing exclusively as his own is all that is necessary. *Bahadar Chand v. Nina Mal*, 231 P.L.R. 1914=133 P.W.R. 1914.

JOHNSTONE and SCOTT-SMITH, JJ.

(13) *Sale by father of joint family property—Part consideration not antecedent debt or for legal necessity—Cancellation of sale-deed—Son not bound to pay whole consideration.*

A son in a joint Hindu family can ask for the setting aside of an alienation made by his father, provided the consideration for the alienation is not an antecedent debt or for legal necessity. Therefore a sale-deed, the consideration of which is partly antecedent debt and partly an advance made to the father which is neither an antecedent debt nor for legal necessity, can

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

be cancelled only on the payment of that portion which is an antecedent debt. **Ram Dyal v. Suraj Mal**, 23 Ind. Cas. 891.

RAFIQUE and PIGGOTT, JJ.

References:—A. W. N. (1901) 57; A.W.N. (1906) 40=3 A.L.J. 81=28 A. 338; 31 A. 176=6 A.L.J. 263=1 Ind. Cas. 479, R.; 11 C. 396, *Not Foll.*

- (14) *Joint family—Alienation—Grand father allotting a portion out of his share to his third wife—Guardians of minor grandson assenting to the same—Competency to consent—Transaction valid.*

Where a Hindu grandfather who, with his undivided minor grandson, formed a joint Hindu family, made, with the consent of the minor's mother and maternal uncle, an alienation of a portion of the family properties in favour of his third wife, reserving the income to himself for life, and stating that the portion so allotted was made out of his own share.

Held, that the alienation was binding on the minor and that, in the circumstances of the case, his guardians were competent to consent for him. It was open to the grandfather, if he had so chosen and without any one's consent, to effect a partition and leave the whole of his half-share to his third wife, and it was clearly for the benefit of the minor grandson for his guardians to avoid an eventuality so injurious to his interests by consenting to an alienation of a portion of the family property in favour of the third wife. **Arunachala Pillai v. Sampurna Thachi**, 27 M.L.J. 485.

WALLIS and MILLER, JJ.

- (15) *Sale by one member—Discharge of antecedent debt—Suit for recovery of his share by another member—Duty to pay his share of the debt—Proper decree.* **Yadivalam Pillai v. Natasam Pillai**, 12 M.L.T. 192=(1912) M. W.N. 851=23 M.L.J. 256=16 Ind. Cas. 835=37 M. 435. See Final Part, 1912, Col. 604.

- (16) *Joint undivided Hindu family—Mortgage of immovable property for purchase of lands—No family necessity—Not binding.* **Subramania Nadan v. Ramasami Nadan**, 25 M.L.J. 563=21 Ind. Cas. 656. See Final Part, 1913, Col. 613.

- (17) *Mitakshara family of father and son—Properties in British India and outside—Alienation by father—Suit by son to set it aside—Consideration of equities.* **Subbaya Mudaliar v. Thulasi Mudaliar**, 14 M.L.T. 537=(1914) M.W.N. 16=22 Ind. Cas. 44. See Final Part, 1913, Col. 614.

- (18) *Guardian, ad litem—Hindu Law—Mortgage before a Hindu son's birth—Defence available to the son—No damage caused by appointment of father—Decree passed on mortgage suit not to be set aside.* **Narayan Das v. Har Dyal**, 11 A.L.J. 941=35 A. 571=21 Ind. Cas. 830, See Final Part, 1913, Col. 614.

Hindu Law—(Continued).**—4.—Alienation—(Continued).**

- (19) *Antecedent debt—Mortgage made by father as auction-purchaser of the property purchased in order to deposit the purchase money in Court—Failure to make deposit—Liability of the auction-purchaser—Liability of the sons of the mortgagor for the mortgage-debt.* **Kapilldeo v. Thakur Prasad**, 11 A.L.J. 961=21 Ind. Cas. 868=36 A. 17. See Final Part, 1913, Col. 645.

- (20) *Nature of possession of one co-parcener—Alienation by such co-parcener—Alienee's possession whether adverse.* See **ADVERSE POSSESSION**, No. 8, 16 M.L.T. 196.

- (21) *Alienation—Ancestral land—Brahmans of mauza Dangoh Khurd—Applicability of Hindu Law or custom.* See **CUSTOMS (PUNJAB—ALIENATION)**, No. 10, 24 P.R. 1914.

- (22) *Ancestral land—Alienation—Brahmans of Mauza Dheriala Saigan—Applicability of Hindu Law or custom.* See **CUSTOMS (PUNJAB—ALIENATION)**, No. 9, 23 P.R. 1914.

- (23) *Bequest of ancestral land by a Girth of Kangra District in favour of stranger—Competency of his brother's daughter and her sons to object.* See **CUSTOMS (PUNJAB—WILL)**, No. 1, 10 P.W.R. 1914.

- (24) *Racital in sale-deed as to debt—Whether evidence of the binding nature of the debt.* See **EVIDENCE**, No. 9, (1914) M.W.N. 874.

- (25) *Presumption as to exact time of conception—Alienation by Hindu father—Son born within 276 days—Son's right to question alienation—Duty of purchaser.* See **EVIDENCE ACT**, No. 69, 27 M.L.J. 580.

- (26) *Infant setting aside deed of guardian—Consideration—Major part satisfactorily proved—Presumption.* See **GUARDIAN AND MINOR**, No. 1, (1914) M.W.N. 490.

- (27) *Alienation by widow—Part of consideration not binding on reversioners—Bona fide purchaser may retain property on paying to reversioners part of consideration not found binding—Proper decree.* See **HINDU LAW (WIDOW)**, No. 16, 27 M.L.J. 132.

- (28) *Alienation by widow—Proof of legal necessity—Onus—Recital in conveyance if evidence—Necessity of proof aliunde.* See **HINDU LAW (WIDOW)**, No. 4, 18 C.W.N. 649.

- (29) *Mortgage by widow to secure debts incurred in course of family business.* See **HINDU LAW (WIDOW)**, No. 6, 15 M.L.T. 323.

- (30) *Alienation by widow of portion of husband's estate with consent of nearest reversioner—Effect upon remote reversioners.* See **HINDU LAW (WIDOW)**, No. 17, 209 P.L.R. 1914.

- (31) *Hindu widow—Pilgrimage to Gaya—Feast given after return from Gaya whether legal necessity—Whether binding on reversioner—Reversioner whether can sue for declaration without offering to reimburse money spent on legal necessity.* See **HINDU LAW (WIDOW)**, No. 18, 18 C.W.N. 1303.

Hindu Law—(Continued).**—5.—Alienation—(Concluded).**

(32) Alienation by widow for payment of interest in excess of what was recoverable under the law of Damdupat—Legality. See HINDU LAW (WIDOW), No. 23, 10 N.L.R. 91.

(33) Alienation by widow—Legal necessity, proof of—High rate of interest. See HINDU LAW (WIDOW), No. 22, 24 Ind. Cas. 84.

(34) Sale by widow with consent of next reversioner—Remote reversioner whether can challenge sale. See HINDU LAW (WIDOW), No. 26, 24 Ind. Cas. 482.

(35) Mortgage by father and decree against him—Liability of sons to satisfy. See HINDU LAW (WILL), No. 5, 17 O.C. 318.

(36) Religious Trusts—Alienation—*Bona fide* enquiry by alienee. See RELIGIOUS ENDOWMENTS, No. 3, 16 M.L.T. 503.

(37) Alienation of religious offices—Legality. See RELIGIOUS OFFICES, No. 1, 26 M.L.J. 315.

(38) Father entering into agreement to sell land—Suit for specific performance—Death of father prior to decree—Son's liability to fulfil contract—Question as to—Whether can be raised. See SPECIFIC PERFORMANCE, No. 4, 26 M.L.J. 218.

(39) Hindu joint family—Agreement by a member to sell his share in specified family property on partition—Agreement found to be not binding on his son—Father and son impleaded in suit for specific performance—Rights of plaintiff—S. 15, Specific Relief Act—Right to claim part performance. See SPECIFIC PERFORMANCE, No. 11, 16 M.L.T. 370.

(40) Mortgage of joint Hindu family property by one of the family members not void but voidable—Remedy of mortgages—Limitation. See TRANSFER OF PROPERTY ACT, No. 66, 21 Ind. Cas. 581.

—5.—Debts.

(1) *Father's debt—Liability of sons—Illegal debt—Enquiry by creditor—Necessity—Burden of proof, whether burden on creditor to prove that he made inquiries and bona fide believed that the debt was for necessary purpose.*

In order that the sons of a Hindu father may claim exemption from liability to a mortgage-debt contracted by their father, on the ground that it was illegal, *viz.*, contracted to redeem jewels pledged to pay a fine imposed upon the father when convicted of a criminal offence, it is not necessary for sons to prove that the creditor also had notice of the illegality of the debt. It is for the creditor to establish that he made inquiries and *bona fide* believed that the debt was required for a purpose binding on the family. Where such inquiry was confined only to ascertaining that the debt was required to redeem jewels pledged to obtain money for payment of fine imposed upon the father, and did not proceed further, *viz.*, to ascertain the nature of the offence of which he was convicted,

Hindu Law—(Continued).**—5.—Debts—(Continued).**

the enquiry is not sufficient, and the creditor is not protected. **Savumian v. Narayanan Chettiar**, 15 M.L.T. 372=23 Ind. Cas. 248.

MILLER and OLDFIELD, JJ.

References :—5 C. 148=4 C.L.R. 226=6 I.A. 88; 13 I.A. 1 (17, 18)=13 O. 21; 30 A. 156=5 A.L.J. 175=A.W.N. (1908), 61, D.

(2) *Suit for mesne profits against father and son—Decree against father alone—Executable against son's share also*

Where a suit is brought against a father and son forming a Hindu joint family for mesne profits and it is decreed against the father, the whole share of the family property including the son's is liable for the satisfaction of the decree. Though the primary liability of the son is negatived in the suit, the liability of the son to pay his father's debt to the extent of his share of the family property based on religious and moral considerations well recognised by the Hindu Law and the Court subsists. **Jenamandra Pappiah v. Lanka Subbasastrulu**, (1914) M.W.N. 616=27 M.L.J. 276.

AYLING and NAPIER, JJ.

Reference :—28 A. 288, F.

(3) *Sons' liability for debts of deceased father—Creditor's remedy against each or all the sons.*

A creditor seeking to make the sons liable for the debt of their deceased father is not restricted to a suit against all the sons for the whole or, if he sues one only, to a suit for a portion of his debt. It is not correct to say that each one is liable only for a portion of the debt proportioned to his share in the joint family property. The creditor can get a decree against any son for the whole amount of the debt to the extent of his share of the joint family property and any other assets being separate property of his father which may be in his hands. **The Salem Town Bank (Ltd.) v. K. Ramaswami Aiyar**, 27 M.L.J. 236.

MILLER, J.

(4) *Widow's duty to pay husband's debts—Payment of debts repudiated by husband not obligatory on the widow.*

Under Hindu Law, a widow is under a pious obligation to pay her deceased husband's debts, even though they may be time-barred; but this obligation does not extend to debts which have been repudiated by her husband before his death. **Bhagwat Bhaskar Koranne v. Nivrutti Sakharam Bhadule**, 16 Bom. L.R. 798=39 B. 119.

BEAMAN and HAYWARD, JJ.

(5) *Partnership—Death of partner—Succession by son—Debts—Presumption.*

When a Hindu son, already liable for his father's debts under the Hindu Law, succeeds as a partner in a partnership business in place of his father, a presumption arises that he intended to make himself liable for the previous

Hindu Law—(Continued).**—5.—Debts—(Continued).**

debts of the firm. **Subramania Chetty v. M. Rm. Vi. Somasundaram Chetty**, 24 Ind. Cas. 86.

WALLIS and SADASIVA AIYAR, JJ.

(6) *Son's liability—Decree for sums spent out of temple funds by the father—Legality—Ayyavaharika debt—Meaning.* **Yenugopal Naidu v. A. Ramanathan Chetty**, 11 M.L.T. 427 = 23 M.L.J. 61 = 14 Ind. Cas. 705 = 37 M. 458. See Final Part, 1912, Col. 610.

(7) *Marriage expenses of member of a joint Hindu family—Binding nature upon the other members—No distinction between sudras and twice-born classes.* **Gadirazu Gopalakrishnamarazu v. Saripalli Venkatanarasarazu**, (1912) M.W.N. 1231 = 37 M. 273 (F.B.). See Final Part, 1912, Col. 611.

(8) *Bajwana property—Darbhanga Raj—Government revenue and cesses whether payable to Raj—Revenue not paid to Raj—Debt whether a joint family debt—Mitakshara family—Decree against father personally—Debt not proved to be illegal or immoral—Whether the interest of the sons passes—"Right title and interest" of judgment-debtor—Meaning of the expression.* **Hitendra Singh v. Ramesh Singh**, 18 C. W.N. 42 = 22 Ind. Cas. 873. See Final Part, 1913, Col. 650.

(9) *Suretyship debt—Decree against father—Partition between father and son—Execution against property in the hands of son—Liability of son to pay it—Restitution of money paid to a surety.* See CIV. PRO. CODE (1882), No. 23, 27 M.L.J. 112.

(10) *Son's right to set aside sale held in execution of decree against father.* See CIV. PRO. CODE (1908), No. 358, 21 Ind. Cas. 46.

(11) *Property descending to son—Assets in the hands of the son made liable for father's debt—Son dying—Divided male succeeds—Property liable for father's debt.* See CIV. PRO. CODE (1908), No. 96, (1914) M.W.N. 354.

(12) *Recital in sale-deed as to debt—Whether evidence of the binding nature of the debt.* See EVIDENCE, No. 9, (1914) M.W.N. 874.

(13) *Joint ancestral property—Mortgage by father as manager—Decree against the father alone—Execution against the sons after father's death—No legal necessity nor antecedent debt—Debt not tainted with immorality—Mortgaged property or father's interest therein not saleable.* See HINDU LAW (ALIENATION), No. 7, 12 A.L.J. 613.

(14) *Son's duty to pay father's debt—Immorality of debt—Son's acquiescence—Effect.* See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(15) *Widow—Debts contracted by widow when to be deemed to be for legal necessity.* See HINDU LAW (WIDOW), No. 2, 22 Ind. Cas. 304.

Hindu Law—(Continued).**—5.—Debts—(Concluded).**

(16) *Debt of deceased husband—Widow's liability—Interest on debt—Alienation by widow for paying the interest—Validity.* See HINDU LAW (WIDOW), No. 12, (1914) M.W.N. 468.

—6.—Exclusion from Inheritance.

(1) *Custom—Exclusion from inheritance—Construction of Wajib-ul-arz—Thakur families in Oudh—Custom of excluding from inheritance daughters and their sons—Oral evidence of witnesses outside family, weight of, in proof of family custom—Decision in previous suit against existence of custom for want of evidence, effect of, on subsequent suit involving issue of same custom—Presumption in case of Hindu widow's possession of her husband's share.*

Although there is no express exclusion from inheritance in the language of a *Wajib-ul-arz*, there may be exclusion by necessary implication (a).

In *Thakur* families in Oudh, the custom of excluding daughters and their sons from inheritance is notoriously common.

General statements of opinion as regards a particular family custom and as found in the oral evidence of witnesses not belonging to the family, in which the custom derogating from the ordinary Hindu Law of inheritance is alleged to exist, are not of much weight as evidence.

When in a previous suit a family custom set up by the plaintiff could not be established owing to his neglect in producing evidence and it was, therefore, decided that the custom did not exist, it cannot be argued, in a subsequent case, in which the question of the same custom of the same family arises, that the custom does not exist.

Where a Hindu widow after her husband's death and in the life-time of his brothers got possession of his proportionate share of the family property, and it was not alleged that the possession was permissive, the natural inference is that she succeeded to the *divided* share of her husband as an ordinary Hindu widow. **Bandi Din v. Dharammangal Singh**, 22 Ind. Cas. 138.

LINDSAY, J.C.

References:—(a) 2 Ind. Cas. 253 = 12 O.C. 63, F.

(2) *Inheritance—Leprosy—Ground of exclusion—Nature of disease—Onus of proof of incurable nature—Symptoms of the incurable type of the disease.*

The onus is heavily upon the party who sets up leprosy as a ground for excluding a certain person from rights of inheritance to prove that the disease was of such a virulent and incurable character as to disinherit the sufferer.

It is only the agonising, sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. Deformity and unfitness for social

Hindu Law—(Continued).**—6.—Exclusion from Inheritance—(Old.).**

intercourse arising from the virulent and disgusting nature of the disease would appear to be what was to be accepted in both the texts and the decisions as the most satisfactory test (a).

Books on medical science written by ancient Hindu writers show that, in order that leprosy may be considered incurable, there must be worms on the body, the ulcers must discharge offensive matters, the nails should drop and that the eyes should be bloodred. **Minor Raju alias Aiyaru Naiken represented by his next friend Ammathayee alias Kanagammal v. Minor Ramasami Naicken**, 16 M.L.T. 254.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References :—(a) 25 M.L.J. 251 = 13 M.L.T. 461, R. (1877) Bom. 551; (1860) Sud. Ad. Rep. 239; (1857) Sud. Ad. Rep. 210; 5 B.H.C. 145, R.

(3) Incurable tumour on the nose whether a disqualification from inheritance. See HINDU LAW (SELF-ACQUISITION) No. 1, 26 M.L.J. 508.

—7.—Gift.**(1) Gift to females—Presumption.**

There is no presumption of law that a gift by a man to his widowed daughter-in-law is only a gift of a life-estate. It has been held in recent cases that documents of gift to daughters and other family members of a Hindu family need not be construed with a bias in favour of the view that an absolute interest could not have been intended to be transferred. **Bodi Muthayya v. Kavari Kodandaramayya**, (1914) M.W.N. 387 = 23 Ind. Cas. 594.

SADASIVA IYER and SESHAGIRI IYER, JJ.

(2) *Gift by father to his only son of all interest in family property—Consideration of natural love and affection—Validity—Rule as to giving a trifle to relinquishing coparcener—S. 25, Contract Act.*

Where a gift is made by a father of all his interest in the family property to his only son, the gift deed may be treated as an agreement by which the father relinquished his rights in favour of his son and it would be a valid agreement supported by the consideration of natural love and affection (S. 25, Contract Act.).

The reference in the texts of Manu, etc., to the giving of a trifle to the relinquishing coparcener must be treated rather as an antiquated formality which was prescribed as conclusive evidence of the deliberate and final character of the relinquishment than as forming an indispensable condition to the validity of such a relinquishment.

It is only a transfer to a stranger of natural rights which carry with them obligations to third parties that could not be assigned under the law, but every man is perfectly entitled to

Hindu Law—(Continued).**—7.—Gift—(Concluded).**

waive or release any rights in property belonging to himself. **Thangavelu Pillai v. Doraisami Pillai**, 27 M.L.J. 272 = 16 M.L.T. 393.

SADASIVA IYER and NAPIER, JJ.

References :—6 M. 71; 11 M. 406, R.

(3) Gift by widow with consent of next reversioner—Validity. See HINDU LAW (WIDOW), No. 25, 24 Ind. Cas. 435.

(4) See HINDU LAW (ALIENATION).

—8.—Guardianship.

(1) *Persons entitled to guardianship—Paternal aunt whether can act as natural guardian—Alienation by de facto guardian found to be for no necessity need not be set aside—Applicability of Art. 44, Limitation Act to alienations by unauthorised guardians.*

Under the Hindu Law, nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties (a).

Recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) when there is no natural guardian alive.

A paternal aunt is therefore not a natural guardian of a minor under the Hindu Law (b).

Assuming that she was the *de facto* guardian her alienation for no necessity need not be set aside. Art. 44 of the Limitation Act does not apply to alienations by unauthorized guardians (c). **Thayammal v. Kuppanna Koundan**, 27 M.L.J. 285.

SADASIVA IYER and TYABJI, JJ.

References :—(a) 2 O.L.R. 583; 2 C.W.N. 191, F. (b) 26 C. 820; 39 C. 233, R. (c) 34 A. 213, R.

(2) Hindu father if may appoint another as guardian of his sons—Authority so given if may be revoked—Father if may be appointed guardian. See ACT VIII OF 1890, (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.

(3) Bond for ancestral debt executed by mother as guardian of minor son—Liability of son or mother. See GUARDIAN AND MINOR, No. 2, 23 Ind. Cas. 877.

—9.—Impartible Estates.

(1) *Impartible estate—Widows of junior members—Right to maintenance—Husband's power to bind her independent right—Limitation Act, 1908, Sch. II, Art. 129—Demand and refusal—Burden of proof.*

In a suit for maintenance, the onus of proving the denial of plaintiff's right to maintenance more than twelve years prior to suit lies on the defendant (*vide* Art. 129, Sch. II, Limitation Act).

Hindu Law—(Continued).**—9.—Impartible Estates—(Concluded).**

The widows of the junior members of the family of a holder of an impartible estate are entitled to receive maintenance out of the impartible property (a).

In the present case, having regard to the fact that plaintiff has not shown that, during the twelve years in which she received nothing from the zamindar, she had to borrow or had any difficulty in obtaining all the comforts which she required and also to other facts, the High Court refused to allow maintenance for the past arrears at the same rate as it did for future years.

It is doubtful whether the plaintiff's husband could bind his heirs to receive a particular amount as maintenance out of the zamindari in lieu of such rights as they may have independently of his right to receive maintenance during his life. *Kachi Yuva Rangappa Kalaka Thola Udayar v. Kulandai Ayai*, 26 M. L.J. 205 = (1914) M.W.N. 374 = 23 Ind. Cas. 831.

MILLER and TYABJI, JJ.

Reference :—(a) 23 M.L.J. 79, R.

(c) Rights of illegitimate son to succeed to impartible property—Preferential rights of widow or undivided co-parceners of last Zamindar—Succession to partible property—Suit for whole property—Alternative reliefs for share not claimed—Right to decree for a share—Kambala caste—Custom of excluding illegitimate sons from inheritance. *Visvanathaswamy Naicker v. Kamu Ammal*, 24 M.L.J. 271 = 21 Ind. Cas. 724. See Final Part, 1913, Col. 653.

(3) Impartible estate, proof of—Sanad granted under Madras Reg. XXV of 1802 in common form, if alters succession—Impartibility, proof of—Raj, estate whether—Question of fact—Concurrent findings—Appeal to Privy Council—Practice. *Meka Venkataramaya Appa Row v. Sri Raja Parthasarathy Appa Row*, 17 C.W.N. 1221 = 14 M.L.T. 259 = (1913) M.W.N. 791 = 25 M.L.J. 386 = 18 C.L.J. 393 = 15 Bom. L.R. 1010 = 21 Ind. Cas. 339 = 37 M. 199 = (P.C.). See Final Part, 1913, Col. 653.

(4) Impartible estate—Whether joint family property governed by Mitakshara law—Rule as to survivorship—Applicability. See HINDU LAW (ADOPTION), No. 6, 27 M.L.J. 306.

(5) Agreement for maintenance—Liability to variation—Binding only on the Zamindar executing the agreement. See HINDU LAW (MAINTENANCE), No. 6, 27 M.L.J. 656.

—10.—Inheritance.

(1) Daughters inheriting father's estate jointly—Death of one—The other if succeeds to deceased's interest as reversionary heir—Adverse possession for more than twelve years during both daughters' lifetime—Surviving daughter's right to recover moiety share belonging to deceased, if arises from her death—Limitation Act, 1908, Sec. I, Art. 141.

Hindu Law—(Continued).**—10.—Inheritance—(Continued).**

Where one of two daughters of a Hindu who inherited his properties died, the survivor did not acquire in the interest enjoyed by the deceased a title of the nature described in Art. 141, Limitation Act. Where after both daughters had been kept out of possession for more than 12 years one of them died, and the other by some means or other got back possession.

Held—that she could not maintain her possession against the person who by 12 years' adverse possession had acquired title in the entire property, including the interest of the deceased daughter, to which she succeeded by survivorship and not by inheritance. *Sachindra Kishore Dey v. Rajani Kant Chuckerbutty*, 18 C.W.N. 904.

JENKINS. C.J., and N.R. CHATTERJEE, J.

(2) *Mitakshara*—"Sapindaship," definition of, if governs inheritance or marriage only—*Bhinna-gotra sapindas* or *bandhus*, who may succeed as—Limit of five degrees and mutuality to be satisfied—Classes of *bandhus* enumerated in *Mitakshara*, if to be extended—Interpretation of Rules of Hindu Law—Suit in ejectment—Plaintiff to strictly prove title.

Sapinda relationship, according to the *Mitakshara*, is based not on the presentation of funeral oblations, but on descent from a common ancestor, and, in the case of females, also on marriage with descendants from a common ancestor, this relationship ceasing—not merely for purposes of marriage but generally and therefore for purposes of inheritance also—after the seventh degree from the *propositus* on the father's side and fifth on the mother's.

The word "*bandhu*" in the system of the *Mitakshara* bears a distinct and technical meaning signifying the *binna-gotra sapindas* and the limitation of the five degrees clearly applies and can only apply to the *binna-gotra sapindas*.

Besides being within the fifth degree from the *propositus* a *bandhu* to be entitled to succeed to the inheritance must be so related to the *propositus* that they are *sapindas* to each other.

Held, accordingly, that the plaintiffs who were the paternal grandfather's son's daughter's daughter's sons of the *propositus* were not his heirs, both because they were his *binna-gotra* beyond the fifth degree and also because the element of mutuality was wanting between them and the *propositus*.

The ruling in *Gridari Lal v. The Bengal Government* (a) that the enumeration of *bandhus* who are entitled to succeed is not exhaustive but merely illustrative, hardly warrants the conclusion that the classes specified by *Vijnaneswar*, viz., *atma bandhus*, *pitri bandhus*, *matri bandhus* can be added to.

The Hindu Law contains its own principles of exposition, and questions arising under it

Hindu Law—(Continued).**—10.—Inheritance—(Concluded).**

cannot be determined on abstract reasoning or analogies borrowed from other systems of laws, but must depend for their decisions on the rules and doctrines enunciated by its own law-givers, and recognised expounders.

In order to succeed in an action of ejectment the plaintiff must strictly prove his title. **Ramachandra Martand Waikar v. Vinayak Venkatesh Kothekar**, 18 C.W.N. 1154=27 M.L.J. 333=16 M.L.T. 447=10 N.L.R. 112=(1914) M.W.N. 835=16 Bom. L.R. 863=12 A.L.J. 1281=20 C.L.J. 573 (P.C.).

LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

References:—(a) 12 M.I.A. 448, R. (b) 2 B. 388; 6 C. 119; 22 C. 339, R.

(3) *Ancestral property—Property inherited by two brothers from their maternal grandfather—Joint tenancy and not tenancy-in-common.*

'Ancestral' property in Hindu Law is to be limited to property which has come from certain male lineal ancestors as enumerated in the text-books.

Where two brothers inherit a certain property from their maternal grandfather, they held it as joint tenants with right of survivorship and not as tenants-in-common. **Karam Chand v. Jai Ram**, 224 P.L.R. 1914=124 P.W.R. 1914=92 P.R. 1914=24 Ind. Cas. 928.

KENSINGTON, C.J., and SHAH DIN, J.

(4) *Dayabhaga School—Inheritance—Paternal great-grandfather's son's daughter's son—Mother's brother—Who is preferable.* **Kailash Chandra Adhikary v. Karuna Kantha Chowdhury**, 19 Ind. Cas. 677=18 C.W.N. 477. See Final Part, 1913, Col. 654.

(5) *Daughters taking estate of father under will from mother whether estopped from claiming as heirs.* See HINDU LAW (PARTITION), No. 7, 16 M.L.T. 592.

(6) *Absolute property left by mother—Devolution on two daughters—One of the latter dying leaving a daughter behind—Preference of surviving sister over the latter.* See HINDU LAW (STRIDHANAM), No. 4, 16 M.L.T. 297.

—11.—Joint Family.

(1) *Property standing in the name of a junior member—Presumption—Self acquisition.*

Where the question is whether a property standing in the name of a junior member of a joint Hindu family is his self-acquisition, the criterion is to consider from what source the money comes with which the purchase-money is paid, and in the absence of evidence that the junior member had any separate funds or that the property in question was purchased with money belonging to him, the presumption is clear and decisive that it was acquired by the

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

head of the family in the name of the junior member and that it was not the self-acquired property of the junior member. **Parbati Dasi v. Raja Balkuntha Nath De**, 15 M.L.T. 66=(1914) M.W.N. 42=19 C.L.J. 129=12 A.L.J. 79=18 C.W.N. 428=16 Bom. L.R. 101=26 M.L.J. 248=22 Ind. Cas. 51 (P.C.).

LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

(2) *Joint Hindu family—Agreement to sell joint family property by one brother with the other brother's consent binding.*

One only of the two brothers, who are both members of a joint Hindu family, can, with the consent and authority of the other, agree to transfer property belonging to both, and such agreement is binding as against a subsequent sale of the same property made by both the brothers. **Thakur Din v. Seetla Sahai**, 12 A.L.J. 52=23 Ind. Cas. 530.

RICHARDS, C.J. and BANERJI, J.

(3) *Jewels made out of family funds—User and possession by one lady in the family—Separate property—Presumption—Re-union—Intention of parties, necessary element—Burden of proof—Difference as regards right of property between a joint family and a re-united family.*

Where in a Hindu family jewels are made from family funds for the use of a lady and she alone has been using them, and where, when other ladies came into the family, they had similar jewels made for their use and they have been using those particular jewels, then such jewels form their separate property and they are not family property. If there should be some evidence to show that the same jewels which were being used by one lady were also used by another lady in the family, or they were kept in the possession of one person in the family for the benefit of and for being handed over to the others for using them, the presumption arising from use and possession will be rebutted. In the absence of such rebutting evidence, the presumption certainly is that the jewels belonged to the ladies that used them.

Re-union depends upon the intention of the parties as well as on the properties being constituted into joint family property. After a re-union the subsequent interest of the members in the re-united family would not be the same as if they had originally remained undivided. It would depend upon the properties which they bring into a common stock, and in a subsequent partition the shares will be proportionate to the properties originally united.

The burden of proving that there was a re-union is upon the persons who set up a re-union.

The position of the members who re-unite is not the same as that of the members of a joint

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

Hindu family. In the one case, it is a co-parcenary. They are joint tenants. In other cases they are tenants in common. Before partition the property goes by survivorship. After re-union," the case is one of succession, though the persons who might take the property as heirs after re-union are not the same as those who would take if they are divided and there had been no re-union.

Quere:—Whether, in the case of a family composed of members who are reunited, the same presumption as to family ownership applies as in the case of a co-parcenary. **Alamelumangathayarammal v. C. Namberumal Chetty**, 15 M.L.T. 352 = 23 Ind. Cas. 824.

SANKARAN NAIR, J.

- (4) *Joint family—Nucleus, meagre—Members earning and living separately—Presumption.*

Where a Hindu family has a nucleus of joint property barely sufficient for the maintenance of its members, and each of them earns, lives and has dealings separately and independently, there is no presumption that they intend to throw their earnings into a common stock or to abandon their separate rights. **Lachhmi Narain v. Ram Dayal**, 22 Ind. Cas. 887.

KANHAIYA LAL and SABONADIERE, A.J. CS.

References:—2 A.L.J. 225; 9 Ind. Cas. 948 = 13 Bom. L.R. 133, R.

- (5) *Property purchased by one member of the family with his money for the family—Joint property—Mortgage by one member—Estoppel against his sons—Non-joinder—Only the heirs of the mortgagor parties.*

When one member of a Hindu family purchases property with his own money for himself and his father and brothers, and the property is treated as their joint property, it is the joint property of the family, and not the self-acquired property of the member with whose money it is purchased.

When joint family property is mortgaged by one member, of the family, the sons of the mortgagor are not estopped from denying the right of the mortgagor to deal with the property alone.

- All the members of the family are necessary parties to a suit for sale upon a mortgage of the family property, and the failure to bring any one of them upon the record is a fatal defect to the suit. **Shiam Sundar Lal v. Budhu Lal**, 12 A.L.J. 794 = 24 Ind. Cas. 252.

BANERJI and CHAMBER, JJ.

- (6) *Interest of a co-parcener attached in execution of decrees against him—Death of judgment-debtor before order for sale—Effect on accrual of title by survivorship.*

Where the interest of the judgment-debtor, a co-parcener, had by an attachment been brought under the control of the Court for the

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

purpose of executing the decree, such attachment precludes the accrual of title by survivorship in the event of the death of the judgment-debtor before an order for sale is made. **Thadi Ramamurthi v. Moola Kamiah**, 16 M.L.T. 123 = (1914) M.W.N. 738 = 24 Ind. Cas. 667.

SANKARAN NAIR and TYABJI, JJ.

References:—4 M. 302; 6 I.A. 88, F.; 8 M.L. J. 64; 30 M. 413; 32 M. 429; 25 C. 179; 9 M.L. T. 98, R.

- (7) *Litigation conducted by father—Decree how far binding on the sons—Agreement by father to be bound by oath—Whether binds sons—Tort committed by father—Whether committed on behalf of sons also.*

A father fully represents the whole family consisting of himself and his undivided sons, in a litigation which he conducts in the interests of the family. Unless the decree in such a litigation was passed owing to the fraud or collusion on his part directed against his sons, that decree and the findings in the suit in which that decree was passed are binding on the sons (a).

An agreement by the father in the previous litigation to be bound by an oath taken under the Oaths Act cannot, by the mere fact that it is based on the special provisions of the Oaths Act, be said to be an agreement made to defraud the sons (b).

Of course, a tort committed by the father is not necessarily one committed on behalf of his sons also, and is not binding on the sons (c). **Samu alias Anantanarayana Pattar v. Swaminatha Iyer**, 16 M.L.T. 163.

SADASIVA IYER and NAPIER, JJ.

References:—(a) 22 M.L.J. 45, R.; 6 M. 284, Diss. (b) 36 M. 287, R.; 5 M. 259, Diss. (c) 17 M.L.J. 197, R.

- (8) *Disruption of unity of a joint Hindu family—Presumption as to date of disruption—Presumption as to unity of other members where one member separates.*

Where a disruption of the unity of a joint family is proved or admitted to have taken place, held, that no presumption can be raised as to the date of that disruption.

Held further, that where one co-parcener separates himself from the others, there is no presumption that the remaining members remain united. **Mendana Musammatt v. Lala Jagan Nath Bakhah**, 17 O.C. 235.

PANDIT KANHAIYA LAL, A.J.C.

References:—3 C. 315; 9 C. 237; 30 C. 725; 18 A. 90, R.

- (9) *Joint family—Contract in the name of a member—Suit thereon without joining the other members—Consideration—Assignment—Transferor and transferee.*

Wallis, C. J.—Where, in the case of the joint family, the contract was in the name of a

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

junior member, he is entitled, as the agent of an undisclosed principal, to sue on it himself without joining the other members of the family.

Kumaraswami Sastri, J.—Where a person purporting to act for his sole benefit uses funds in which his brothers have a share, the fact that he may be accountable to his brothers affords no ground for dismissing the suit on the mortgagor for non-joinder. The mortgagor is entitled to sue on a mortgage obtained by him in his sole name while he was living separately from his brothers, and the mere fact that his brothers had an interest in the funds would afford no defence to the mortgagor in a suit filed on the mortgage. The managing member of an undivided family can sue on a contract entered into by him in his own name without joining the other members of the family. This proposition rests on the general principle of law that the person in whose name the contract is made can enforce it without joining persons simply interested in it, apart from the other theory that the managing member represents the whole family.

Mere non-payment of consideration between the transferor and the transferee would be no ground for holding that the property did not pass. The question as to consideration is one between the transferor and the transferee, and the mortgagor cannot take advantage of non-payment of consideration for the assignment. **Adikalam Cheanty v. Subban Chetty, (1914) M.W.N. 684=16 M.L.T. 279=27 M.L.J. 621.**

WALLIS, C.J., and KUMARASWAMI SASTRI, J.

(10) Hindu Law—Presumption—Jointness of family—General rule—Where cannot be relied upon.

The presumption of jointness of a Hindu family cannot be safely relied upon in a case in which the disputed property was in the possession of the person under whom the defendant claimed and was ostensibly that person's own property at the time of his death. **Protap Chandra Chakravarty v. Sarat Kamini Debya, 24 Ind. Cas. 90.**

HOLMWOOD and CHAPMAN, JJ.

Reference :—3 C. 315 (P.C.), F.

(11) Joint family—Bequest of self-acquired property by father to sons—Bequest found invalid—Nature of estate taken by sons—Eldest member appointed executor under will—Eldest member also manager—Debts contracted by him whether binding on family—Renewal of debt—Security apportioned—Apportionment found invalid—Right of creditor to fall back on original security—Joint family trade—Pro-note in the name of a firm by one member—Whether other members can be sued—Receiver appointed in partition or administration, suit—Receiver's power to acknowledge a

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

debt—Effect of such acknowledgment—Compound interest at 18 per cent. with monthly rests—Whether enforceable.

One P. V. died in 1887 leaving a will. It provided for the payment of certain legacies and directed that the residue should be divided among his sons and grandsons into 5 equal shares as soon as the grandsons should attain majority, that his eldest son (1st defendant), should be the executor under the will and should conduct the testator's business and administer his estate generally. The sons and the grandsons were living with the testator as members of one family at the time of his death. The eldest son continued to manage the estate according to the provisions in the will, he incurred debts and executed mortgages for family and business purposes, and no objection was taken to his administration of the properties until 1905. In 1905, some of the members of the family filed a suit praying for an account of the assets, etc., of the testator in the hands of the present 1st defendant as executor and for partition into five shares in accordance with the will, and for each party being put in possession of his share. During the pendency of that suit a Receiver was appointed with power "to pay interest and arrears accrued due and payable on the mortgages executed by the 1st defendant of the immoveable properties belonging to the deceased's estate." In that suit it was decided that the will was not valid in law, that there was an intestacy with regard to the residuary estate and that the property devolved upon the heirs-at-law of the deceased. The suit was eventually compromised and the compromise decree provided, *inter alia*, that the "debts of the 1st defendant binding on him incurred prior to the institution of this suit and disclosed to the Receiver are binding on the parties and shall be paid by the Receiver out of the income of the estate in his hands." All the parties to the present suit were duly represented in that suit.

In the present suit, plaintiff sued to recover a certain sum alleged to be due on an equitable mortgage created by the 1st defendant by the execution of 2 pro-notes carrying interest at 18 percent. per annum and by the deposit of title deeds. The defendants (other than the 1st defendant) pleaded *inter alia* that the equitable mortgage was not binding on them and that the payments made by the Receiver towards the said mortgage transaction would not save limitation.

Held that the monies borrowed by the 1st defendant from the plaintiff were for joint family purposes and the mortgage in question was therefore binding on the joint family.

By virtue of the decree in the suit of 1905, there was clearly an intestacy and the whole property devolved on the heirs, not under the will, but by reason of an intestacy. Therefore the fact that the will was executed appointing the 1st defendant as executor would not take the

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

properties out of the ordinary rules of Hindu law relating to succession to the properties of an intestate.

• Even assuming that there was no intestacy, the mere fact that a will was left would not make the properties bequeathed by a father, who was living jointly with his sons, the self-acquired properties of his sons. The general rule is that, where a family is joint and continues joint after the death of a testator, the properties which they get by a will would be joint properties, unless there is something in the will which raises a presumption to the contrary (a).

The renewal of a debt does not *ipso facto* put an end to the security which a person has, unless such renewal is accompanied by a fresh contract giving fresh security; nor would an attempt made to apportion the security, which is invalid, deprive the person of the security which he already has.

So where, an apportionment of the title deeds to the 2 pro-notes is for the benefit of the mortgagor and the mortgagor chooses to plead that the apportionment is invalid for want of registration, it will be perfectly open to the mortgagee to fall back upon the security which he never relinquished and to insist upon his original title (b). It is always presumed that the mortgagee intends to keep the mortgage alive when it is for his benefit to do so.

There is no defence in the remedies between regular and equitable mortgages, and there is no authority for holding that O. XXXIV, r. 1, Civ. Pro. Code, or the general rules of Hindu Law as to suits on mortgages created by a manager do not apply when the mortgage is created by execution of a pro-note and the deposit of title-deeds.

Where a joint family trades under a firm name, the members can be sued on a note properly executed by one member in the firm name.

A payment by a Receiver, who is appointed in a suit for partition or administration and who is authorised by the order of appointment to pay interest on debts, is sufficient to keep the debts alive against all the parties who are bound by the debts (c).

An agreement to pay compound interest at 18 per cent. with monthly rests ought not to be enforced, especially where the security is ample and the mortgagees had not taken any risk. **Y. Venkatramiah Pantulu v. P. V. Subramaniam Pillai**, 16 M.L.T. 489.

KUMARASWAMI SASTRI, J.

References:—(a) 24 M. 429, R. (b) 3 B. 312, R. (c) 26 B. 221; 6 B.L.R. 486; (1864) 11 H.L.O. 115; (1899) 2 Ch. 107, R.

(12) *Joint Hindu family—Separation—Succession of daughters—Khatries of Rahon and Nurmahal in the Jullundhur District owning*

Hindu Law—(Continued).**—11.—Joint Family—(Continued).**

agricultural land—Value of entry in—Riwaj-i-am unsupported by custom—Rebuttal of presumption of jointness. **Mt. Rukman v. Kirpa Devi**, 209 P.W.R. 1913=338 P.L.R. 1913=22 Ind. Cas. 134. See Final Part, 1913, Col. 665.

(13) *Burden of proof—Joint family—Separation.* **Ganpat Marwari v. Balmakund Behara**, 18 C.L.J. 548=22 Ind. Cas. 27. See Final Part, 1913, Col. 665.

(14) *Joint family property acquired in the name of different individual members—No presumption that property separate.* **Kundal Lal v. Shanker Lal**, 11 A.L.J. 910=21 Ind. Cas. 13=35 A. 564. See Final Part, 1913, Col. 665.

(15) *Grant of inam to manager—Presumption of acquisition on behalf of the family—Suit for partition.* See ACT XXIII OF 1971 (PENSIONS), No. 2, 16 M.L.T. 239.

(16) *Application for succession certificate—Joint Hindu family—Applicant joint with the deceased—Grant of certificate.* See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 5, 12 A.L.J. 525.

(17) *Reference to arbitration by father or manager whether binds the other members of the family.* See ARBITRATION, No. 3, 10 N. L.R. 74.

(18) *Decree following attachment before judgment—Effect upon accrual of title by survivorship under Hindu Law.* See ATTACHMENT BEFORE JUDGMENT, No. 2, 26 M.L.J. 517.

(19) *Father and son—Release by the former of his share—Subsequent birth of two more sons—Residue of family property—Right of all sons to equal shares.* See CIV. PRO. CODE (1882), No. 15, 26 M.L.J. 460.

(20) *Mitakshara joint family—Mortgage executed in favour of karta for benefit of family—Suit by karta alone—Parties—Limitation.* See CIV. PRO. CODE (1908), No. 403, 22 Ind. Cas. 570.

(21) *Parties in doubt about their rights—Minor son bound by compromise of father.* See COMPROMISE, No. 10, 24 Ind. Cas. 491.

(22) *Joint family partnership—Death of one of the partners—Effect upon dissolution of partnership—Agreement between survivors to continue the partnership—Liability of surety—Suit for dissolution and accounts—Art. 106, Limitation Act (1908).* See CONTRACT ACT, No. 104, 101 P.R. 1914.

(23) *Applicability to Cutchi Memons.* See CUTCHI MEMONS, No. 1, 16 Bom. L.R. 224.

(24) *Nature of right by birth and right of survivorship—Father purchasing property, in another's name with a view to defraud creditors—Whether property can be recovered by another co-parcener.* See FRAUDULENT TRANSFERS, No. 1, (1914) M.W.N. 595.

(25) *Hindu son's right in the family property—Unfriendliness of father does not exclude son*

Hindu Law—(Continued).**—11.—Joint Family—(Concluded).**

—Effect of division of property by private arrangement. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(26) Suit filed on last date—Original plaintiff used to collect rent—Minor member of joint Mitakshara family—Effect of adding him as plaintiff after limitation. See LIMITATION, No. 1, 19 C.L.J. 5.

(27) Suit for foreclosure—Managing members made defendants—Co-parceners not made parties if bound by decree—Suit by latter for redemption if lies. See MORTGAGE (GENERAL), No. 17, 19 C.W.N. 968.

(28) Joint family—Promissory note in favour of deceased member—One other member and deceased alone entitled to benefit of it—Suit by his widow or all surviving members—Maintainability. See PROMISSORY NOTE, No. 4, 26 M.L.J. 224.

(29) Contract to grant permanent lease—Contract by members of joint Mitakshara family in Bengal—Certificated guardians executing contract on behalf of minor members—Legal necessity—Benefit of family—Contract that permission of Judge would be taken for grant of lease of minor members' shares—Validity—Contract whether binding upon minors—Whether major members bound as far as contract relates to their shares. See SPECIFIC PERFORMANCE, No. 7, 22 Ind. Cas. 612.

—12.—Maintenance.

(1) *Principle on which maintenance should be awarded to Hindu widow—Right to arrears.*

Where a widow has asked for separate maintenance, the Court must look first at the mode of life of the family during her husband's lifetime and try to find out what amount will be sufficient to allow the widow to live, as far as may be, consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime. Then the Court must see what the husband's estate is and also how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate (a).

A wrongful withholding or demand is not necessary to entitle a widow to arrears of maintenance (b). Her status as the widow of one of the members of a joint family holding property in common, is sufficient to entitle her to receive maintenance from the date of her husband's death. She may no doubt be living with her parents or otherwise impliedly waive her right to be maintained by her husband's relations during the time that she lives away from them, but waiver cannot be necessarily inferred in every case from the fact of separate residence alone.

Hindu Law—(Continued).**—12.—Maintenance—(Continued).**

Arrears will be refused only in cases where the person liable to make the payment had justifiable ground for inferring that the claim was abandoned, and had in consequence not set aside any portion of his annual income to meet such a claim (c).

Held, under the circumstances of this case, that Rs. 140 a month would be a reasonable rate of maintenance to be allowed to the widowed daughter-in-law of the defendant. **Pushpavalli Thayarammal v Raghaviah Chetty**, 15 M.L.T. 95=23 Ind. Cas. 413.

WALLIS, J.

References:—(a) 9 C.W.N. 651, R. (b) 21 M.L.J. 706, R. (c) 24 M. 147 (P.C.), F.

(2) *Mitakshara—Step-mother, right of—Partition among sons—Status of step-mother—Privy Council Rulings are binding on Courts.*

Held, that under Hindu Law, both Dayabhaga and Mitakshara, a step-son is not bound to contribute to the maintenance of his step-mother after a partition of the joint property has been effected between him and his step-brother (the son of his step-mother) (a).

The status of a step-mother discussed (b). **Bishen Das v. Mussammatt Mansa Devi**, 60 P.L.R. 1914=47 P.R. 1914=23 Ind. Cas. 536.

RATTIGAN and BEADON, JJ.

References:—(a) 16 C. 758 (P.C.), F. (b) 1 C.L.J. 142; 8 C. 537 (543); 37 C. 214; 5 M. 29 (32); 8 M. 107 (F.B.); 4 B. 188; 2 B. 614; Beng. L.R. Sup. Vol. P.B. p. 67 (F.B.); 16 A. 221 (224); 153 P.R. 1889, R.

(3) *Maintenance—Widow of deceased undivided brother—Family trade, source of income—Development of trade after the death of the deceased brother—Rate of maintenance—Basis of calculation—No arrangement for her maintenance at partition between brothers—Widow living apart—No waiver.*

Where, in a suit for maintenance brought by the widow of one of the three brothers of an undivided Hindu family against the surviving brothers, it appeared that the major part of the income was derived from the family trade in which the plaintiff's husband took part at the time of his death, and the trade had developed considerably since his death:

Held that the plaintiff was entitled to have the amount of maintenance fixed with reference to the family income at the date of suit and not with reference to such income at the date of her husband's death. In calculating the rate of maintenance the share which her husband would get if he were alive at the time of the suit should be taken into consideration, and not the share, if any, to which he was entitled on his death (a).

Where, in a partition between the two surviving brothers of her deceased husband, no

Hindu Law—(Continued).**—12.—Maintenance—(Continued).**

arrangements were made for the widow, and in consequence, she was obliged to go to her father's house, *held* that there was no waiver of her claim (a). **Manikka Mudaliar v. Soubagla Ammal**, 27 M.L.J. 291.

SANKARAN NAIR and SPENCER, JJ.

References :—(a) 11 B. 199 ; 2 B. 639 ; 13 Ind. Cas. 136 ; 22 M. 175, R.

(4) *Will—Provision for maintenance of his wife after testator's death—No deprivation of maintenance by unchastity—Construction of will—Rules of.*

* Where, by his will, a Hindu testator gave his widow a clear right to receive till her death a certain quantity of rice yearly for her maintenance.

Held that she could not be deprived of her right by adding to the will certain words and terms which the testator might be presumed to have intended to add if certain future contingencies had been in his mind when he made the will.

There is no certain and necessary implication that a Hindu who by will provided for the maintenance of his wife after his death intended to deprive her of the maintenance if she should become unchaste (a). **Bommaya Hegade v. Srinivasa Hebarra**, 27 M.L.J. 305.

SADASIVA AIYAR and TYABJI, JJ.

References :—(a) 34 B. 278, F. ; 26 M.L.J. 411 (414) (P.C.), R.

(5) *Maintenance—Grant—No writing necessary—Nor registration—Admissibility of oral evidence to prove such a grant.*

A grant of immoveable property to a Hindu widow for maintenance can be made by other means than by a registered instrument. If there be a document evidencing the grant, it would then require registration.

The Registration Act is silent as to whether any transaction must be in writing or not.

The Transfer of Property Act requires certain transfers of certain value to be by a registered instrument. But that is only in the case of sale, gift, mortgage, or lease. A grant of maintenance to a Hindu widow is not specifically dealt with by that Act. The question must therefore be decided under the Hindu Law, according to which no transaction need necessarily be in writing.

Oral evidence is admissible to prove a grant of maintenance to a Hindu widow. **Jiwanlal v. Chudaman**, 10 N.L.R. 111.

MITTRA, A.J.C.

(6) *Maintenance—Document—Nature.*

Where a document has been executed in pursuance of compromise of a suit, it has not the binding force of a decree.

Where the agreement of compromise is not registered, the parties cannot rely on terms

Hindu Law—(Continued).**—12.—Maintenance—(Continued).**

which have not passed into a decree or order of Court, so far as they affect immoveable property.

An amount provided as maintenance for a member of a family does not lose its character as a maintenance allowance, by being embodied in an instrument or decree, the character of being liable to be increased or decreased under a change of circumstances.

A maintenance document creating a future interest in immoveable property in favour of unborn persons and providing a line of succession excluding females and collaterals is one opposed to the principles of Hindu law and the law of perpetuities.

A right to receive maintenance is not dependent on decree or agreement but on the relationship to the owner of the Zemindari. **Umde Rajah Raja Damara Kumara Seshachalapathi Nayanam Bahadur Yaru v. Umde Rajah Raja Damara Kumara Timma Nayanam Bahadur Yaru**, 27 M.L.J. 656=(1914) M. W.N. 900.

SANKARAN NAIR and SPENCER, JJ.

(7) *Wife—Maintenance—Adultery.*

A wife is not entitled to maintenance from her husband, if at the time of the suit, she is living in adultery and persists in her vicious course of life.

Therefore, a wife, who gave birth to an illegitimate child but at the time of the suit, was not living in adultery, is entitled to maintenance. **N. Subbhaya v. Bhavani**, 24 Ind. Cas. 390.

MILLER and SANKARAN NAIR, JJ.

References :—19 M. 6 ; 5 Ind Cas 960=34 B. 278=12 Bom. L.R. 136, F.

(8) *Father's self-acquisition—Son's widow, not entitled to maintenance thereout.* **Meenakshi Ammal v. Rama Aiyar**, (1913) M.W.N. 40 =13 M.L.T. 97=24 M.L.J. 106=18 Ind. Cas. 34=37 M. 396. See Final Part, 1913, Col. 667.

(9) *Grant for maintenance—Powers of grantee—Whether alienation by grantee may be prevented under Hindu Law.* See **GRANT**, No. 1, 15 M.L.T. 361.

(10) *Widow of junior member of family of holder of impartible estate—Her right to maintenance—Arrears of maintenance—Principle on which arrears to be granted—Demand and refusal—Burden of proof—Limitation.* See **HINDU LAW (IMPARTIBLE ESTATES)**, No. 1, 26 M.L.J. 205.

(11) *Durbhanga Raj—Babuana and Sohag grants to junior members and their wives—Widow's right to maintenance—Dispossession by widow—Mesne profits disallowed in absence of proof of offer of maintenance—Maintenance made a charge on property decreed.* See **HINDU LAW (SUCCESSION)**, No. 6, 18 C.W.N. 1249.

(12) *Property given to widow for maintenance—Whether resumable—Presumption.* See **HINDU LAW (WIDOW)**, No. 20, (1914) M. W. N. 782.

Hindu Law—(Continued).**—12.—Maintenance—(Concluded).**

(13) Widow—Maintenance whether a charge on whole family property or on her husband's share only—Charge when and how created—Liability of alienes of property—Right created by attachment. See HINDU LAW (WIDOW), No. 24, 16 M.L.T. 551.

—13.—Marriage.

(1) Wife—Right to live in the husband's house—Unchastity and immorality—Ejectment suit.

A Hindu husband has full ownership and dominion over his house and the wife cannot insist upon living in any part of the house against his will. In a suit brought by him to eject his wife from the house, the question of immorality or unchastity of the wife does not arise. *Ganpat v. Sundri*, 12 A.L.J. 1039.

SUNDAR LAL, J.

Reference:—1 A. 77^a, R.

(2) Validity of *Gandharva* form of marriage among the Kumbala caste—Forms of marriage among that caste—Validity of marriage not proved—Value of circumstantial evidence as to treatment of wife, &c.—Duty of Courts to recognise such forms. *Visvanathaswamy Naicker v. Kamu Ammal*, 24 M.L.J. 271=21 Ind. Cas. 724. See Final Part, 1913, Col. 669.

(3) Hindu married woman of Balli caste—Conversion to Mahomedanism—Second marriage with Mahomedan during the subsistence of first marriage—Legality—Applicability of Hindu or Mahomedan Law—Recognition of paternity and acknowledgment—Effect—Conflict between persons of different religions—Law applicable—Doctrine of *Factum valet*—Applicability—Legitimacy of offspring. See CONVERTS, No. 1, 15 M.L.T. 107.

(4) Marriage is a *Samskara*—Partition of joint family property—Provision to be made for marriage expenses of unmarried co-parceners. See HINDU LAW—PARTITION, No. 1, (1914) M.W.N. 282.

—14.—Partition.

(1) Marriage expenses—Provision should be made for marriage expenses of unmarried co-parceners—Marriage—*Samskara*.

Held (agreeing with *Sundara Iyer, J.*).—As marriage is a *Samskara*, which it is not usual to omit, and it is necessary that *Samskaras* should be performed out of family funds when such exist, at a partition between members of a joint Hindu family, funds should be set apart for the marriage of unmarried brothers, especially when the other brothers had been married at the family expenses. *Srinivasa Iyengar v. Minor Thiruvengadath Iyengar*, (1914) M.W.N. 282.

SPENCER, J.

References:—84 M. 422; 33 B. 81; (1912) M.W.N. 908, F.

Hindu Law—(Continued).**—14.—Partition—(Continued).**

(2) Adopted grandson takes one-fourth of the share of the natural grandson—Joint family estate—*Mitakshara*—*Mayukha*—*Dattaka Chandrika*.

The adopted son of a pre-deceased natural son of a common ancestor, on partition with the natural son of another predeceased natural son of the common ancestor, takes one-fourth of the share of the latter.

N died leaving two sons H and B, who lived as members of joint Hindu family. H died leaving a widow G, who was pregnant. B died leaving a widow M to whom he had given authority to adopt. G gave birth to a posthumous son, the defendant. M adopted the plaintiff. In a suit by the plaintiff to partition the ancestral estate.

Held that he was only entitled to one-fourth of the share of the defendant. *Bachoo Harikondas v. Nagindas Bhagwandas*, 16 Bom. L.R. 263=23 Ind. Cas. 912.

SCOTT, C.J., and BATCHELOR, J.

(3) Code of Civil Procedure (1908), O. XX, r. 18—*Agra Tenancy Act* (II of 1901), S. 32—Suit for partition of joint Hindu family property—Occupancy holding included in suit—Preliminary decree—Actual division of holding not necessary.

In a suit, brought in the Civil Court by one Hindu brother against two others, for partition of a joint family property, including a certain occupancy cultivatory holding, the Court gave the plaintiff a decree for possession of a one-third share in the whole of the property, but the decree was wholly silent as to the manner in which the partition was to be effected. *Held* that the decree given is a preliminary decree for partition.

Held also, that a suit for partition of a joint family property can be brought even if the property included an occupancy holding; the Court can either give the occupancy holding to one party taking from that party an equivalent in value, or simply declare that the parties are entitled jointly to that holding. *Dwarka v. Ram Pat*, 12 A.L.J. 696.

RICHARDS, C.J., and TUDBALL, J.

Reference:—4 A.L.J. 809, R.

(4) Partition—Construction of partition deed—Family consisting of father and three sons—Status after partition.

Where a Hindu father and his minor son, by his second wife, effected a partition with his two major sons by his first wife, and the partition deed recited that some of the immoveable properties shall be enjoyed by the two sharers (father and minor son) and that such and such property shall pass to and be enjoyed by each of the other two sons:

Held, that the father and the minor son still constituted a joint family and in a sale by the

Hindu Law—(Continued).**—14.—Partition—(Continued).**

father the interest of the minor son also would pass. *Singa Iyer v. Venkataramana Iyer*, 28 Ind. Cas. 6.

• *MILLER and TYABJI, JJ.*

- (5) *Benares School-Mitakshara Law—Sisters jointly inheriting property of their father—Co-widows jointly inheriting property from husband—Right to make partition so as to extinguish rights of survivorship.*

Two or more sisters governed by the Mitakshara Law, who have jointly inherited the estate of their father, can by express agreement amongst themselves, effect such a partition of their interests as to destroy their rights of survivorship *inter se*.

Even co-widows may, by agreement between themselves, convert their joint estate in property inherited from their common husband, into estates in severalty so as to destroy the right of survivorship *inter se*. *Balu Ba v. Tanu Ba*, 10 N.L.R. 51=24 Ind. Cas. 808.

STANYON, A.C.J.

References :—1 C.P.L.R. 45; 5 C.P.L.R. 58; 7 C.P.L.R. 153; 8 C.P.L.R. 99; 1 M.H.C. 233; 3 M.H.C. 268; 3 M.H.C. 424; 2 M. 290; 22 M. 522; 23 M. 504; 11 M.I.A. 487; 12 A. 51, R.

- (6) *Partition—Joint family property includes occupancy holding—Agra Tenancy Act (II of 1901), S. 32.*

A suit for partition of joint family property can be brought even if the property includes an occupancy holding. A Court need not subdivide the holding in contravention of the provisions of the Tenancy Act, but it can either give the occupancy holding to one party taking from that party an equivalent in value, or can leave the occupancy holding undivided, merely making a declaration that the parties are entitled jointly to the holding. *Dwarka v. Rampat*, 24 Ind. Cas. 235=25 A. 461.

RICHARDS, C.J., and TUDBALL, J.

- (7) *Daughters taking estate of father under Will from mother—Oral partition—Survivorship, right of, whether extinguished—Evidence Act, S. 115—Estoppel—Daughters taking under Will, whether estopped from claiming as heirs—Partition, oral, whether valid.*

Daughters taking the estate of their deceased father, according to a Will executed by their mother, are not estopped from claiming subsequently as heirs to their father on the ground that the Will executed by their mother in respect of such properties is invalid.

But when they divide the properties equally among themselves under an oral partition, they must be deemed to have given up their rights to succeed by the right of survivorship to the estate of a sister who may die subsequently.

A partition of immoveable property of whatever value can be effected by oral arrangement

Hindu Law—(Continued).**—14.—Partition—(Continued).**

and need not be in writing and registered, as it is not an 'exchange,' 'sale,' 'mortgage,' or 'lease.'

Therefore the mere fact that the rights mutually relinquished under an oral partition are to continue for periods of greater or less duration, cannot have much bearing on the question whether written instruments are required to effect valid partitions. *Alamelu Ammal v. Balu Ammal*, 16 M.L.T. 592=26 Ind. Cas. 455=(1915) M.W.N. 26.

SADASIVA AIYAR and NAPIER, JJ.

References :—(1897) 2 Ch. D. 86=66 L.J. Ch. 604=76 L.T. 700=45 W.R. 685; (1874) 18 Eq. 320=43 L.J. Ch. 787=30 L.T. 779=22 W.R. 807; 33 C. 915=10 C.W.N. 747=3 C.L.J. 629 25; C. 210=2 C.W.N. 291; 3 Ind. Cas. 247=10 C.L.J. 503; 4 M.I.A. 137=7 W.R. 35 (P.C.)=1 Suth. P.C.J. 172=1 Sar. P.C.J. 327=18 E.R. 651, R., 4 M.L.T. 354; 15 Ind. Cas. 343=37 M. 423=(1912) M.W.N. 854=23 M.L.J. 339=12 M.L.T. 425; 7 Ind. Cas. 858=34 M. 72=8 M.L.T. 233=(1910) M.W.N. 692; 13 M.L.J. 500; 22 M. 522=9 M.L.J. 101, F.

- (8) *Partition—Status—Intention to divide—Presumption when one co-parcener divides.*

If the male members of a joint Hindu family wish to become divided in status, they are at liberty to agree to do so, and on their so agreeing they become divided in status even though the properties are not actually divided between them by metes and bounds. A definite and unambiguous indication even by one member of his intention to separate himself and enjoy his share in severalty may amount to separation. A definite partition of properties by metes and bounds is not essential to constitute a definite division in status between co-parceners. The presumption, when one of several co-parceners becomes divided, is that the others also have become divided in status. *Y. Balakrishna Mudaliar v. Y. Raju Mudaliar*, 16 M.L.T. 610=(1915) M.W.N. 17.

SADASIVA IYER and NAPIER, JJ.

(9) *Mitakshara—Partition—Ancestral property—Minors—Father's power to bind his minor sons—Share given to a stranger—Practices—Suit by a Hindu governed by the Mitakshara law to set aside his father's alienation of ancestral property—Form of the suit—Nature of the relief to be granted—Equity between the father and his alienee. Ramkishore Kedarnath v. Jainarayan Ramrachpal*, (1913) M.W.N. 661=15 Bom. L.R. 867=14 M.L.T. 163=17 O.W.N. 1189=18 C.L.J. 237=25 M.L.J. 512=20 Ind. Cas. 958=40 C. 966=11 A.L.J. 865=10 N.L.R. 1 (P.C.) See Final Part, 1913, Col. 676.

(10) *Suit for partial partition by alienee of some co-parceners against an alienee of the remaining co-parceners—Maintainability—Plaintiff's right to mesne profits subsequent to suit—*

Hindu Law—(Continued).**—14.—Partition—(Concluded).**

Amendment of plaint when may be disallowed. **Amritrao v. Govind**, 9 N.L.R. 145=21 Ind. Cas. 590. See Final Part, 1913, Col. 677.

(11) *Manager of a joint Hindu family—Suit for partition—Ordinary procedure to pay each man's share—Exceptional procedure where the managing member is guilty of fraud—Receiver when to be appointed.* **Rama Iyer v. Raja-gopala Iyer**, (1913) M.W.N. 982=14 M.L.T. 510=21 Ind. Cas. 598. See Final Part, 1913, Col. 677.

(12) *Partition—Provision for upanayanam and marriage of co parcener—Right to past profits of member living separately.* **Srinivasa Iyengar v. Minor Thiruvengadathaiyangar**, 25 M.L.J. 644=(1913) M.W.N. 1034=15 M.L.T. 307=23 Ind. Cas. 264. See Final Part, 1913, Col. 679.

(13) *Separation of father from sons remaining joint—Unusual.* See ACT I OF 1869 (OUDH ESTATES), No. 1, 22 Ind. Cas. 129.

(14) *Bengal School of Hindu law—Partition suit between sons—Mother's share if ascertained before decree.* See ADMINISTRATOR, No. 1, 18 C.W.N. 631.

(15) *Disruption of unity of joint family—Presumption as to date of disruption—Presumption as to unity of other members where one member separates.* See HINDU LAW (JOINT FAMILY), No. 8, 17 O.C. 235.

(16) *Land granted as Desai inam to manager of undivided family—Presumption—Suit for partition—Maintainability without certificate under Pensions Act—Jurisdiction of Civil Courts whether ousted.* See INAM, No. 7, 27 M.L.J. 618.

(17) *Document merely declaring the divided status of family—Whether registrable—Civ. Pro. Code (1908), O. XXI, r. 103—Civ. Pro. Code (1882), S. 335—Art. 11, Limitation Act—Undivided share in joint family purchased in Court auction—Effect of symbolical delivery—Suit for partition and separate possession—Limitation.* See REGISTRATION, No. 1, 15 M.L.T. 163.

—15.—Religious Endowments.

(1) *Limitation Act (1908), Sch. I, Art. 144—Issue, amendment of, after trial on issues originally framed is completed—Construction of one document with reference to another—Hindu Law—Idol capable of being endowed with property—Juridical person—Family idol and idol installed in temple for public worship, gifts in favour of, distinction between—Perpetuity, rule forbidding creation of, not applicable to cases of valid dedication for religious purposes—Consecration of idol, effect of—Gift in favour of consecrated idol with charge on gifted property for maintenance of certain persons validity of property to be vested in idol or deity—Trustee's beneficial interest in property of trust—Omission to frame*

Hindu Law—(Continued).**—15.—Religious Endowments—(Contd.).**

specific issue when issues already framed sufficiently wide, effect of—Succession rule of cannot be changed by colourable or fictitious endowment—Endowment, deed of, interpretation of—Vesting of property from date of gift—Mutation of names in favour of idol, donor's omission as to, effect of—Mutawalli, donor's position as—Wakf—Possession of endowed property, suit for recovery of, by heirs of donor.

After the trial on the issues originally framed is completed, the Court can amend an issue and give the parties an opportunity of producing their evidence in regard to the same, if it finds, that any pleas taken in the pleadings were inadvertently ignored.

The omission to frame a specific issue cannot prejudice the parties in the trial if the issues framed are sufficiently wide and they are not taken by surprise (a).

It is dangerous to construe one deed by a reference to the terms and conditions entered in another, unless the two form part of one and the same transaction (b).

Under the Hindu law an idol is a juridical person capable of taking and holding property, and although the idol holds property in an ideal sense through its manager or *Shebait*, the nature of the title is in no way different from that of a living individual. There is no distinction in this respect between a family idol and an idol installed in a temple for public worship (c).

Where there is a valid dedication of premises for religious purposes, it will not be invalid merely by reason of its transgressing the rule which forbids the creation of a perpetuity (d).

When an idol has been consecrated by the appropriate religious ceremonies for public worship, the invisible deity of which the idol is the visible symbol is considered to reside in it (e).

The Hindu law recognizes a gift made in favour of such an idol to the same extent as a gift in favour of a deity in the abstract and gives effect to it even if a portion of the income of the gifted property is set apart for the maintenance of certain members of the family or of the manager and administrator of the trust (f).

The property which is the subject of the gift must be vested in the idol or deity, as the case may be, though the donor or settlor may retain the management of the same in his own hands.

Where the whole property is devoted absolutely and in perpetuity to religious purposes the trustee has no beneficial interest in it beyond what he is given by the express terms of the trust.

It is not open to a person to change the rule of succession under the colour of a fictitious endowment.

Hindu Law—(Continued).**—15.—Religious Endowments—(Contd.).**

A deed of endowment purported to be an immediate and absolute gift of the entire property to an idol with a direction that half the income of the said property was to be applied to the maintenance of certain female members of the donor's family and their issue for their lives and was to revert to the temple after them if their lines became extinct. The donor appointed himself the *mutawalli* of the temple for his life and declared that after his death the female members of the family and after them their issue should act as such. The deed provided for the acts of the *mutawallis* being subjected to the supervision of the Government and for the Government assuming charge of the management of the temple and its property in case none of the persons mentioned in the deed were thereafter in existence and in case any dispute occurred between them in connection with the management:

Held, that the above deed of endowment was neither colourable nor fictitious, but valid and enforceable.

The property gifted to an idol becomes vested in it on the date of the gift, irrespective of the fact that the donor omitted to get mutation of names effected in its favour in his lifetime.

The possession of the donor appointing himself a *mutawalli* becomes, after the date of the gift, that of a manager, and a suit by the donor's heirs for recovery of possession of such property brought after twelve years from the date of the gift is barred under Art. 144, Sch. I, of the Limitation Act (g). **Sri Thakur Sitaramji v. Jadunath Singh**, 24 Ind. Cas. 72.

STUART and KANHAIYA LAL, A.J.CS.

References :—(a) 27 A. 634=15 M.L.J. 352=9 C.W.N. 1009=2 C.L.J. 194=8 O.C. 317; 29 A. 184=11 C.W.N. 321=4 A.L.J. 102=5 C.L.J. 115=17 M.L.J. 103=2 M.L.T. 109=9 Bom. L.R. 267, R. (b) 7 Bom. L.R. 850=27 A. 383=9 C.W.N. 817=15 M.L.J. 327=8 O.C. 270=2 C.L.J. 57=3 A.L.J. 64=32 I.A. 135, R. (c) 25 C. 112; 6 C.W.N. 178; 23 C. 536; 23 C. 645; 32 C. 129=7 Bom. L.R. 765=37 I.A. 203=8 C.W.N. 809=1 A.L.J. 585; 30 M. 245=17 M.L.J. 174; 2 C. 341 (347)=4 I.A. 52, R. (d) 25 C. 112, R. (e) 7 C.L.R. 278; 29 C. 260=6 C.W.N. 267; 27 M. 435=14 M.L.J. 105, R. (f) 6 C. 106; 30 A. 288=5 A.L.J. 256=A.W.N. (1908) 182, R. (g) 4 Ind. Cas. 449=36 C. 1003=10 C.L.J. 284=6 A.L.J. 857=11 Bom. L.R. 1234=19 M.L.J. 530=14 C.W.N. 1=36 I.A. 148, R.

(2) **Hindu law—Private debutter—Conversion of debutter to secular property—Consensus of family—Property whether really or nominally debutter—Question of fact—Second appeal—Civ. Pro. Code (Act V of 1908), S. 100.** **Tulsi Das Bairagi v. Siddhi Nath Misser**, 9 Ind. Cas. 650=20 C.L.J. 315. See Final Part, 1911, Col. 579.

(3) **Hindu Law—Debutter—Idol, destruction or mutilation of, if terminates endowment—**

Hindu Law—(Continued).**—15.—Religious Endowments—(Contd.).**

Consecration of new idol, effect of—Land given for worship of idol—Grantee if bound to apply proceeds for service of new idol—Statement partly against one's interest and partly self-regarding—Admissibility. **Bojoy Chand Mahatar v. Kali Pada Chatterjee**, 17 C.W.N. 1013=18 C.L.J. 347=20 Ind. Cas. 78=41 C. 57. See Final Part, 1913, Col. 682.

(4) **Alienation of religious offices—Legality.** See RELIGIOUS OFFICES, No. 1, 26 M.L.J. 315.

(5) **Shebait's right to take a share of surplus income from offerings.** See SHEBAIT, No. 1, 18 C.W.N. 1029.

—16.—Religious Offices.

Purohitam office—Monopoly to officiate as purohit—Not to be recognized—Opposed to public policy—Alienation—Effect.

A monopoly to officiate as a *purchit* should not be recognized by Courts and it is against public policy to allow any such claim (a).

It is contrary to the Hindu Sastras to recognize any such hereditary right, in a spiritual office, the right to hold such an office depending on the requisite spiritual qualifications (b). (*Per Sadasiva Aiyar, J.*)

It cannot be said that *purohitam* is an office at all, that it is hereditary or that it is immoveable property which can be leased at all. (*Per Seshagiri Aiyar, J.*) **Saripaka Chinna Mahadeva Yazulu v. Muthura Suryaprakasam**, 26 M.L.J. 482=(1914) M. W.N. 379=24 Ind. Cas. 204.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

References :—(a) 7 M. 424; 21 M.L.J. 57, F.; 11 C.W.N. 585 (590)=30 M. 185 (F.C.)=17 M.L.J. 240; 13 C.L.J. 449; 17 M.L.J. 493; 20 M.L.J. 590, R.

—17.—Restitution of Conjugal Rights.

Legal cruelty, what amounts to—When desertion by wife justified. See RESTITUTION OF CONJUGAL RIGHTS, No. 3, 12 A.L.J. 995.

—18.—Re-union.

(1) **Mitakshara joint Hindu family—Partition among father and three sons—Re-union of one son with father—Right to inherit property left by father.** **Yenka v. Dharma**, 9 N.L.R. 150=21 Ind. Cas. 597. See Final Part, 1913, Col. 684.

(2) **Intention of parties to re-unite—Burden of proof—Right of property—Difference between joint family and re-united family—Effect of re-union on co-parcenary.** See HINDU LAW (JOINT FAMILY), No. 3, 15 M.L.T. 352.

—19.—Reversioners.

(1) **Reversionary heirs—Agreement between widow and reversionary heirs settling reversion on latter, whether legal.**

A Hindu widow and the expectant reversionary heirs cannot legally enter into an

Hindu Law—(Continued).**—19.—Reversioners—(Continued).**

agreement whereby the latter's expectant reversionary rights become converted into vested reversionary rights. *Palla Kanakamma v. Challa Ramasami*, 28 Ind. Cas. 98.

SADASIVA AIYAR and SPENCER, JJ.

(2) *Reversioner—Declaratory suit—Offer to pay—Conditional decree.* *Garikipati Paparayudu v. Garikipati Rattamma*, (1912) M.W.N. 1176=13 M.L.T. 110=17 Ind. Cas. 508=24 M.L.J. 62=37 M. 275. See Final Part, 1912, Col. 643.

(3) *Suit by reversioner—Offer by reversioner—Decree in suit.* *Arunachala Goundan v. Kuppanada Goundan*, 14 M.L.T. 391=(1913) M.W.N. 866=21 Ind. Cas. 562. See Final Part, 1913, Col. 685.

(4) Possession of a co-heir whether adverse to other co-heirs—Possession traceable to a lawful title is not adverse—Hindu widow alienating property by gift to one of the presumptive reversioners—Validity—Alienation by donee—Suit by alienee from the other reversioners—Adverse possession when commences. See ADVERSE POSSESSION, No. 16, 16 M.L.T. 530.

(5) Alienation by widow—Suit by reversioner for possession—Parties—Persons in possession and transferees from widow—Muhifariousness. See CIV. PRO. CODE (1908), No. 231, 12 A.L.J. 509.

(6) Decree for rent against Hindu widow—Sale in execution—Cancellation of sale on deposit by reversioner—Reversioner's right to recover from widow. See CONTRACT ACT, No. 55, 21 Ind. Cas. 207.

(7) Decree in favour of widow as representing estate—Suit by reversioner against widow, not *res judicata*—No strangers party to suit—Each member of the family litigating for himself. See GUARDIAN AND MINOR, No. 3, 27 M.L.J. 486.

(8) Alienation by widow—Legal necessity—Admission by parents in an affidavit in a different suit against the interest of infants, if admissible in evidence in subsequent suit by the latter for recovery of property as reversionary heirs of maternal grandfather—Delay in bringing suit—Effect. See HINDU LAW (WIDOW), No. 5, 18 C.W.N. 718.

(9) Alienation by widow—Consent of reversioners—Evidence of legal necessity—*Ijara* for 60 years—Expectant reversioners taking the benefit of the lease—Conduct showing sanction to alienation. See HINDU LAW (WIDOW), No. 3, 18 C.W.N. 673.

(10) Alienation of husband's estate by widow—Widow wasting husband's estate—Reversioner's right to control widow's acts. See HINDU LAW (WIDOW), No. 1, 21 Ind. Cas. 8.

(11) Surrender of her interest by widow to the nearest reversioner—Validity. See HINDU LAW (WIDOW), No. 8, 17 O.C. 108.

Hindu Law—(Continued).**—19.—Reversioners—(Concluded).**

(12) Alienation by widow—Alienee what to prove—Suit for declaring invalidity of alienation—Reversioner whether necessary party. See HINDU LAW (WIDOW), No. 18, 20 C.L.J. 23.

(13) Alienation by widow—Part of consideration not binding on reversioners—*Bona fide* purchaser may retain property on paying to reversioners part of consideration not found binding—Proper decree. See HINDU LAW (WIDOW), No. 16, 27 M.L.J. 132.

(14) Widow—Pilgrimage to Gaya—Feast given after return from Gaya whether legal necessity—Whether binding on reversioner—Reversioner whether can sue for declaration without offering to reimburse money spent on legal necessity. See HINDU LAW (WIDOW), No. 18, 18 C.W. N. 1303.

(15) Prior alienation by widow—Effect of subsequent relinquishment by her in favour of reversioner. See HINDU LAW (WIDOW), No. 19, (1914) M.W.N. 735.

(16) Suit by widow—Decree when binding on reversioner—Invalid transfer by widow—Permissive or adverse possession—Transferee's title by adverse possession. See HINDU LAW (WIDOW), No. 21, 23 Ind. Cas. 931.

(17) Sale by widow in favour of three out of four next reversioners with consent of the fourth—Remote reversioner whether can challenge. See HINDU LAW (WIDOW), No. 26, 24 Ind. Cas. 482.

(18) Will by widow—Right of remote reversioners to sue for declaration as to invalidity of will when arises. See HINDU LAW (WILL), No. 3, 26 M.L.J. 616.

(19) Reversioner's suit to recover property—Setting aside adoption—Limitation—Suit by widow—Decision when operates as *res judicata* in subsequent suit by reversioners. See LIMITATION ACT (1871), No. 1, (1914) M.W. N. 903.

(20) Succession of widow to shebaitship—Alienation by widow of surplus offerings—Suit to declare alienation invalid—Maintainability—Limitation. See SHEBAIT, No. 2, 16 M.L. T. 210.

(21) Suit by remote reversioner against widow—Declaration that deed of sale by widow is void against plaintiff—Immediate reversioner living—Maintainability. See SPECIFIC RELIEF ACT, No. 25, 23 Ind. Cas. 809.

—20.—Self-acquisition.

(1) *Substantial nucleus of ancestral property—Burden of proving self-acquisition—Incurable tumour in the nose—Whether a disqualification from inheriting.*

Where there is a substantial nucleus of family property of which the father was the manager, the onus would lie on those who assert that any property afterwards acquired in the name

Hindu Law—(Continued).**—20.—Self-acquisition—(Concluded).**

of the father was acquired without detriment to that property and was his self-acquisition.

A tumour in the nasal cavity and on the nose, even if it was congenital, is not one of the diseases which disqualifies a person from inheritance. **Subba Naidu v. Venkatarama Naidu**, 26 M.L.J. 508 = 15 M.L.T. 418 = 23 Ind. Cas. 528.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

References:—25 M. 133; 25 M.L.J. 251, R.

(2) *Title-deeds in the name of one member of joint family—Presumption, whether properties self-acquisition.*

The mere fact that title-deeds stand in the name of one member of a joint Hindu family gives rise to no presumption that the properties covered by them are his self-acquisitions, but if there is proof that he had a trade of his own and that there was no ancestral property in his possession out of the income of which he would have acquired any property, the properties mentioned in the title-deeds must be held to be his acquisitions. **Guruswami Aiyar v. Mari Chetty**, 22 Ind. Cas. 852.

SANKARAN NAIR and TYABJI, JJ.

References:—5 Ind. Cas. 143 = 20 M.L.J. 86 = 7 M.L.T. 382 = 33 M. 250, F.

(3) *Joint family presupposes possession of common property—Proof of existence of nucleus—Burden of proof as to self-acquisition.*

A joint family presupposes the possession of common property. Under the Hindu Law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilized for the purpose of making the subsequent acquisitions, or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them.

There is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property. It is only when there is ancestral property by means of which other property may have been acquired that it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. **Akkaraju Narayana Rao v. Akkaraju Seshamma**, 27 M.L.J. 677.

WALLIS, C.J., and SESHAGIRI AIYAR, J.

References:—33 A. 677, *Appr.*; 3 M.I.A. 229; 2 M. 19, R.

(4) *Property standing in the name of a junior member—Presumption. See HINDU LAW (JOINT FAMILY), No. 1; 15 M.L.T. 66.*

(5) *Joint family—Meagre nucleus—Members earning and living separately—Presumption. See HINDU LAW (JOINT FAMILY), No. 4, 22 Ind. Cas. 887.*

Hindu Law—(Continued).**—21.—Stridhanam.**

(1) *Nature of property acquired by the joint exertions of husband and wife—Doctrine of survivorship whether applies—Devolution of wife's share in the property.*

Property acquired by a woman by her own exertions during coverture is her own property which she is entitled to hold independently of her husband, and it devolves on her heirs.

Where both the husband and wife (Hindus) were carrying on a trade and were equally working together, and properties are acquired with the profits earned by them both, the properties become the joint properties of both the husband and the wife (a). On the death of the wife, her interest does not survive to her husband, but the woman's own heirs are entitled to her undivided interest (b). They would become co-owners with the husband on the death of the wife. **Muthu Ramakrishna Naicken v. Marimutha Goundan**, 26 M.L.J. 532 = 24 Ind. Cas. 363.

SANKARAN NAIR and AYLING, JJ.

References:—(a) 3 M.H.C. 272; 21 M. 100; 27 M. 493, R. (b) 1 M. 307, R.

(2) *Stridhan property—Succession—Daughter succeeding to mother's stridhan—Character of estate—Limited estate of Hindu woman—Daughter's power to dispose of stridhan inherited from mother, by way of gift—Title passes to whom after daughter's death—Daughter's daughter—Right of succession.*

A Hindu daughter succeeding to the stridhan property of her mother takes only the limited estate of a Hindu woman (a).

It follows, therefore, that the daughter, having succeeded to her mother's stridhan property by inheritance, has no power to dispose of it by way of gift; and upon the daughter's death, the title to the property passes not to her heir, but to the heir of her mother.

The general principle in Bengal is that women can only inherit under some express text. The daughter's daughter is not included in the text books in the special line of heirs to stridhan whether *vautuka* or *avautuka*. **Madhumala Das v. Lakshman Chandra Pal**, 22 Ind. Cas. 518.

CARNDUFF and RICHARDSON, JJ.

References:—(a) 5 C. 222; 17 C. 911; 19 M. 107; 19 M. 110 = 6 M.L.J. 4; 30 I.A. 202 (207) (P.C.) = 5 Bom. L.R. 828 = 25 A. 468 = 13 M.L.J. 330 = 7 C.W.N. 831; 30 I.A. 209 = 25 A. 476 = 7 C.W.N. 840 = 13 M.L.J. 336 = 5 Bom. L.R. 883, *Rel.*

(3) *Mitakshara law—Devolution of, stridhanam where marriage is in orthodox form—Brother's widow not an heir—Escheat.*

The stridhanam property of a Hindu female married according to an orthodox form and dying without issue, devolves on her husband, and failing her husband, on his sapindas in the

Hindu Law—(Continued).**—21.—Stridhanam—(Continued).**

order laid down in the Mitakshara with reference to the succession to the property of a male (a).

A brother's widow is no doubt a gotraja sapinda, but it does not follow that she is entitled to succeed as an heir, and as a fact under the Madras System of Inheritance she is not (b).

The doctrine of escheat is contrary to the general spirit of Hindu Law of Inheritance and one to which Courts should be loath to give effect. It is unsupported by any text or ruling.

On failure of the husband's sapindas, the widow's blood relations would, at any rate, succeed to the exclusion of the Crown. **Kanakammal v. Ananthamathi Ammal**, 37 M. 293.

WHITE, C.J., and SANKARAN NAIR, J.

References:—(a) (1911) 2 M. W. N. 168, F. (b) 18 M. 169, F.; 8 M. 107; 21 M. 263, R.

(4) *Stridhanam—Widow—Partition between husband's brother's son and herself—Allotment of property with powers of alienation—Absolute property—Death of widow—Devolution upon two daughters—One daughter dying leaving a daughter behind—Preferential right of surviving sister to succeed.*

P, a Hindu widow, got, at a partition with her husband's undivided brother's sons, certain property and it was agreed that her husband's brother's sons or their heirs shall not raise any kind of dispute if P at any time in future alienate the same according to her wish. P died leaving behind her two daughters A and N. A died leaving behind her a daughter L, the present plaintiff. L sued to recover the whole of the property left by P, alleging that N gave up her right to the property, and in the alternative to recover a moiety of the property if the relinquishment by N was found against.

Held, that the property acquired by P was her absolute property descendible to her heirs, that, on P's death, her property devolved upon her two daughters A and N, and that, on A's death, the share of A devolved on her sister N, in preference to her daughter. L. **Gadiparthi Pedd Subbayya v. Chirumamella Lakshmiddevamma**, 16 M.L.T. 297=(1914) M.W.N. 875.

MILLER and SADASIVA AIYAR, JJ.

Reference:—19 M. 107, F.

(5) *Stridhanam—Gift by father before betrothal—Hindu Law commentators—Their duty.*

Seshagiri Aiyar, J.—The property known as 'saudayika' is at the disposal of the donee. Property given by a father to a woman before her marriage is at her absolute disposal.

Stridhanam is divisible into 'yautaka' and 'ayautaka'. 'Yautaka' is that which is given at the nuptial fire and includes all gifts made

Hindu Law—(Continued).**—21.—Stridhanam—(Concluded).**

during the marriage ceremonies. 'Ayautaka' as gift made before or after marriage. *Saudayika* includes both *yautaka* and *ayautaka* not received from strangers, that is, gifts from affectionate kindred.

In construing Hindu law texts, it is not the literal meaning of the original text alone that has to be looked at. Commentators found a body of usages which was not in accordance with the strict Hindu law. Having to recognise the force of such usages they preferred to say that the usage was within the meaning of the text. The commentaries are only attempts to reconcile the text law with the actual usages of the people. The development of Hindu law is attributable to this progressive instinct.

Hindu law deals with the dependence of women more as a right inhering in them for protection as a duty resting upon men than as a disqualification for dealing with property.

The text that a gift exceeding 2,000 fanams in value is not to be regarded as stridhanam must be regarded as now obsolete.

Wallis, C.J.—The statement in the Smriti Chandrika that gifts made by a father to his daughter before betrothal are not 'saudayika' cannot outweigh the authority of other text writers to the contrary effect in Southern India. **K. Muthukarupa Pillai v. Sellathammal**, 16 M.L.T. 587=(1915) M.W.N. 48.

WALLIS, OFFG. C.J. and SESHAGIRI AIYAR, J.

(6) *Stridhan—Daughter-in-law succeeding to such property—Adverse possession against daughter—Nature of title acquired—Limited interest—Not absolute right—Evidence to show acquisition of absolute title—Nature of. See ADVERSE POSSESSION, No. 3, 10 N.L.R. 35.*

(7) *Woman's estate—Jewels made out of family funds—User and possession by one lady—Her separate property—Presumption. See HINDU LAW (JOINT FAMILY), No. 3, 15 M. L.T. 352.*

(8) *Widow of Agambadia caste—Succession to her stridhanam property. See HINDU LAW (SUCCESSION), No. 3, 23 Ind. Cas. 124.*

(9) *Property acquired by widow with accumulations whether stridhan or part of husband's estate. See HINDU LAW (WIDOW), No. 9, 22 Ind. Cas. 701.*

—22.—Succession.

(1) *Barar—Sister—Paternal uncle's son—Preferential right of former—Mitakshara as followed in Western India—Law applicable.*

According to the law obtaining in Barar, the sister is a heir preferential to the paternal uncle's son (a).

Hindu Law—(Continued).**—22.—Succession—(Continued).**

The law applicable is the Mitakshara as interpreted and followed in Western India (*b*). *Bhadia v. Mt. Bhagi*, 10 N.E.R. 24=23 Ind. Cas. 229.

MITTRA, OFFG. A.J.C.

References:—(a) 2 Barar L.J. 135, F.; 32 B. 300; 11 M.L.A. 386 (400); 5 M. 241; 9 M.L.A. 520; 24 B. 563, R. (*b*) 4 N.L.R. 31 (34); 6 N. L.R. 89 (40), R.

(2) *Mitakshara—Succession—Full sister—Son of a separated half-brother—Civ. Pro. Code*, 1908, S. 11—*Res judicata between co-defendants*.

Under the Mitakshara, the son of a separated half-brother is entitled to succeed in preference to the full sisters of the propositus (*a*).

Per Shah, J.—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interest among the defendants and that there was a judgment defining the real rights and obligations of the defendants *inter se* (*b*). *Hari Annaji Deshpande v. Yasudev Janardhan Satbhai*; *Malbai v. Bagubai*, 16 Bom. L.R. 283=38 B. 438=23 Ind. Cas. 944.

HEATON and SHAH, JJ.

References:—(a) 10 Bom. L.R. 389=32 B. 300, F.; 11 B. 216, F.

(3) *Custom—Stridhanam—Widow of Agambadia caste—Succession—Parents succeed in preference to husband's kindred*.

According to custom, the stridhanam property of a widow of the Agambadia caste, who leaves no issue, goes to her parents and not to her husband's kindred. *Yellachami Servai v. Mamundi Servai*, 23 Ind. Cas. 124.

SANKARAN NAIR and AYLING, JJ.

(4) *Succession—Daughter's daughters—Paternal grand nephews—Preference of the latter over the former—Brahmins of Mauza Jadla, Nawashahr tahsil, Jullundur District—Governed by Hindu Law—Muafi—Resumption of—Settlement with a particular person—Settlee's rights*.

J, a Hindu, who was the last male holder of the property in dispute, died in 1891 leaving him surviving H, his widow, K his daughter, and R his brother's son. After J's death, the property passed in the ordinary way to H, his widow, and at the settlement of 1885 a *muafi* held by J was resumed and the settlement was made by the Revenue authorities with his widow. In 1903 the widow made a gift of the land to her daughter K. R brought a suit to contest the gift but failed on the ground that he had no *locus standi*, as the donee K was the next heir under the Hindu Law. K had a son who predeceased her and left a widow M and also three daughters of whom one daughter had a son L. K died and mutation was effected in the name of her daughter in-law M. M made a gift of the property to L her husband's sister's son. The

Hindu Law—(Continued).**—22.—Succession—(Continued).**

sons of R (J's brother's son's sons) sued to set aside the gift but a compromise was effected between them and and L. L sued to set aside the compromise but his suit was dismissed. D and P, the two daughters of K, instituted the present suit for possession of 2/3rds of the land left by J, the last male holder.

Held, that the argument that H (the widow of J), by virtue of the act of the Revenue authorities, acquired the property in absolute ownership in her own right and was therefore competent to make a gift of it to her daughter cannot be allowed to be raised in appeal for the first time and that the question did not arise in the case.

Whether the property was acquired or ancestral, H's possession, would be merely that of a widow and she could not by any act of donation on her part confer on the next heir, her daughter, any greater or more extensive rights than she herself possessed.

K was under the Hindu law the heir of her father J, but she could not, when so succeeding to her father, form the stock of a fresh descent, and as a result, the sons of R, who was the son of J's brother, would be entitled to succeed in preference to K's daughters who could claim only as *bandhus* of their deceased grandfather.

Where a *muafi* is resumed and a settlement is thereafter made with a particular person, the action of the settlement authority does not affect or alter the position of the settlee with regard to the property.

The Brahmins of Mauza Jadla, in the Nawashahr tahsil, Jullundur District, are governed by Hindu law. *Mussammatt Kishen Devi v. Shib Saran*, 77 P.R. 1914.

KENSINGTON, C.J., and RATTIGAN, J.

(5) *Succession—Degraded women—Competition between legitimate son and illegitimate daughter*.

The legitimate son of a degraded woman is a preferable heir to her illegitimate daughter to her Stridhanam property.

The illegitimate children of a prostitute have no rights of inheritance under Hindu Law as obtains in this Presidency.

Seshagiri Aiyar, J.—The ancient law-givers did not contemplate rights of succession or inheritance in favour of illegitimate children except in the special case referred to of illegitimate children among Sudras. Under the Mitakshara system of inheritance the offering of spiritual benefits is no index to rights of property or to preference. A woman who adopts the life of a prostitute does not sever the tie which connects her with her kindred by blood and Hindu law does not become inapplicable to her rights of inheritance among dancing girls are not governed by the precepts of sages but by the custom which is grown among them. A woman taking to bad ways does not become a dancing girl so as to enable her to exercise all the rights which by custom and

Hindu Law—(Continued).**—22—Succession—(Continued).**

precedent have been allowed to her. The custom is not immoral because it regulates rights of property among dancing girls. *Meenakshi v. Munlandi Panikkan*, (1914) M. W.N. 672=27 M.L.J. 353=16 M.L.T. 270.

OLDFIELD and SESHAGIRI AIYAR, JJ.

- (6) *Mithila sub-school of Mitakshara Law—Durbhanga Raj—Babuana and Sohag grants to junior members and their wives incidents of—Succession, rule of—Kulachar or family custom—Females and daughter's sons, exclusion of—Grant if partible—Exclusion, custom of, if applies to partitioned share of grant—“Putra-pautradi,” whether words of limitation or general inheritance—Established custom, isolated departure from, effect of—Widow's right to maintenance—Dispossession by widow—Mesne profits disallowed in absence of proof of offer of maintenance—Maintenance made a charge on property decreed—Costs—Custom, statements of deceased persons as to existence of, if admissible, when made after controversy arisen—Evidence Act, S. 32.*

By *kulachar* or family custom, the right of succession to the *guddi* and to the properties of the *Durbhanga Raj Reaset* descends according to the rule of primogeniture. The younger sons of the *Maharaja* who are styled “*Babus*” are by *kulachar* entitled each by way of a *babuana* grant to a portion of the *Raj Reaset* for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a *Maharaja* gets, by way of *sohag* grant, the usufruct of a portion of the *Raj Reaset* for the maintenance of herself and her male descendants in the male line. In each case the property granted continues to form part of the *Raj Reaset* from which it is never separated (being entered in the Government Revenue Register under the name of the *Maharaja* for the time being as proprietor) and reverts to the *Maharaja* for the time being on the failure of male descendants in the male line of the grantee.

Babuana and *sohai* grants differ essentially in their nature from absolute grants and are subject to the *kulachar* under which they are authorised and in accordance with which they are made.

The custom governing the succession to and the inheritance of *sohag* property is the same as the custom governing the succession to and the inheritance of *babuana* property.

In each case females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession.

The right under the *Mitakshara* of co-parceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under grant or is subject to a custom which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant of custom.

Hindu Law—(Continued).**—22—Succession—(Continued).**

Babuana and *sohag* lands descend in the family of *Durbhanga*, not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners (a).

A separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their co-parcenary rights in the property is unknown to the law.

The custom excluding the widow, the daughter or the daughter's sons from the succession of *babuana* or *sohag* grants would apply (as a matter of law) even after the co-parceners in joint enjoyment thereof, have separated in food, worship and estate.

Where two brothers holding *babuana* and *sohag* property effected a partition thereof, and then one of them died childless leaving a widow :

Held, that, although there was little evidence to show that the rule as to exclusion of females, etc., applied even where there has been a partition, the surviving brother was entitled to recover from the widow of the deceased the latter's separated share, as well as immoveable properties acquired from the income and profits of that share which formed accretions to the subject matter of the grant, subject however to the payment to the widow of a money-maintenance, the amount of which the Judicial Committee fixed and charged upon the share recovered.

Mesne profits were disallowed in consideration of the fact that no substantial offer of adequate maintenance was made to the widow.

Moveable property and accumulations claimed by the plaintiff were also disallowed.

A well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced.

In certain *sanads* which testified to grants by way of *babuana*, the expression *auras-putra-pautradi* was used to indicate the course of descent.

Held, that as such grants could not be made under the ordinary Hindu Law, but were authorised only by the custom which excluded females from succession the words *duras-putra-pautradi* should be regarded as words of limitation consistent with the custom, and not as words of general inheritance (b).

Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen. *Ekradeswar Singh v. Mussammatt Janeshwari Bahayaain*, 18 C.W.N. 1249=27 M.L.J. 373=(1914) M.W.N. 807=16 M.L.T. 382=12 A.L.J. 1217=17 Bom. L. R. 18=21 C.L.J. 9 (F.G.).

LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

References :—(a) 36 I.A. 176=13 C.W.N. 1013, *Not F. and Expt.* (b) 8 I. A. 46, *D.*

Hindu Law—(Continued).**—22.—Succession—(Concluded).**

- (7) *Hindu Law — Succession — Bairagis of Ramanandi Class—Death of the Head of the Math—Sanyasis, succession to.*

Under the Mitakshara, the heir of a *sanyasi* (ascetic) is a virtuous pupil.

The plaintiff, a Bairagi belonging to the sect of Vaishnavas of the Ramanandi Class, sued to recover possession of certain temple properties from the defendant, claiming to be the Pitrai Chela (associate in holiness) of the deceased Mahant of the temple :

Held, that, as the plaintiff was not a pupil of the deceased Mahant; he was not entitled to the temple properties.

Seemle.—It is extremely doubtful whether the Bairagis can be classed as *sanyasis* because the order of Bairagis is not confined to the members of the twice-born castes. **Ramdas Gopaldas v. Sadhu v. Baldevdas Kaushalyadas**, 16 Bom. L.R. 757.

SCOTT, C.J., and HAYWARD, J.

- (8) *Mitakshara — Succession — Priority — Widow of separated brother—Uncle's son.*

Under the Mitakshara School of Hindu Law the brother's widow is entitled to succeed in priority to the paternal uncle's son of the propositus. **Basangauda Nagangauda v. Basangauda Dodangauda**, 16 Bom. L.R. 699 = 39 B. 87.

SCOTT, C.J., BEAMAN and HAYWARD, JJ.

- (9) *Succession—Second marriage in the lifetime of the first husband—Validity of marriage—Succession to second husband. Sri Ram v. Inchi*, 11 A.L.J. 711 = 21 Ind. Cas. 313. See Final Part, 1913, Col. 690.

- (10) *Succession—Nihang Goshains—Vow of celibacy—Marriage not allowed—Sons born of the marriage not heirs. Ram Kishore v. Jagannath Puri*, 11 A.L.J. 738 = 21 Ind. Cas. 85. See Final Part, 1913, Col. 690.

- (11) *Succession—Ascetic of the Nihang order—No custom of marriage among the members of the order—Marriage illegal—Issue of marriage illegitimate and no heir. Sespuri v. Dwarka Prasad*, 11 A.L.J. 778 = 21 Ind. Cas. 432. See Final Part, 1913, Col. 691.

- (12) *Succession to a yati (religious ascetic)—Chela and sishya (disciple or pupil) of Hindu religious ascetic or mendicant—Heirs natural and special, under rules of Hindu Law. Gouri Sunker Byas v. Niader Sing*, 18 C.W.N. 59 = 23 Ind. Cas. 287. See Final Part, 1913, Col. 692.

- (13) *Succession—Step-mother's right. Punga Seethal Ammal v. Punga Nachiar Ammal*, 14 M.L.T. 596 = (1914) M.W.N. 28 = 26 M.L.J. 10 = 22 Ind. Cas. 18 = 37 M. 286. See Final Part, 1913, Col. 692.

—23.—Texts.

- (1) *Construction of Texts—Duty of commentators. See HINDU LAW (STRIDHANAM), No. 5, 16 M.L.T. 587.*

Hindu Law—(Continued).**—24.—Widow.**

- (1) *Sale by widow of mortgage-deed forming husband's estate, validity of—Surt by transferee of mortgagee rights against transferor and mortgagor—Widow's competence to transfer—Reversioner's right to control widow's act—Mortgagor, right of, to question payment of sale consideration—Assignment—Pleadings—Assignor's right to plead invalidity—Admission of execution of deed, and receipt of consideration—Burden of proof—Effect of non-receipt of consideration.*

Where a mortgagor is sued on his mortgage by the assignee of mortgagee rights, he can put the assignee to proof that his assignment was a valid one. But the mortgagor's rights in this matter are limited to seeing that the assignee holds a valid transfer as against the assignor, inasmuch as he gets a complete and final discharge of his liabilities if he satisfies a decree obtained against him either by the assignor or by any person holding a valid deed of assignment. He has no concern with the question whether consideration actually passed as between the assignor and the assignee.

As a Hindu widow in possession of her deceased husband's estate is competent to realize debts due to the estate and to convert them into cash in her own hands, she is competent to alienate the mortgagee rights forming part of the estate in her possession, inasmuch as such a transfer is merely a method of realizing mortgage-debts.

It does not lie in the mouth of an assignor to plead that he or she was incompetent to effect the assignment.

Where receipt of consideration was admitted in the deed of assignment as well as before the registering officer and the assignor was proved to be the executant of the deed :

Held, that these facts, if un rebutted, would sufficiently prove that the consideration had passed.

Non-payment of consideration for an assignment would not necessarily invalidate the deed of transfer, but the assignor can maintain a suit for recovery of consideration.

Obiter dicta : When a Hindu widow, in possession of her deceased husband's estate, tries to realize debts due to the estate of her husband, the reversioners are entitled to exercise some sort of control over the proceedings of the widow in realizing the debts, and the Courts would enforce their rights by suitable orders calculated to prevent the widow from wasting the estate or from making any arrangements which would amount to an alienation of the corpus of the estate in her hands. **Nand Kishore v. Mangal Din**, 21 Ind. Cas. 8.

PIGGOTT, J.C., and SABONADIÈRE, A.J.C.

- (2) *Debts contracted by widow—Charge upon estate—Costs of litigation in defending life estate or protecting estate—Legal necessity*

Hindu Law—(Continued).**—25.—Widow—(Continued).**

—*Interest—Costs of management*—Manager's salary, charging estate for, when legal necessity.

Debts contracted by a Hindu widow for meeting the costs of litigation, in defending her life estate in her husband's property, or for protecting the estate, are binding upon the estate in the hands of the reversioner, as they constitute legal necessity (a).

Although a loan by a widow may be necessary, the rate of interest at which she borrowed must be proved to be necessary before interest at that rate can be allowed (b).

It is not necessary for a lender of money to a Hindu widow to show that the debt which was in litigation, for meeting the costs of which he lent the money, was or was not her personal debt. It is sufficient if it is shown that there was pressure upon the estate, that there was necessity for borrowing money for the costs of the litigation, or that the creditor made reasonable inquiries and was satisfied of the necessity for the loan.

Obiter:—The question, whether the salary of a manager, which is part of the costs of management of the estate, is or is not a personal debt of the widow, depends upon the circumstances of each case. If the widow is in enjoyment of the rents and profits of the estate, and they are sufficient to pay the manager's salary, she is not entitled to appropriate the profits, and throw the liability for the costs of management of the estate on the reversioners by charging the estate. If, on the other hand, the collections are not sufficient for meeting the expenses of the widow and the costs of management, where, for instance, the estate is involved in heavy litigation and is heavily encumbered, the charge created by the widow would be binding upon the estate. *Stevens, E. H. v. Janki Baiha; Prasad*, 22 Ind. Cas. 304=19 C.W.N. 80.

CHATTERJEE and WALMSLEY, JJ.

References:—(a) 12 C. 52; 31 C. 438; 8 C.W. N. 408; 1 Ind. Cas. 62; 9 C. L. J. 346 (353), *Rel.* (b) 18 C. 311; 18 I.A. 1, *F.*

(3) *Alienation by widow—Consent of reversioners, evidence of legal necessity—Ijara for 60 years, executed to save property from destruction owing to litigation—Expectant reversioners taking the benefit of the lease, conduct showing sanction to alienation.*

S., a Hindu widow, who came into possession of her husband's estate on his death in 1832 as his sole heiress, was dispossessed by one of her husband's relations B, against whom and his brothers one of whom was A. She brought a suit for recovery of possession which was finally decided in her favour by the Privy Council in 1858. Being still unable to get possession, and as meanwhile adverse rights were (under the Limitation Act then in force) accruing in favour of persons in actual possession who refused to pay rent under the pretext that the title had not been settled, S. in 1863 entered

Hindu Law—(Continued).**—25.—Widow—(Continued).**

into an arrangement with the expectant reversioners, under which *inter alia* a 60 years' *ijara* was granted to two of them one being A. The term was fixed at 60 years to facilitate practical settlement of the property so as to obtain its full value, though S being then 42 years old, it was evident to all concerned that the *ijara* would extend beyond her lifetime. A died in 1882 and S in 1893, whereupon A's sons who from 1882 to 1893 as A's heirs took the benefit of the arrangement sued to set aside the *ijara*.

Held affirming the High Court, that the arrangement of which the *ijara* formed part was dictated by the necessities of the case, and the choice of the term of 60 years as the term of the *ijara* was made for the benefit of the estate and did not injure any one.

That the conduct of the plaintiffs themselves in taking for 11 years the benefit of the *ijara* showed that they believed that the arrangement had been made in good faith and under such circumstances of necessity as would give it validity according to Hindu Law.

That the Privy Council attached great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence of legal necessity, and the conduct of the plaintiffs could be relied on as such evidence. *Bijoy Gopal Mukerji v. Girindra Nath Mukerji*, 18 C.W.N. 673=12 A.L.J. 711=16 Bom. L.R. 425=(1914) M.W.N. 430=19 C.L.J. 620=16 M.L.T. 68=23 Ind. Cas. 162=41 C. 793=27 M.L.J. 123 (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

(4) *Widow, alienation by—Legal necessity, proof of—Onus—Recital in conveyance if evidence—Proof aliunde, necessity of.*

The onus of supporting a sale from a Hindu widow is on the purchaser.

Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. To substantiate the allegation there must be some evidence aliunde. *Lala Brij Lal v. Musammat Indar Kunwar*, 18 C.W.N. 649=26 M.L.J. 442=35 A. 187=(1914) M.W.N. 405=15 M.L.T. 395=19 C.L.J. 469=12 A.L.J. 495=16 Bom. L.R. 352=23 Ind. Cas. 715 (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

(5) *Hindu widow, alienation by, for legal necessity—Duty of purchaser to make enquiry—Admission by parents in an affidavit in a different suit against the interest of infants, if admissible in evidence in a subsequent suit by the latter for recovery of property as reversionary heirs of maternal grandfather—Recital in conveyance by Hindu widow of legal necessity, if evidence—Delay of reversioner in bringing suit for recovery of property alienated by Hindu*

Hindu Law—(Continued).**—24.—Widow—(Continued).**

widow, when suit brought within statutory period of limitation—Non-filing of account books when explained—Prejudices.

- In a suit by Hindu reversioners for recovery of immoveable property left by their maternal grandfather and sold by their maternal grandmother for alleged necessity, the purchaser's representative adduced oral evidence to show that the widow had sold it for her husband's debts. The evidence was found by the trial Judge to be unreliable, but the learned Judge, adverting to documentary evidence, chiefly relied on an affidavit which was filed in another suit and was signed by the reversioners' mothers and fathers, and which contained a statement to the effect that certain other premises had been mortgaged by the widow (grandmother) for her husband's debt and that her daughters and sons-in-law had joined for protecting the reversioners' (the present plaintiffs') interest, and the Judge held that the affidavit was admissible, regarding the "parents as the guardians of the plaintiffs and as capable of making admissions against their interests on their behalf."

Held that there is nothing in the Indian Evidence Act to support the view of the learned Judge or make the affidavit relevant.

That the present plaintiffs had in no sense derived their interest in the subject-matter of the suit from their parents, nor could their parents be regarded as having been expressly or impliedly authorised by them to make the admission.

That when the suit was brought long after the alienation but within the period of limitation and the delay was explained as being due to the pendency of another suit and also to want of means :

Held, that the delay did not operate to the prejudice of the plaintiffs' suit for declaration and possession. *Srimutty Manokarani Debi v. Haripada Mitter*, 18 C.W.N. 718=24 Ind. Cas. 311 (P.C.).

LORD MOULTON, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE and MR. AMEER ALI.

- (6) *Family business—Right to carry on—Debts incurred in course of such business—Power to mortgage family properties to secure them—Reversioner, taking power of attorney from widow with knowledge of her minority—Inducing plaintiff to make advances of money—Suit to recover such advances—Plea of widow's minority by the reversioner—Estoppel.*

Where a Hindu widow who was a minor succeeded to the business carried on by her husband, and where the first defendant, who was one of the nearest reversioner, took a power of attorney from the widow of whose minority

Hindu Law—(Continued).**—24.—Widow—(Continued).**

he was fully aware, and induced the plaintiffs to go on doing business with her, and the plaintiffs, in consequence of the representations of the first defendant, had become involved in dealings with the widow. *Held*, that the first defendant is estopped from setting up the minority of the widow.

A Hindu widow is entitled in proper cases to carry on the family business that has descended to her from her deceased husband, and she is entitled to mortgage the family properties for indebtedness in the ordinary course of such business (b). *The South Indian Export Company, Limited v. T. N. Viswanatha Iyer*, 15 M.L.T. 323=24 Ind. Cas. 398.

WALLIS, J.

References :—(a) (1888) 41 Ch.D. 348, R., (b) 21 A. 71 (P.C.), *Expt.*; 26 B. 206; 14 A. 420; 35 M. 692; 21 A. 71; 19 I. A. 187; 6 C. 843, R.

- (7) *Agreement to sell, whether gives any title to property—Suit, right of—Hindu Law—Hindu widow—Bond executed for legal necessity—Inheritance not charged—Property sold to pay off bond—Title of purchaser—Mortgage executed by widow—Compromise decree on mortgage—Sale in execution—Title of purchaser to depend on whether there was legal necessity—Barred debt of husband, widow can alienate property to pay off—Borrowing money for household expenses during famine—Legal necessity.*

One K, the nearest agnate of a deceased Hindu, wished to sue for recovery of the property, which had been alienated by the deceased mother and widow, but as he had no funds, he entered into an agreement with one D agreeing to convey to D one-half of the property recovered in consideration of D financing and helping K in recovering the property from the alienees by suit. D joined K as co-plaintiff averring that he was entitled, under the agreement, to a moiety of the property in suit and also to all the benefits arising from the decree which may be passed in the suit :

Held, that, as the agreement in favour of D did not pass any title but merely bound K to convey to D half of all the property that he might recover, D had no right against the defendants, until the suit succeeded, and the property was recovered.

A simple bond was executed by a Hindu widow for legal necessity. The bond did not purport to charge the inheritance.

Subsequently, the widow sold a portion of the estate left by her husband to pay off the debt covered by the bond. There was nothing in the document to suggest that the parties intended that the limited interest of the widow only should pass :

Held, that the purchaser got an absolute right in the property purchased by him (a).

Hindu Law—(Continued).**—24.—Widow—(Continued).**

A Hindu widow executed two mortgages of the property left by her husband. Suits were brought upon them and were compromised, and in execution of the compromise decrees, some property was sold, there being no intention of confining the sale to the widow's estate:

Held, that the validity of the sale must depend on the question whether there was a justifying legal necessity.

A Hindu widow can alienate property to pay off barred debts of her husband.

A Hindu widow borrowed money for her household expenses on account of a famine:

Held, that the money was borrowed for legal necessity as, in the presence of a great natural calamity, the action of the widow should not be judged harshly and she should not be held bound to the strictest economy. *Khojendra Narain Singh v. Santo Lal*, 22 Ind. Cas. 669.

COXE and CHATTERJEE, JJ.

References:—(a) 3 Ind. Cas. 692=9 C.L.J. 88=13 C.W.N. 353; 3 C.W.N. 637, D.; 1 Ind. Cas. 62=9 C.L.J. 346; 10 C. 985=11 I.A. 66, R.; 12 C.W.N. 769, Diss.

(8) *Hindu widows, succession to husband's property by—Surrender of her interest by a Hindu widow to the nearest reversioner—Oral award, effect of—Award when it can operate to transfer property—Family arrangement, meaning of—Family arrangement, test of.*

When a Hindu dies leaving two widows they succeed jointly to the husband's property. While they may during their life-time enjoy their shares separately, they cannot so deal with the property as to destroy the incident of survivorship which attached to the estate.

Under the Hindu Law where a widow makes a surrender of her estate in favour of the nearest reversioner, the surrender must be of her entire interest in her husband's property.

An oral award can be as good and effective as a written award. But until an award, whether oral or written, has been made a rule of Court so as to give it the force of a Civil Court decree it cannot operate to transfer property.

Where the several members of a family make a settlement of their dispute, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively, the transaction is what is called a family arrangement and should be upheld as such. The test of such an arrangement is that it constitutes the recognition of a pre-existing title and not that the parties derive any title from each other (a). *Dalipat Singh v. Kashinath*, 17 O.C. 108=24 Ind. Cas. 542.

LINDSAY, J.C.

Reference:—(a) 33 A. 356, R.

Hindu Law—(Continued).**—25.—Widow—(Continued).**

(9) *Accumulations—Property acquired by widow with accumulations; whether stridhan or part of husband's estate.*

Property acquired by a Hindu widow with the accumulations of the income of her husband's estate, does not constitute her stridhan; but forms part of the corpus of the estate, and, therefore, is inalienable by the widow except for purposes that would justify alienation or disposition of the original estate. *Kula Chandra Chakravarti v. Bama Sundari Dasya*, 22 Ind. Cas. 701=41 C. 870.

IMAM and CHAPMAN, JJ.

References:—24 W.R. 168=1 C. 104=2 I. A. 256; 10 I.A. 150=10 C. 324=13 C.L.R. 418, Rel.

(10) *Alienation by Hindu widow—Suit by vendee to recover property after widow's death from stranger—Proof of legal necessity, if necessary—Suit for possession—Symbolical possession delivered to plaintiff more than 12 years ago, as against defendant—Presumption of continuance of possession—Finding that no actual possession ever obtained—Limitation—Limitation Act (1908), Sch. I, Arts. 142, 144—Recovery of rent decrees against raiyats within 12 years if possession.*

An alienation by a Hindu widow without legal necessity is voidable but not void, and until the reversioner (including in that term the Crown if there is no nearer reversioner) decides to avoid it or to treat it as a nullity, it stands good, and the alienee is entitled to recover possession from a stranger without being required to prove legal necessity (a).

Delivery of symbolical possession is conclusive evidence, as between the parties, that possession was delivered, but is not in the least conclusive evidence that the possession so delivered continued. There may be a presumption that such possession would continue until the contrary was proved, but that is all.

Where it was found that the plaintiff to whom symbolical possession was delivered never got actual possession, the finding can only mean that the possession delivered did not continue at all, so that Art. 142 and not Art. 144 of the Limitation Act applied to the case.

Where it appeared that the plaintiff had recovered rent decrees from raiyats within 12 years of the suit and the decrees were not open to question as collusive and fraudulent, the plaintiff's possession of the lands held by the raiyats through them within the statutory period of limitation was established. *Deonandan Perahad v. Udit Narain Singh*, 18 C.W. N. 940=28 Ind. Cas. 298.

COXE and D. CHATTERJEE, JJ.

References:—(a) 11 C.W.N. 424; 25 C. 1, R.

Hindu Law—(Continued).

—23.—Widow—(Continued).

- (11) *Alienation—Settlement of dispute by compromise—Hindu widow who is party if thereby alienates property in excess of her powers.*

A dispute between the daughters of a deceased Hindu on the one hand and the widow of his alleged adopted son on the other, each party claiming to be solely entitled to the estate, was settled by a compromise, each party getting thereunder a share in the family property. In a suit by a daughter of the alleged adopted son (as one of the reversionary heirs expectant on her mother's death) to set aside the compromise as beyond the competence of a limited owner like her mother :

Held—That the compromise was in no sense of the word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties. *Musammam Hiran Bibi v. Musammam Sohan Bibi*, 18 C.W.N. 929=27 M.L.J. 149=24 Ind. Cas. 309 (P.C.).

LORD MOULTON, LORD PARKER, SIR JOHN EDGE and MR. AMEER ALI.

References :—38 I.A. 87=15 C.W.N. 545, F.

- (12) *Debt of deceased husband—Widow's liability—Interest on debt.*

A widow is not entitled to alienate property belonging to her husband for the purpose of paying the interest on debts due by him ; the interest on such debts is primarily payable out of the life interest of the widow, though she may alienate part of such property for discharging the interest if it is shown that there was no surplus income available for payment of the same. *Sakhireddy Appalasamy v. Sakhireddi Venkanna*, (1914) M.W.N. 488=24 Ind. Cas. 534.

TYABJI and SPENCER, JJ.

- (13) *Hindu widow—Alienation—Alience, what to prove—Bona fide enquiry—Loan obtained to pay rent—Legal necessity—Widow's intention—Creditor's intention—Reversioner, if necessary party—Declaratory suit—Estate in defendant's possession—Plaintiff not entitled to eject—Specific Relief Act, S. 42.*

The powers of a Hindu widow, in respect of alienation of the estate of her husband, are similar to those of a guardian of an infant. Consequently a person who claims title under an alienation from her must prove that there was legal necessity for it, that is, such pressure on the estate at the time the loan was taken or the alienation made as justified the act of the widow ; he can also protect himself by proof of bona fide enquiry, and if the fact of such enquiry is established, the real existence of an

Hindu Law—(Continued).

—24.—Widow—(Continued).

alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his title.

The mere fact that the loan was taken to pay rent and the money raised was applied for that purpose, is not sufficient. The creditor, to protect himself—where he is not shown to have made a bona fide enquiry—must prove that there was an actual pressure on the estate, such as an outstanding decree or an impending sale, which the widow had no funds capable of meeting.

Where a Hindu widow obtains a loan, she is at liberty to bind herself personally, or, when the purpose for which she borrows is a necessary one, she is equally entitled to bind her husband's estate. Whether, in a particular case, the widow intended to bind herself alone or to bind the estate as well, must be gathered from the statements, if any, in the deed, or from the surrounding circumstances. In this respect, there is no real distinction in principle between a case where a charge is formally created by the widow, and another where she executes a bond for the money advanced.

It is not enough to show that the widow intended to create a liability upon the estate in her hands. The creditor has further to establish that he intended to enforce such liability. The real question in fact is, what was liable to be sold and what in fact was actually sold. In the investigation of this question, the frame of the suit, the judgment, the decree, the execution proceedings, the sale proclamation, the amount of purchase-money and the conduct of the parties, must all be taken into account ; the sale certificate is by no means conclusive. As the proceeding may be against the widow personally or against the widow as representing her husband's estate, the true test is to see whether the proceeding in which the sale was directed was brought against the widow personally or with a view to affect the whole inheritance. It is not necessary that the reversioner should be joined as party to the suit, but if he is so joined the fact would afford clear indication that the creditor intended to make the inheritance liable and not to restrict his remedy to the qualified interest of the widow.

Cases on the points reviewed.

When the property is in the possession of the defendant and the plaintiff cannot ask for ejectment against him, a suit for declaration of title without consequential relief is not barred under S. 42 of the Specific Relief Act. *Rameswar Mandal v. Provabati Debi*, 20 C.L.J. 23=19 C.W.N. 313.

MOOKERJEE and BEACHCROFT, JJ.

References :—11 M. 116 ; 36 M. 62=21 M.L.J. 1022, R.

- (14) *Alienation by widow with consent of next reversioner—Validity.*

Hindu Law—(Continued).**—24.—Widow—(Continued).**

A widow may alienate the whole estate with the consent of the next reversioner. This rule is not affected by the decisions in 40 C. 721 and 18 C.W.N. 673 (P.C.) which only deal with partial alienations. *Adalkka Malstry v. Muthusami Ambalagaran*, 27 M.L.J. 24.

WALLIS and OLDFIELD, JJ.

References:—40 C. 721; 18 C.W.N. 673, D.

(15) *Suit to restrain waste by widow—What amounts to act of waste—Receiver when may be appointed—Property vesting in Administrator-General—Administrator-General handing keys—Effect—Purchase of property in the name of wife and son—Presumption—Benami transaction.*

S. and D. carried on the business of S. and Co. S. died in 1908. His son succeeded him and died two months after. On the application of S's widow, the Administrator-General was directed to apply for letters of administration to take possession of the property and effects of S. He applied accordingly and sued D. (S's partner) for a declaration of the dissolution of partnership and for consequential relief. There was a preliminary decree and an order directed the commissioner appointed under the decree to sell the properties including the business and the shop premises where the business was carried on "between the parties thereto." The widows of S. and his son requested the Administrator-General to purchase the good will and he purchased the same. A final decree was passed by which the Administrator-General was to retain and enjoy for his share the shop premises for Rs. 24,000 and the good will of S's business for Rs. 29,000. Shortly afterwards, a partnership was entered into between the son's widow and three persons for carrying on the business. The three others were awarded 3/16 share each. In order to carry on the business, she obtained from the Administrator-General a sum of Rs. 12,000. She also raised by mortgage another sum of Rs. 12,000 from one R. S's business was continued to be carried on by the son's widow and the three persons who were admitted into partnership by her. She also raised certain other debts.

The expectant reversioner now sued to declare that the mortgage to R. and other alienations by the widow were not binding on him, for the appointment of a Receiver to take possession of S's estate and manage the same, and for an injunction to restrain the widow from receiving any money or property from the Administrator-General or from otherwise realizing the assets of the estate.

Held that, as the final decree contemplated that the business was to be carried on for the benefit of the estate, the carrying on of the business cannot be said to be an act of waste on the part of the widow.

But her conduct in taking three other persons as partners is *prima facie* an act detrimental to

Hindu Law—(Continued).**—24.—Widow—(Continued).**

the reversion. The three partners not being persons whose services it was necessary for her to secure to carry on the business, the alienation of 9/16 share of the good-will to them was not necessary in the interests of the business.

It was also found that the widow exercised no real supervision and had no control over the business and the accounts were not kept in the ordinary course of business. *Held* that, under such circumstances, the Court was bound to appoint a Receiver in the interest of the reversion.

Held also that, by the handing over of the keys of the business premises, the Administrator-General has not parted with his interest in the same.

In this case a question also arose as to whether a house belonged to the estate of S. or to S's widow. The purchase money was advanced by S, and it was purchased in the name of his wife and son. He afterwards took a deed of release from his son and it was mortgaged by him and his wife.

Held that, if the property were taken in the name of the son alone, the presumption might be that it was a benami purchase, but that, in the absence of some explanation to account for his taking it in the names of his wife and son, it cannot be held that his wife had no interest in the property, as *prima facie* he intended it for both of them. His wife was therefore entitled to a moiety. *Thanikachala Mudaliar v. Alamelu Ammal*, 16 M.L.T. 26.

SANKARAN NAIR, J.

(16) *Alienation by widow—Part of consideration not binding on reversioners—Bona fide purchaser may retain property on paying to reversioners part of consideration not found binding—Proper decree.*

Where, in a *bona fide* sale by a Hindu widow, a portion of the consideration money is found not to be binding on the reversioners, it is at the option of the alienee to retain the property and pay the amount so found to the reversioners. *Kalagara Ramanna v. Kalagara Gangayya*, 27 M.L.J. 132=23 Ind. Cas. 778.

MILLER and TYABJI, JJ.

References:—6 Ind. Cas. 207=14 C.W.N. 895, F.

(17) *Widow in possession of husband's estate—Alienation of portion of estate with consent of nearest reversioner—Right of remoter reversioners to contest alienation.*

In all cases and under all circumstances the consent of the next reversioner of a Hindu widow in possession of her husband's estate to an alienation of a portion of that estate does not validate the alienation and debar the more remote reversioners from contesting it.

Hindu Law—(Continued).**—24.—Widow—(Continued).**

The principles underlying such cases discussed and explained. *Devi Das v. Raja Khan*, 209 P.L.R. 1914=91 P.R. 1914=24 Ind. Cas. 417=150 P.W.R. 1914.

• *SHAH DIN and SCOTT-SMITH, JJ.*

References:—19 Ind. Cas. 273; 17 C.W.N. 701; 17 C.L.J. 499; 40 C. 721, *Rel.*

(18) *Hindu widow—Pilgrimage to Gaya—Feast given after return from Gaya, whether legal necessity—Reversioner—Suit for declaration that alienation was without legal necessity—No offer to reimburse money spent on legal necessity—Suit whether maintainable.*

A Hindu widow is competent to alienate her husband's estate for expenses in connection with a feast given to Brahmins, etc., after return from pilgrimage to Gaya (a).

Quere.—Whether a declaratory suit can be maintained by a reversioner who does not offer in the plaint to reimburse the purchaser to the extent that the sale was for necessity. *Dinanath Ghosh v. Hrishikesh Pal*, 18 C.W.N. 1303=20 C.L.J. 285=24 Ind. Cas. 670.

MOOKERJEE and BEACHROFT, JJ.

Reference:—(a) 33 A. 255, *Not F.*

(19) *Mortgage or sale—Test—Relinquishment by widow—Prior alienation—Effect on.*

Whether the two documents form a mortgage or sale depend upon the intention of the parties and that is the test to be applied.

Where there is a document of sale and a document to reconvey, they constitute together a mortgage by conditional sale.

• A widow cannot, by relinquishing her widow's estate to the reversioner, affect the validity of alienations made by her before such relinquishment, which, though not binding on the reversioner, were binding on her for life. *Singaram Chettiar v. Kalyanasundaram Pillai*, (1914) M.W.N. 735.

WALLIS, C. J. and HANNAY, J.

(20) *Widow—Property given for maintenance—Presumption—Rights.*

Immoveable property given for the maintenance of a widow is *prima facie* resumable on the death of the grantee. A widow can only succeed to property which has actually vested in her husband at the time of his death. No fresh right can accrue to her as widow in consequence of the subsequent death of a person to whom he would have been heir if he had lived. *Goyindammal v. Marimuthu Pillay*, (1914) M.W.N. 782.

• *SPENCER and HANNAY, JJ.*

(21) *Suit by widow—Decree, when binding on reversioner—Invalid transfer by widow—Permissive or adverse possession—Transferee's title by adverse possession.*

Hindu Law—(Continued).**—24.—Widow—(Continued).**

The heirs of a Hindu widow are bound by a decree fairly and properly obtained against her (a).

Where the property in suit had been in the defendants' ancestors' possession for more than half a century under an invalid transfer by a Hindu widow to her brother, and the plaintiff's case for possession entirely depended on this possession being permissive, which the Courts below held he had entirely failed to show;

Held, that, as there is one continued chain of succession in the defendants' family without any title, the plaintiff's suit must fail, as the defendants have got title by adverse possession. *Gobinda Nath v. Mohini Mohun Mojumdar*, 23 Ind. Cas. 981.

HOLMWOOD and CHAPMAN, JJ.

References:—(a) 9 M.I.A. 539=2 W.R. (P.C.) 31=19 Eng. Rep. 843, *Rel.*

(22) *Civ. Pro. Code* (1908), S. 11—*Res judicata between co-defendants—Alienation by Hindu widow—Legal necessity—Interest.*

In a suit by a mortgagee on foot of his mortgage, both the plaintiff and the defendant of the present suit were arrayed as co-defendants, plaintiff as a puisne mortgagee and the defendant as a donee from a Hindu widow. Subsequently, the plaintiff brought the present suit on the basis of his mortgage. The defendant pleaded that the mortgage in suit had been executed by the widow without legal necessity;

Held, that the defendant was not precluded from raising such a plea simply because he had not raised it in the previous suit.

Legal necessity must be shown not only for the loan itself but also for raising the loan at an exceptionally high rate of interest.

In the case of a mortgage by a Hindu widow, it is not sufficient merely to show that the widow had incurred previous debts, but it must be shown that those debts themselves were incurred for legal necessity. *Chhittar Mal v. Ram Narain*, 24 Ind. Cas. 81.

RICHARDS, C.J., and BANERJI, J.

(23) *Widow—Alienation—Payment of interest in excess of what was recoverable under law of damdupat—Mortgage of husband's property for such payment—Illegality—Berar.*

In Berar, a Hindu widow is not justified in alienating her husband's property for the payment of a sum over and above double the amount of the principal of a debt, in other words, for payment of interest in excess of what was legally recoverable under the rule of *Damdapat*. *Ramechandra v. Mt. Radha*, 10 N. L.R. 91².

MITTRA, A.J.C.

References:—13 M. 189; 11 B. 320, *R.*

(24) *Widow—Maintenance, whether charge on whole family property or on husband's share only—Charge when and how arises.*

Hindu Law—(Continued).**—24.—Widow—(Continued).**

—Alienee of property, liability of—Attachment, right created by—Suit by one widow for declaration of charge—Co-widow, whether necessary party.

A Hindu widow has a right to get her husband's estate charged with her maintenance, but she must make a formal assertion to obtain recognition. Waste or improper alienation of her husband's estate with the very object of depriving her of her subsistence is invalid, and the purchaser who joins in the effort to defeat her rights is under certain circumstances himself liable to the charge (a).

The right of maintenance of a Hindu widow against persons other than her husband or son rests upon their possession of family property in which her husband had a share (b).

The mere attachment of a property before it is charged for maintenance creates no right or title in the attaching creditor (c).

In a suit by a widow for declaration that she has a charge for maintenance on certain property, the co-widow is not a necessary party.

Per *Tyabji, J.*—The Court has power to charge the whole of the joint family property for a widow's maintenance, though her deceased husband's share in the property "in fixing the amount of maintenance will naturally be taken into consideration.

Per *Spencer, J.*—The whole family property remains liable for the widow's maintenance, provided that the portion charged does not exceed her husband's interest therein (d).

Where the estate of the husband of a Hindu widow was attached in a simple money-decree prior to her decree for maintenance, but was sold after the decree was passed :

Held, that the decree was binding on the purchaser and created a charge on the estate. *Krishna Patter v. Sinnaponnu*, 16 M.L.T. 551=25 Ind. Cas. 759.

TYABJI and SPENCER, JJ.

References :—(a) 4 I.A. 247; 3 C. 198; 1 C.L.R. 49; 3 Sar. P.C.J. 730; 4 Suth. P.C.J. 468; 1 Ind. Jur. 504 (P.C.). (b) 4 B.L.R. (O.C.J.) 72; 12 W.R. (O.C.) 35; 8 B.L.R. 225; 17 W.R. 433 note; 1 A. 262; 28 A. 655; 3 A.L.J. 551; A.W.N. (1906) 165; 27 C. 194; 4 A. 296 (298); A.W.N. (1882) 42; 6 Ind. Jur. 594; 5 A. 367; A.W.N. (1883) 65; 2 B. 494; 10 C. 1035; 11 I.A. 126 (P.C.); 8 Ind. Jur. 396; 4 Sar. P.C.J. 548; 12 B.H.C.R. 69 (71); 2 Agra Rep. 42; 4 B.H.C.R. (A.C.J.) 73; 9 B.H.C.R. 116 F. (c) 15 C. 202; 25 C. 179 (P.C.); 24 I.A. 170; 1 C.W.N. 639, F. (d) 10 Ind. Cas. 347; 85 M. 147; 21 M.L.J. 493; 10 M.L.T. 1; (1911) 2 M.W.N. 148, F.

(25) *Gift by widow with consent of next reversioner, validity of.*

A gift made by a Hindu widow, although with the consent of the next reversioner, is

Hindu Law—(Continued).**—25.—Widow—(Continued).**

invalid. *Mussammatt Umrao Kunwari v. Sheo Mangal Singh*, 24 Ind. Cas. 435.

RICHARDS, C.J. and TUDBALL, J.

References :—30 A. 1 (P.C.)=3 M.L.T. 1=12 C.W.N. 74=9 Bom. L.R. 1349=6 C.L.J. 766=5 A.L.J. 1=35 I.A. 1=17 M.L.J. 605, D.; 5 Ind. Cas. 270=7 A.L.J. 121=32 A. 176; 12 Ind. Cas. 601=8 A.L.J. 1918=34 A. 129, R.

(26) *Sale by widow with consent of next reversioner—Remote reversioner, whether can challenge sale.*

Where a sale-deed is executed by a Hindu widow in favour of three out of four next reversioners with the consent of the fourth, a remote reversioner cannot question the sale. *Surajbale Singh v. Birthu*, 24 Ind. Cas. 482.

BANERJI and CHAMIER, JJ.

References :—30 A. 1 (P.C.)=12 C.W.N. 74=9 Bom. L.R. 1348=6 C.L.J. 766=3 M.L.T. 1=5 A.L.J. 1; 35 I.A. 1=17 M.L.J. 605, R.

(27) *Senior and junior widows—Right of adoption.*

Where several widows inherit jointly, the senior widow in the case of an ordinary co-parcenership has a preferential right to the management of the joint property on behalf of the widows, unless by consent or decree the joint estate is converted into an estate in severalty.

The senior widow has the preferential right to make the adoption as adoption is an act of religion and her preferential right to perform acts of religion should be recognised. So long as such preferential right exists, the junior widow has no right to adopt and the consent of the *sapindas* will not give her a right. An adoption made by the junior widow will therefore be invalid. *Kakerla Chukkamma v. Kakerla Punnamma*, 16 M.L.T. 612=(1915) M.W.N. 19.

SANKARAN NAIR and SPENCER, JJ.

(28) *Hindu widow, if can devise property inherited from husband with consent of next reversioners.* *Durga Sundari Sen Gupta v. Ramakrishna Poddar*, 18 C.L.J. 162=21 Ind. Cas. 714. See Final Part, 1913, Col. 700.

(29) *Widow—Alienation—Reversioner—Consent of the reversioner—Reversioners' heir cannot set aside alienation—Legal necessity for alienation need not be proved—Registration Act (1908), S. 97, cl. (d)—Daughter's assent to the alienation—Spes successionis—Assent in writing not compulsorily registrable.* *Mallik Saheb Abdul Saheb Gandigiwad v. Mallikarjunappa Shivomurtaya*, 15 Bom. L.R. 1142=22 Ind. Cas. 292=38 B. 224. See Final Part, 1913, Col. 701.

(30) *Hindu widow's power to extend limitation by making written acknowledgment—Hindu widow's power to pay a barred debt.* *Bhagwan Singh v. Daulat Singh*, 16 O.C. 272=21 Ind. Cas. 757. See Final Part, 1913, Col. 701.

Hindu Law—(Continued).**—24.—Widow—(Continued).**

(31) *Widow's estate—Acquisition of property by widow—Accretion to her husband's estate—Question of intention—Widow's dealing with the property as her own.* **Wahid Ali Khan v. Tori Ram**, 11 A.L.J. 856=21 Ind. Cas. 91=35 A. 551. See Final Part, 1913, Col. 702.

(32) *Acquisitions by Hindu widow out of the income of her husband's estate, presumption in favour of—Suit by reversioners to recover such property, onus of proof.* **Lal Bahadur v. Sheo Narain Lal**, 16 O.C. 359=22 Ind. Cas. 702. See Final Part, 1913, Col. 702.

(33) *Possession of a co-heir whether adverse to other co-heirs—Possession traceable to a lawful title is not adverse—Hindu widow alienating property by gift to one of the presumptive reversioners—Validity—Alienation by donee—Suit by alienee from the other reversioners—Adverse possession when commences.* See ADVERSE POSSESSION, No. 16, 16 M.L.T. 530.

(34) *Alienation by widow—Suit by reversioner for possession—Parties—Persons in possession and transferees from widow—Multi-fariousness.* See CIV. PRO. CODE (1908), No. 231, 12 A.L.J. 509.

(35) *Decree in favour of widow as representing estate—Suit by reversioner against widow—Not res judicata—No strangers party to suit—Each member of the family litigating for himself.* See GUARDIAN AND MINOR, No. 3, 27 M.L.J. 486.

(36) *Alienation by widow—Partial or total alienation—Consent of next reversioner—Effect.* See HINDU LAW (ALIENATION), No. 11, 16 M.L.T. 251.

(37) *Widow's duty to pay husband's debts—Payment of debts repudiated by husband not obligatory on widow.* See HINDU LAW (DEBTS), No. 4, 16 Bom. L.R. 798.

(38) *Presumption in case of Hindu widow's possession of her husband's share.* See HINDU LAW (EXCLUSION FROM INHERITANCE), No. 1, 22 Ind. Cas. 138.

(39) *Agreement between widow and reversionary heirs settling reversion on the latter whether legal.* See HINDU LAW (REVERSIONERS), No. 1, 23 Ind. Cas. 98.

(40) *Widow representing the whole estate and putting forward all pleas open to a reversioner—Decision in suit—Effect—Subsequent suit by the reversioners—Res judicata.* See LIMITATION ACT (1871), No. 1, (1914) M.W. N. 903.

(41) *Executor appointed under will of Hindu widow—Onus of showing that money belonged to her absolutely on whom lies.* See LIMITATION ACT (1908), No. 82, (1914) M.W.N. 264.

(42) *Reversioner allowed to recover his moiety on proof of absence of legal necessity for sale by widow—Fresh suit on the other moiety falling in—Decision on the issue of legal necessity if res judicata.* See RES JUDICATA, No. 9, 18 C.W.N. 888.

Hindu Law—(Continued).**—24.—Widow—(Concluded).**

(43) *Ex parte decree against widow declaring plaintiffs to be reversioners—Right of subsequent transferee from widow to deny their right.* See RES JUDICATA, No. 13, 12 A.L.J. 1011.

(44) *Succession of widow to shebaitship—Alienation by widow of surplus offerings—Suit to declare alienation invalid—Maintainability—Limitation.* See SHEBAIT, No. 2, 16 M.L.T. 310.

(45) *Widow whether forfeits rights as shebait, if unchaste.* See SHEBAIT, No. 3, 24 Ind. Cas. 266.

(46) *Suit by remote reversioner against widow—Declaration that deed of sale by widow is void against plaintiff—Immediate reversioner living—Maintainability.* See SPECIFIC RELIEF ACT, No. 25, 23 Ind. Cas. 809.

—25.—Will.

(1) *Will—Construction—Gift to a woman for life and after her death to her heirs, executors, administrators and representatives—No disposition of the corpus—Intention to tie up immoveable property and to distribute only the income—Validity.*

N made a will in 1871 and a codicil in 1875. Cl. 8 of the will bequeathed to two persons "their executors, administrators and representatives" specified immoveable properties, "to hold the same unto the said Kristna Row and Rama Row, their executors, administrators and representatives (all the said properties assigned to the said Kristna Row and Rama Row shall neither be sold, mortgaged nor in any way alienated but shall remain for ever as trust property) upon trust that they, the said Kristna Row and Rama Row and the survivor of them and the executors, administrators and representatives of such survivor," do receive the rents and profits of the properties and pay outgoings and an allowance to the testator's adopted son; "and the said trustees do and shall pay the balance of the said rents and profits to my said wife Soundari Boyee during her life and after her death to my aforesaid daughter-in-law, the said Radha Boyee, during her life, and after her death to her heirs, executors, administrators and representatives."

The codicil recited the bequest contained in the above cl. 8 and gave power to the trustees to sell the immoveable property and invest the proceeds, and repeated the bequest of 'the balance' of the income in the identical words of that clause.

The testator died in 1880 leaving his wife and daughter-in-law and two grandchildren, the plaintiff and the first defendant. Plaintiff claimed that she was the heir of her mother Radha Boyee and as such was included in the description of the beneficiaries who were to take after Radha Boyee's death.

Hindu Law—(Continued).**—25.—Will—(Continued).**

Held, on a construction of the will, that the testator intended to tie up his immoveable property so that only the income should be available and did not intend to dispose of the corpus in favour of any beneficiary.

The words 'heirs, executors, administrators and representatives' were not intended to denote the *quantum* of interest to be taken by any beneficiary in the property, but to describe the persons who are to enjoy the income, *i.e.*, they were words of purchase and not words of limitation.

The word "themselves" and the words "after her death" have a direct reference to the death of Radha Boyee, and indicate that the beneficiaries are to be determined at her death. The words describe all the persons who could take her estate upon her death, testate or intestate, whether they are appointed by her will or by the Court, and the last word "representatives" includes the other three.

The declaration of the testator, which precedes the whole gift of the beneficial interest, that his immoveable properties "shall remain for ever as trust property," clearly indicates his intention to create a perpetuity; and the words describe not a homogeneous class but all persons who might in any event succeed to Radha Boyee's estate upon her death, and include those who would succeed upon an intestacy as well as those entitled under her will.

Held therefore that the words in question were intended to create a perpetual trust in favour of Radha Boyee's representatives and that the gift was accordingly void. *Krishnamma Boyee v. Gopal Rao*, 15 M.L.T. 405=24 Ind. Cas. 485.

BAKEWELL, J.

Reference :—11 C. 684 (692), *R.*

(2) *Will, construction of—Construction put on terms of will with reference to events that had then happened, if binding on happening of a fresh event—Gift to daughters in equal shares and each share to each daughter's sons on her death—Gift to class, some of whom not in existence at testator's death—Hindu Wills Act (XXI of 1870), S. 3.*

A testator who died in 1875 directed his executors (in certain events which happened) to make over and divide the whole of his estate "unto and between" his two daughters "in equal shares to whom and their respective sons" "he gave, devised and bequeathed the same, but should either of his said daughters die without leaving any male issue surviving, but leaving the other daughter her surviving, then and in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in case of the death of either daughter leaving sons, the share of such daughter was to be paid to such her son or sons, share and share alike." *R.*, one of the

Hindu Law—(Continued).**—25.—Will—(Continued).**

daughters, being childless, adopted a son J in 1900. P, the other daughter, had several sons born in the testator's lifetime and several others born subsequently. In 1904, when both R and P were alive, the question whether under the will they were each entitled absolutely to a moiety of the estate having been raised at the suit of R, the Privy Council on 14th May 1908 held that, in the events that had happened, R and P were entitled to the estate "in equal shares for life with benefit of survivorship between themselves." P died in 1909 and in 1910 one of her sons who were born in the testator's lifetime applied for a further construction of the will in the events that had happened, making his brothers and J parties. The High Court (on appeal) held that the fresh event that had happened (*i.e.*, P's dying leaving sons) took the case outside the purview of the order in Council which in the events which had then happened was concerned only with the question, *vis.*, what interest the daughters took under the will; that the intention of the testator was that the sons of a daughter were to succeed to her moiety on her death; but that, in view of the rule of Hindu Law that no person not in existence at the testator's death can take under his will and the proviso in S. 3 of the Hindu Wills Act, only those sons of P who were then in existence would succeed to P's moiety under the will (the gift to grandchildren, though a gift to a class of persons some of whom could not take under the above rule of Hindu Law, not being for that reason defeated as regards those born in the testator's lifetime). R and J having appealed to His Majesty in Council:

Held, that the judgment of the High Court was correct and based on correct reasoning (a).

The appeal was dismissed subject to a direction that the decision was not to prejudice the position of J, if and when the question of his right to take under the will should come before a Court for decision. *Ranmoni Dasi v. Radha-prasad Mullick*, 26 M.L.J. 653=18 C.W.N. 873=16 M.L.T. 217=23 Ind. Cas. 713=(1914) M.W.N. 624=16 Bom. L.R. 797=41 C. 1007=20 C.L.J. 348 (P.C.).

LORD MOUTLTON, LORD PARKER, SIR JOHN EDGE and Mr. AMEER ALI.

Reference :—(a) 15 C.W.N. 113, *affirmed*.

(3) *Will—Construction—Devise in favour of widow and nephew—Nephew to take properties on widow's death if both lived amicably—Absence of words of disposition—Effect—Right of remota reversioner to sue for declaration when arises—Grant of declaratory relief—Practice—Reference to provisions relating to wills made in Presidency towns as embodying the principles of justice, equity and good conscience—Contingent interest when becomes vested—Pronouncement on construction of will may be made to prevent further litigation.*

Hindu Law—(Continued).**—25.—Will—(Continued).**

G executed a Will in 1877 and died subsequently. It purported to be in favour of S his widow and A his nephew and son-in-law. A died in 1878, leaving his widow and widowed daughter. In 1908 S, the widow of G, executed a will and died.

There were four principal clauses in G's will :—(1) The preamble says that the will is made in favour of his wife and nephew. (2) It next recites the fact that his nephew has been living with the testator since birth, and says : "All my properties should, after my death, be in the possession of my wife herself and she herself should be heir to everything, and A and my wife should live together amicably as of one family." (3) The third clause provides that if the two could not agree and live together amicably "my wife should pay Rs. 4,000 and separate him and then my wife should enjoy all the remaining properties with absolute rights." (4) Then comes the final provision which directs that "if both of them should live together amicably, A himself should enjoy the properties which remain after the death of the said S." Plaintiffs were the reversioners to the estate of A and they sued for declaration that S was not competent to dispose of the plaint property by her will, that A had a vested interest in it at the time of his death, and that plaintiffs were entitled to succeed to the estate after the lifetime of A's widow and widow's daughter who were the second and third defendants in the case.

Held, that, as S's will was partly in favour of the third defendant and as neither the third defendant nor her mother, the second defendant, was interested in questioning the disposition made by S, plaintiffs, the remote reversioners of A, were entitled to bring this suit. A remote reversioner can sue for a declaration when the presumptive reversioner is either colluding with the alienor or is not interested in seeking to set aside the unlawful dealings of the widow in possession (a).

Held, also that the words 'should be heir' in cl. 2 of the will were not intended to confer an absolute estate on the widow of G and that they gave her only that right which she was entitled to under the Hindu law.

Where the words of disposition are clear and unambiguous, the sex of the donee will not be a disqualification for acquiring an unqualified estate. But where the words consistent with the creation of an interest which the law ordinarily gives to females, then the rule of law is that the testator intended to confirm to the principles of law by which the parties, in the absence of a testamentary disposition, are governed.

Held, also that the condition, if any, to the nephew A being entitled to a vested interest, was fulfilled by his having lived amicably with the widow S till his death (c), and that plaintiffs were therefore entitled to sue for a declaration

Hindu Law—(Continued).**—25.—Will—(Continued).**

that the will of S. in favour of strangers was not binding on the reversioners (plaintiffs).

On the contention that there are no words of gift in favour of A in G's will, *held*, that words of conveyance which are usually to be found in wills made in England under legal advice are not to be expected in the case of wills made by Hindu laymen in this country, and that, the will having been made in a mofussil station where there are no statutory provisions governing its construction, Courts will be justified in referring to the provisions relating to wills made in the Presidency Towns as embodying the principles of justice, equity and good conscience. **Ratna Chetti v. Narayanaswami Chettiar**, 26 M.L.J. 616=24 Ind. Cas. 796.

AYLING and SESHAGIRI AIYAR, JJ.

References:—(a) 33 M. 410, F.; 10 C. 324 (333), R.; 18 C.W.N. 596, R. (b) 30 A. 84; 35 I.A. 118; 35 B. 279, R. (c) 12 C.W.N. 668, R.

(4) *Hindu Law—Will in favour of females—Construction—Absolute estate or life-estate—Intention.*

The rule of construction or presumption that, where a Hindu testator devises or bequeaths property to a daughter or wife, the intention is that the female should only take a life-estate, does not apply where from a Will, read as the whole, it appears that the intention of the testator was that the female should take an absolute estate.

Per Seshagiri Aiyar, J.—Where the words of a gift are capable of conferring an absolute estate on a person, the fact that that person is a female will not derogate from the grant. **Gomattam Ramanuja Aiyangar v. Satagopachar**, 24 Ind. Cas. 20=27 M.L.J. 329.

WHITE, C.J., and SESHAGIRI IYER, J.

References:—22 M. 357; 31 M. 179=3 M.L. T. 369; 35 C. 896=12 C.W.N. 729 (P.C.)=10 Bom. L.R. 604=8 C.L.J. 48=5 A.L.J. 460=18 M.L.J. 287=4 M.L.T. 23=35 I.A. 118, *Dist.*

(5) *Joint family property disposal by will of—'Married woman' as used in Civ. Pro. Code, meaning of—Burden of proof—Decree against a Hindu father, son's liability to satisfy.*

Held, that a member of a joint Hindu family is not competent to dispose of the joint family property by will.

Held, further, that the word "married woman" as used in the Code of Civil Procedure, 1882, referred to *femme couverte* as opposed to *femme sole* and therefore did not apply to a widow.

Held, also, that where a decree has been obtained against a Hindu father whose children are minors, upon a mortgage executed by him of joint family property, whether or no there had been a sale of the property in execution of the decree, it is for the sons who come into Court to escape liability thereunder to prove that the debt was contracted for an immoral or

Hindu Law—(Continued).**—25.—Will—(Continued).**

illegal purpose or that the debt was of an illusory character. *Gur Narain v. Gulzari Lal*, 17 O.C. 318.

STUART and KENDALL, J. CS.

- (6) *Bequest in favour of unborn persons—Provision in will for feeding 100 persons annually as charity—Gift of portion to testator's daughter as stridhanam—Provision that property should go to her descendants on her death—Validity—Retrospective operation of Madras Act I of 1914 (Hindu transfers and bequests.)*

The scheme of the will in this case was that the testator's children by his two wives should remain together and hand over their earnings to the executors who were directed to support them, that the earnings so handed over and the rents of the properties collected with any surplus should be accumulated for the benefit of the grandchildren and that the property should be taken by the grandchildren on the death of the testator's sons and daughters. The will was dated 6-8-1893 and none of the grandchildren were born at the death of the testator.

Held, that a bequest to persons who were not born at the date of the testator's death was invalid and consequently the dispositions in the will in favour of the grandchildren were invalid.

Madras Act I of 1914 which declares the rights of Hindus to make transfers and bequests in favour of unborn persons has no application as the testator died long before the Act came into force, and the Act has retrospective effect only to the extent that it applies to wills made before the passing of the Act where the dispositions made are intended to come into operation at a time which is subsequent to the passing of this Act. Where the testator dies before the Act came into force, the properties would vest in his heirs in the event of an intestacy according to the law then in force and S. 2 of the Act does not operate to divest such vesting.

Held, also that, as there was no gift in favour of the sons and daughters even for their lives, there was an intestacy and the sons and daughters took the properties as heirs under the Hindu Law.

There was a gift of a house in the will to the testator's daughter as stridhanam, and it was also provided that, after her, the property should be enjoyed by her descendants.

Held that the gift to her was valid and the fact that the gift over was invalid would not defeat the estate given to her.

Held also that the direction in the will whereby 100 persons should be fed annually in a particular month out of the income of certain properties was valid. *Varadaraja Mudaliar v. Narayanasaami Mudaliar*, 27 M.L.J. 681.

KUMARASAMI SASTRI, J.

Hindu Law—(Continued).**—25.—Will—(Concluded).**

(7) Suit by minor plaintiff for declaration that a will of joint family property by his deceased father was void and for possession—Death of plaintiff—Suit whether abates. *See ABATEMENT*, No. 1, 27 M.L.J. 674.

(8) Joint family—Bequest of self-acquired property by father to sons—Bequest found invalid—Nature of estate taken by sons. *See HINDU LAW (JOINT FAMILY)*, No. 11, 16 M.L.T. 489.

(9) Will—Provision for maintenance, to wife after testator's death—No deprivation of maintenance by unchastity—Construction of will. *See HINDU LAW (MAINTENANCE)*, No. 4, 27 M.L.J. 305.

(10) Daughters taking estate of father under will from mother whether estopped from claiming as heirs. *See HINDU LAW (PARTITION)*, No. 7, 16 M.L.T. 592.

(11) *See WILL*, No. 4, 18 C.W.N. 554.

(12) Will—Construction—Executory devise—Time of distribution, death of testator if—Event happening after testator's death, gift over to take effect on—Principles of interpretation. *See WILL*, No. 5, 13 C.W.N. 844.

(13) Will—Donee not in existence at testator's death—Rule in Tagore case—Life estate to daughter—Gift over to cousins—Gift takes effect if daughter has no sons in testator's lifetime. *See WILL*, No. 9, 16 Bom. L.R. 577.

—26.—Women's Estate.

- (1) *Female heirs—Life estate—Partition—Right of survivorship—Provision precluding such right—Validity—Deed—Use of words sarva swatantra Badiyamayum, etc.—Effect—Avoidance of right of survivorship.*

When two female heirs A and B inheriting life interests in properties belonging to a male *propositus* divide the said properties, not for mere convenience of enjoyment, but under a contract containing terms which indicate that each of the female heirs intends to give up *in presenti* her life-interest in the properties which fell to the share of the other female heir, such a complete relinquishment is valid so as to prevent the heir (A or B) from claiming those properties if she happens to survive her co-heir (B or A) (a).

The words '*sarva swatantra Badiyamayum*' and '*santhathi prave samayum*' used in a document executed by two female heirs indicate that one heir intended to give up her life-interest in the properties dealt with by the document and also the right of survivorship in case the other heir happened to predecease her. *Subbammal alias Pichu Ammal v. Krishna Aiyar* minor through his father and guardian, G. K. Lakshmana Aiyar, 26 M.L.J. 479=22 Ind. Cas. 399.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 23 M.L.J. 355; 22 M. 522, F.

Hindu Law—(Concluded).**—26.—Women's Estate—(Concluded).**

(2) *Daughter's estate—Representation of her deceased father for general purposes—Right of sons to execute decree for possession obtained by her.* **Mahadeo Singh v. Sheo Karan Singh**, 11 A.L.J. 798=35 A. 481=21 Ind. Cas. 264. See Final Part, 1913, Col. 708.

(3) *Woman's estate—Sale of portion with consent of presumptive reversioner, if passes absolute title—Presumption of propriety.* **Gopeshwar Miera v. Durgamani Balshnabi**, 17 C.W.N. 1062=21 Ind. Cas. 200=19 C.L.J. 318. See Final Part, 1913, Col. 708.

(4) *Benares School—Mitakshara Law—Sisters jointly inheriting property of their father—Co-widows jointly inheriting property from husband—Right to make partition so as to extinguish rights of survivorship.* See **HINDU LAW (PARTITION)**, No. 5, 10 N.L.R. 51.

Hindu Temple.

Ilaiwaniyars—Right of worship—Right to enter temple up to garbhagraham—Burden of proof. See **RELIGIOUS ENDOWMENTS**, No. 2, 27 M.L.J. 253.

Hindu Transfers and Bequests Act.

See **MADRAS ACT I OF 1914.**

Hindu Wills Act.

See **ACT XXI OF 1870.**

Hire-purchase Agreement.

Hire-purchase agreement—Failure to pay instalments—Conditions not fulfilled—No agreement for sale—Relief to be given on the footing of hire.

Where the plaintiff had given a sewing machine to the defendant under a hire-purchase agreement and the defendant made default in paying the instalments. Held, that the agreement did not become an agreement for sale until the conditions were fulfilled, and that the agreement should be treated as an agreement for hire and relief given on that footing. **The Singer Manufacturing Co., Ltd. v. Gobind, son of Krishin**, 7 S.L.R. 103=23 Ind. Cas. 801.

PRATT, J.C., and HAYWARD, A.J.C.

Reference :—6 Bom. L.R. 871, F.

Holder in due course.

Whether includes payee of instrument payable to bearer. See **ACT III OF 1905 (PAPER CURRENCY)**, No. 1, U.B.R. (1914), 1st Qc., p. 13.

Holidays.

Condition of service to work on holidays—Failure to work on holidays—Summary dismissal and forfeiture of wages—Legality. See **MASTER AND SERVANT**, No. 1, 50 P.R. 1914.

Hundi.

(1) *Shah Jog Hundi—Payment of forged Hundi—Rights of person who makes payment.* See **BILL OF EXCHANGE**, No. 1, 16 Bom.L.R. 434.

(2) *Hundi given in discharge of certain debt—Suit on hundi—Subsequent suit on debt due—Causes of action whether different.* See **OIV. PRO. CODE (1908)**, No. 241, 12 A.L.J. 959.

(3) *Hundis renewed from time to time—Last renewal of hundis on insufficiently stamped paper—Secondary evidence.* See **EVIDENCE ACT**, No. 48, 12 A.L.J. 861.

(4) *Payment of Hundi not as Shah but as indorsee for collection of the Hundi—Custom of Marwari merchants.* See **SHAH JOG HUNDI**, No. 1, 16 Bom. L.R. 972.

Husband and Wife.

(1) *Wife's right to live in the husband's house—Suit by husband to eject wife—Question of immorality or unchastity of wife does not arise.* See **HINDU LAW (MARRIAGE)**, No. 1, 12 A.L.J. 1039.

(2) *Nature of property acquired by the joint exertions of husband and wife—Doctrine of survivorship whether applies—Devolution of wife's share in the property.* See **HINDU LAW (STRIDHANAM)**, No. 1, 26 M.L.J. 532.

Hyderabad Assigned Districts Courts Law (1889).

Civil Judge in Berar invested with unlimited original jurisdiction under the Hyderabad Assigned Districts Courts Law—Not competent to hear applications under Guardians and Wards Act—Appointment of guardian by such a Civil Judge *ultra vires*—Minority of, ward not extended to 21 years—Meaning of, 'Court of Justice,' in the Majority Act. See **ACT VIII OF 1890 (GUARDIANS AND WARDS)**, No. 2, 10 N.L.R. 161.

Hypothecation.

Letter of Hypothecation—Construction of document—Rights under the document—Simple mortgage of goods—Equitable charge—S. 16 (5), Provincial Insolvency Act—"Reputed ownership"—Rights of secured creditors. **D. Sassoon v. The National Bank of India**, 7 S.L.R. 61=21 Ind. Cas. 520. See Final Part, 1913, Col. 710.

Idols.

Idol capable of being endowed with property—Juridical person—Family idol and idol installed in temple for public worship—Distinction between gifts in favour of such idols—Effect of consecration of idols—Gift in favour of consecrated idol with charge on gifted property for maintenance of certain persons, validity of—Effect of donor's omission as to mutation of names in favour of idol—Suit for possession of endowed property by heirs of donor—Limitation. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 1, 24 Ind. Cas. 72.

Ignorance of Law.

Whether an excuse. See CIV. PRO. CODE (1908), No. 373, 15 P.L.R. 1914.

Ilaiwaniyar.

Ilaiwaniyar—Sudra caste—Exclusion from entry into space between Flag Staff and Garbhagraham—*Onus*. See RELIGIOUS ENDOWMENTS, No. 2, 27 M.L.J. 253.

Illegitimate Children.

(1) Gift to mistress and her sons by unmarried person—Illegitimate sons whether meant—Man whether father of the illegitimate children. See ACT X OF 1865 (SUCCESSION), No. 3, 23 Ind. Cas. 348.

(2) Rights of. See HINDU LAW (SUCCESSION), No. 5, (1914) M.W.N. 672.

Immoveable Property.

Immoveable property—Kolhu fastened to the ground.

A Kolhu (i.e., an iron sugar-cane press) fastened to the ground is immoveable property. *Musal Kurmi v. Sub Karan Kurmi*, 23 Ind. Cas. 250.

RYVES, J.

Inam.

(1) Inam grant made by Zemindar—Suit by inamdar to eject tenants—Burden of proof—Presumption of grant of melvaram—Description of inam as land—Appeal, second—Question of fact—Evidence Act, S. 11—Presumption varies according to evidence in each case.

Where a minor or a major inam is granted by a zemindar or jagirdar to a Brahman, the presumption is that the grant is only of a melvaram (a).

The description of the grant as one of land, and the fact that the inamdars themselves treated the grant as such in the several sale-deeds executed by them, do not enlarge their rights in the land.

Where an inamdar, claiming under such a grant, sues to eject the tenants in occupation of the land from 1801, the burden is on him to prove his title to eject and he will discharge that burden only when he gives proof that the tenants were let into the land either by himself or by his predecessors-in-title. A *muchilika* executed by a tenant does not, as between the landlord and tenant, amount to an admission and proof of such letting, and does not estop the tenant from asserting a right of occupancy in the land (b).

Presumption and burden of proof vary according to the evidence in each case; there is no hard and fast rule as to what a presumption should be and what it should not be.

A question of fact cannot be made the subject of second appeal on the assumption that every piece of evidence legally admissible raises a presumption or shifts the burden of proof.

Inam—(Continued).

Pingale Viswanatha Row v. Chinnakolandal Nainar, 22 Ind. Cas. 869.

SADASIVA AIYAR and TYABJI, JJ.

References:—(a) 19 Ind. Cas. 440=24 M.L.J. 288=(1913) M.W.N. 282=20 Ind. Cas. 753=24 M.L.J. 655, R. (b) 20 Ind. Cas. 759=24 M.L.J. 656=(1913) M.W.N. 774, F.

(2) Inam granted by Government to a person doing service in temple—Right of temple authorities to prevent its alienation—Servant removed from service—Right of his successor to recover the inam.

Where an inam is given by the Government, and not by the temple authorities, to a person doing service in the temple, the temple trustees cannot intervene to prevent the alienation of the inam, though, no doubt, the Government might resume it. If the servant who is responsible for the alienation were removed from office, his successor in office could recover the inam (a). But the trustees cannot recover possession of the land. *Matte Sarayya v. Yapparathi Vidyathatham*, 27 M.L.J. 57.

MILLER and SADASIVA AIYAR, JJ.

Reference:—(a) 14 M.L.J. 134, F.

(3) Inam granted to Vritikars of temple for reciting Vedas—Inam granted by Zemindar and confirmed by Government—Right of temple trustees to resume—Trustees' power to dismiss Vritikars—Minority, sex or ignorance of the Vedas whether disqualifications for performing service—Service performed by proxies—Onus on Dharmakartas to prove disqualification.

An inam was granted by a Zemindar to certain Vritikars for reciting Vedas in a temple and it was confirmed by the British Government. The temple never had any right of property in the inam lands. Held, the right of resumption would be in the Government and not in the temple trustees.

Whether, in the case of such a grant, the trustees would have a right to dismiss the Vritikars cannot be decided on any assumption.

There is no basis for the assumption that a minor, a female or a person unlearned in the Vedas would lose the right to the service in the temple. As services in temples are often performed by proxies, the onus would be on the Dharmakartas to prove any such disqualification. *Tangirala Chiranjivi v. Raja Manikya Rao*, 27 M.L.J. 179.

SUNDARA IYER and BENSON, JJ.

(4) Service inam—Alienation in favour of a relation incapable of doing service invalid—Adverse possession of right to income.

Where lands were given as inam for fanning service to be performed by dancing girls in a temple and the last holder gave the lands to her two daughters and the son of a deceased third daughter, directing the two daughters to perform the fanning service, held that the alienation in favour of the daughter's son is invalid.

Inam—(Continued).

Where the son is alleged to have enjoyed the income of the lands jointly with his aunts, held that the joint possession with the office-holders even though it may be regarded as adverse, would not give him a right to a share of the income of the lands. **Yusa Chandrakantam v. Yusa Subbarayudu**, (1914) M.W.N. 745=16 M.L.T. 347.

AYLING and NAPIER, JJ.

- (5) *Inamdar and lessee—Increase in quit-rent, consequent on enfranchisement—Tenant, whether liable for increase.*

Where an *inam* is held by lessees for a fixed period and the *inamdar* gets it enfranchised for his own benefit, his lessees are not liable for the consequent increase in the quit-rent. **Ravipati Ramayya v. Addanki Seshayya**, 23 Ind. Cas. 765.

SADASIVA AIYAR, J.

- (6) *Madras Act VIII of 1863—Naidu's inam of enfranchisement, effect of—Inam title-deed does not affect other people's interests—Burden of proof.*

Nothing contained in any *inam* title-deed shall be deemed to affect the interest of any person other than the *inam*-holder named in it, whether the deed has been issued before the Madras Act VIII of 1869, or after it. Enfranchisement does neither grant nor create a fresh title, but only confirms the existing one freed from the obligation of service. The issue of the *inam* title-deed at most imposes on the persons setting up title against the *inam* holder the burden of proving their title against him. **Polaki Latchmana Naidu v. Dola Geddanna Naidu**, 24 Ind. Cas. 377.

AYLING and OLDFIELD, JJ.

- (7) *Land granted as Desai inam to manager of undivided family—Presumption—Maintainability of suit for partition without certificate under Pensions Act—Jurisdiction of Civil Courts whether ousted.*

Where land was granted as *Desai inam* to the manager of an undivided Hindu family, he must be deemed to have taken the property for and on behalf of the joint family (a).

Where there has been a grant of land, and the grantees had no *kudiwaram* right in the soil prior to the grant to them, the Pensions Act is inapplicable, and the pre-requisite of filing a certificate under the Pensions Act has no application in cases of partition of the land granted as *inam* among the members of the grantee's family; and the jurisdiction of the Civil Courts is not ousted by the Pensions Act (b). **Desayi alias Allam Raju Nanjunadhiah v. Desayi alias Allam Raju Venkatasubbiah**, 27 M.L.J. 618.

SESHAGIRI AIYAR and KUMARASAMI SASTRI, JJ.

References:—(a) 26 M. 399, Appl. (b) 7 M. 191; 23 M.L.J. 687; 36 M. 559; 1 B. 523; 33 A. 580, F.; 12 M. 98, R.

Inam—(Concluded).

(8) *Nottam inam—Enfranchisement—Proprietorship of the Zemindar. N. Rama Row v. The Secretary of State for India in Council*, (1913) M.W.N. 639=21 Ind. Cas. 49. See Final Part, 1913, Col. 713.

(9) *Pre-settlement Inam—Right to resume—Presumption—Services to zemindar—Settlement Records—Non-production—Inference. Sri Raja Parthasarathy Appa Row v. The Secretary of State for India*, (1913) M.W.N. 959=14 M. L.T. 514=26 M.L.J. 39=21 Ind. Cas. 871. See Final Part, 1913, Col. 714.

(10) *Inam lands—Alienation—Service tenure—Incidents—Family custom—Effect. See BOMBAY ACT II OF 1863 (SUMMARY SETTLEMENTS), No. 1, 16 Bom. L.R. 164.*

(11) *Grant of inam to manager of joint Hindu family—Presumption of acquisition on behalf of family. See ACT XXIII OF 1871 (PENSIONS), No. 2, 16 M.L.T. 239.*

(12) *Inam granted prior to Permanent Settlement—Suit for rent for such land—Maintainable in Civil Court. See MAD. ACT I OF 1908 (ESTATES LAND), No. 6, 26 M.L.J. 258.*

(13) *Grant of inam village—Presumption as to grantee being owner of kudiwaram at the time of grant—Party seeking to oust jurisdiction of Civil Court must establish his right to do so. See ACT I OF 1903 (MADRAS ESTATES LAND), No. 10, 27 M.L.J. 233.*

(14) *Meaning of 'estate'—Inam of part of village, whether 'Estate'—Suit for rent—Jurisdiction of Civil Courts. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 12, 23 Ind. Cas. 859.*

(15) *Inamdar—Liability to pay ghattuthumulu cess to Zemindar even after enfranchisement. See GHATTUTHUMULU CESS, No. 1, (1914) M.W.N. 373.*

(16) *Agraharam grant—Grantee whether owner of Kudiwaram—Presumption. See GRANT, No. 8, 16 M.L.T. 596.*

(17) *Service grant—Resumption—Grant for public or private services. See GRANT, No. 7, (1914) M.W.N. 936.*

(18) *Effect of enfranchisement. See SHROTRIAM GRANT, No. 1, 15 M.L.T. 277.*

Inams Act.

See MADRAS ACT VIII OF 1869.

Income-Tax Act.

See ACT II OF 1886.

Indemnity.

Indemnity—Contract of indemnity—Breach of contract—Suit by third person against promisor and promisee—Decree against promisee whether binds promisor—Co-defendants—Applicability of doctrine of res judicata—Equitable estoppel.

The second defendant agreed, while plaintiff was a minor, to manage plaintiff's properties and one of the duties he undertook to perform was the payment of interest due on the debts,

Indemnity—(Concluded).

He did not pay the interest on one of the debts and in consequence the creditor sued the present plaintiff and the present second defendant. The present second defendant contended in that suit that he had paid up the interest, but failed to adduce evidence to prove his contention. The creditor's suit was therefore decreed. Plaintiff subsequently paid the amount to the creditor and brought this suit to recover the damages sustained by him in consequence of the present second defendant's failure to pay. The second defendant again pleaded that the interest due to the creditor had been discharged by him prior to the previous suit.

Held that, whether the technical doctrine of *res judicata* is applicable or not, there was no doubt that the second defendant must be held to be estopped from contending that the debt was discharged, by reason of the finding in the previous suit.

Where there is a contract to indemnify, if a decree has been passed against the person entitled to indemnity; the correctness of that decree cannot be impeached by the person bound to indemnify. The contract of indemnity might no doubt strictly be said to require that it should be proved that the indemnifier acted in violation of his duty, as well as that his act caused loss to the party entitled to indemnity. But the Courts have held that the contract is substantially broken when the Court has found, in a suit honestly defended by the party entitled to indemnity, that there has been a violation of duty by the indemnifier which has entitled a third party to the damages for which the indemnity has been given. It has further been held that, if both the indemnifier and the party entitled to indemnity were parties to the action by the third party, as in this case, or if the indemnifier had notice given to him of the suit against the party entitled to the indemnity, the judgment would be conclusive against the indemnifier even as an adjudication by Court. **Nallappa Reddi v. Vridhachala Reddi**, 37 M. 270.

SUNDARA IYER and PHILLIPS, JJ.

References:—21 M. 8; (1873) L.R. 8 Ch. App. Cas. 1035 (1059); (1894) 1 Ch. 578, R.

Inherent Powers.

See COURT.

Injunction.

- (1) *Injunction, suit for, if lies against trespasser in possession—Specific Relief Act, S. 56, ill. (i).*

A plaintiff who is out of possession should not be allowed to sue the defendant who is alleged to be in possession as a trespasser for an injunction. He ought to sue for recovery of the land. **Jahar Lal Banduri v. Nanda Lal Chaudhuri**, 18 C.W.N. 545 = 24 Ind. Cas. 199.

COXE and RAY, JJ.

- (2) *Injunction—Discretionary order—Appeal—Appellant, what to prove.*

Injunction—(Continued).

An order of injunction is a discretionary order and it is essential for a party appealing against a discretionary order to prove that the Court, against whose judgment the appeal is preferred, acted in the exercise of its discretion wrongly in not granting the mandatory injunction. **Umesh Chandra Mukhopadhyaya v. Niparan Chandra Konwar**, 19 C.L.J. 305 = 22 Ind. Cas. 710.

FLETCHER and CHATTERJEE, JJ.

- (3) *Perpetual injunction—Decree for closing a door for ever—New door opened after a short time.*

Where a decree purported to grant a perpetual injunction to keep a door closed by using the words (*hamesha ke waste*) and the judgment-debtor opened another door, *held*, he transgressed this direction and the decree-holder could execute his decree and was not bound to bring a fresh suit. **Habib Ullah v. Abdullah**, 12 A.L.J. 347 = 23 Ind. Cas. 247.

PIGGOTT, J.

- (4) *Injunction—Opening a door in a public street of a village—Incompetency of proprietors of its soil to object—Special damage—Finding on fact without evidence—Second Appeal—S. 40 of the Punjab Courts Act XVIII of 1894 as amended by the Punjab Acts I and IV of 1912.*

Held, that, according to law, a person cannot prevent another from opening a door on what is for all practical purposes an old public street of a village, unless he is able to show some special damage to himself even if its soil was originally his property.

Held, also, that a finding of fact is liable to be set aside in a second appeal where no evidence to support it is on the record. **Mam Chand v. Bud Ram**, 80 P.W.R. 1914 = 179 P.L.R. 1914 = 24 Ind. Cas. 902.

JOHNSTONE, J.

- (5) *Injunction, mandatory suit for—Damages—Balance of convenience.*

Where, upon a balance of convenience, damages will be an adequate remedy, relief by way of mandatory injunction should not be granted. **V. R. Ry. Sethuram Madigal Row Sahib v. Gopal Row Peishwa**, 23 Ind. Cas. 785.

SANKARAN NAIR and BAKEWELL, JJ.

- (6) *Suit for custody of infants—Right to mandatory injunction. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.*

- (7) *Stay by injunction—Injunction order set aside—Time whether excluded—S. 15, Limitation Act. See ACT I OF 1908 (MADRAS ESTATES LAND, No. 61, 27 M.L.J. 784.*

- (8) *Temporary injunction by Munsif—Suit transferred to the file of District Judge after injunction by Munsif—Breach of injunction after transfer—Jurisdiction of District Judge to punish for contempt. See CIV. PRO. CODE (1909), No. 431, 18 C.W.N. 470.*

Injunction—(Concluded).

(9) Interlocutory injunction — Mandatory injunction—Jurisdiction to grant. See CIV. PRO. CODE (1908), No. 427, 16 Bom. L.R. 288.

(10) Power to order mandatory injunction on an interlocutory application. See CIV. PRO. CODE (1908), No. 428, 16 Bom. L.R. 566.

(11) Obstruction to execution of decree—Suit to remove obstruction—Temporary injunction whether may be granted. See CIV. PRO. CODE (1908), No. 426, 16 Bom. L.R. 676.

(12) Alienation made pending temporary injunction is not void. See CIV. PRO. CODE (1908), No. 340, 253 P.L.R. 1914.

(13) Money detained under a temporary injunction—Whether liable to rateable distribution. See CIV. PRO. CODE (1908), No. 107, 7 Bur. L.T. 277.

(14) One co-owner building upon joint property to prejudice of other co-owners—Suit for partition—Right to obtain temporary injunction See CO-OWNERS, No. 3, 24 Ind. Cas. 313.

(15) Suit by co-sharer for joint possession and injunction—Injunction when to be granted. See CO-SHARERS, No. 2, 18 C.W.N. 328.

(16) Suit for—Under-valuation—Arbitrary valuation — Court-fee. See COURT-FEES, No. 1, 19 C.L.J. 15.

(17) Suit for damages for wrongfully obtaining temporary or permanent injunction—Maintainability—Limitation. See DAMAGES, No. 3, 18 C.W.N. 1189.

(18) Suit for—Duty of plaintiff—Mining lease — Surface owner—Right to support when protected by injunction—Injunction when granted in case of subsidence. See MINING LEASE, No. 1, 20 C.L.J. 538.

(19) Interference with the performance of charter parties—Injunction. See SPECIFIC RELIEF ACT, No. 37, 15 Bom. L.R. 178.

Insolvency.

- (1) *Indian Insolvency Act, S. 39—Provincial Insolvency Act, S. 30—Insolvency—Set-off—Fraudulent claim—Notice of available act of bankruptcy committed by debtor—English and Indian Law.*

The defendants claimed set-off against the plaintiffs, purchasers of the estate of the insolvents.

Held, that the doctrine of set-off is of equitable jurisdiction, and its object is not merely to avoid cross actions but to do substantial justice and to prevent the great injustice which would arise if a person, who is the insolvent's creditor on one account and his debtor on the other, is compelled to pay 16 annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him, that this doctrine cannot be extended to cover cases where, at the time of insolvency one person owes a debt to the insolvent and, with full knowledge that the latter has become hopelessly involved, buys up a third person's

Insolvency—(Continued).

claim against the insolvent in order to relieve himself of the liability of having to pay his just debt.

Held, also that the transaction relied upon by the defendants being a bogus one, the set-off claimed could not be allowed. The English Law on the subject discussed. **Seth Radha Kishen v. The Firm of Ganga Ram Radha Kishen**, 95 P.L.R. 1914=53 P.R. 1914=118 = P.W.R. 1914=23 Ind. Cas. 927.

•RATTIGAN and BEADON, JJ.

References—3 Revised Reports, p. 119; 25 Ch. D. 587, R.

- (2) *Insolvency—Limitation—Claim of Official Assignee—Insolvent's after-acquired property—Possession of insolvent for more than 12 years—Official Assignee's claim not barred.*

An insolvent, who has obtained merely a personal discharge, can make subsequent acquisitions only as the agent of the Official Assignee. A claim, therefore, by the Official Assignee to such after-acquisitions, even after twelve years' possession by the insolvent, is not barred by limitation. The possession of the insolvent in such a case is not adverse against the Official Assignee. **Official Assignee v. Moorli Dass**, 22 Ind. Cas. 271.

WALLIS, J.

References—28 M. 168; (1907) 1 K.B. 149; 76 L.J.K.B. 134; 95 L.T. 887; 14 Manson 6; 23 T.L.R. 99, F.; 5 Q.B. 965; 2 D & L. 49; 13 L.J.Q.B. 209; 8 Jur. 812; 114 Eng. R., p. 1512, R.; 8 C. 556 (559); 12 C.L.R. 253, Diss.

- (3) *Insolvency proceedings—Partnership—Factors determining whether person is mere creditor or partner—Madras Insolvency Rules, r. 47.*

In determining whether a person (against whom an application to be declared an insolvent was made along with other parties of a firm), is a mere creditor of or a partner in, a firm, the facts that he had no ledger page in the firm's book, that he drew no interest on the sums deposited by him, that he was not included in the schedule of unsecured creditors filed along with the petition for insolvency, and that he was described also as an *yejaman*, are clearly indicative of his position as a partner. **T. Abdul Rahman Sahib v. The Official Assignee, Madras**, 22 Ind. Cas. 14.

WHITE, C.J., and OLDFIELD, J.

- (4) *Attachment, effect of—Insolvency of judgment-debtor after attachment—Effect—Official Assignee if takes subject to attachment—Official Assignee how to be bound by execution proceedings—Substitution of Official Assignee for judgment-debtor, if necessary—Civ. Pro. Code (1882), Ss. 32, 372, if apply—Summons on substituted party to appear, necessity of—Civ. Pro. Code (1882), S. 248—Notice of proceedings, necessity of, to bind Official Assignee—Stay*

Insolvency—(Continued).

of execution proceedings when judgment-debtor declared insolvent—Insolvent-debtor's (India) Act 11 and 12 Vict., C. 21, S. 49—Sale without serving notice, effect of—Irregularity.

Attachment in execution of a money-decree followed by an order for sale does not confer on the judgment-creditor any charge on the land (a).

An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Insolvent Debtors (India) Act of 1848, and an order for sale, though it binds the parties does not confer title.

Where, after an order for sale made at the instance of an attaching-creditor, an order vesting the property to be sold in the Official Assignee was made on 8th September 1904, and on the 12th September 1904, the Judge stayed the sale until further orders, and the attaching-creditor then applied for and obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors; and the Official Assignee though duly served took no notice of it, and when the time fixed by the notice to show cause expired, the attaching-creditor applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors but directing the sale to proceed, and the sale took place and the purchaser obtained the usual certificate which referred to the right, title and interest of the judgment-debtors as the property sold.

Held, that the sale was altogether irregular and inoperative.

That the execution could not proceed until the Official Assignee had been properly brought before the Court by taking out and serving on him a notice under S. 249 of the Civ. Pro. Code of 1882.

That the notice served was not a proper notice under S. 248.

That, taking the notice to be a proper notice preliminary to adding the Official Assignee as a party under S. 32 of Code, in order to bind the party added, it was necessary, after he had been added, to serve him with a summons to appear and answer.

That no such proceeding having been taken under either S. 32 or under S. 372 of the Code, the Official Assignee (who did not appear to have been aware of the order for sale) was not bound by the sale.

Quere.—Whether these sections were applicable after the final decree (b).

Held, that the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vest in a purchaser.

If the judgment-debt was included in the schedule filed by the insolvents under the Act

Insolvency—(Continued).

of 1848, the executing Court was bound to stay the sale under S. 49 of the Act.

27 I.A. 216=25 Bom. 337, did not apply to this case as no notice was served under S. 248 of the Civ. Pro. Code and the purchaser (the attaching-creditor himself) had full notice of and was responsible for the irregularities of the procedure adopted (c). *Ragunath Das v. Sunder Das Khetri*, 18 C.W.N. 1058=27 M. L.J. 150=(1914) M.W.N. 747=24 Ind. Cas. 304=16 M.L.T. 353=16 Bom. L.R. 814=20 C.L.J. 555=13 A.L.J. 154 (P.C.).

LORD MOULTON, LORD PARKER, SIR JOHN EDGE and MR. AMBER ALI.

References:—(a) 1 N.W.P.H.C. Rep. 172, R. (b) 10 A. 97, R. (c) 20 C. 370, R.

(5) *Debt due by insolvent to a creditor—Suit by a third person against creditor—Decree against creditor and debt due from insolvent purchased in Court auction—Rights of purchaser.*

A person claiming to have acquired the debt due by the insolvent to a creditor by purchase at a Court auction in a suit in which the insolvent's creditor was the judgment-debtor, is entitled to an order from the Court giving leave to the Receiver to substitute his name in the schedule of the creditors' names in respect of the debt due to the creditor in substitution for the creditor's name. *Chathapuram Gramam Vaidyanatha Iyer v. Ramaswami Iyer, Receiver of the Ry. R. M. Company*, 16 M.L.T. 85=23 Ind. Cas. 815.

WALLIS and SADASIVA IYER, JJ.

Reference:—(1899) 2 Q.B. 50, R.

(6) *Presidency Towns Insolvency Act and Provincial Insolvency Act—Jurisdiction conferred by the two Acts distinct—Insolvency petition pending before the Insolvency Court at Madras—Transfer to a Mofussil District Court—Legality—Jurisdiction of the District Court—S. 24, Civ. Pro. Code, 1908. Sreenivasa Iyengar v. The Official Assignee of Madras*, 14 M.L.T. 184=25 M.L.J. 299=(1913) M.W.N. 1004=21 Ind. Cas. 77=(1914) M.W.N. 45. See Final Part, 1913, Col. 719.

(7) *Allegations in insolvency petition as to assets and liabilities—Duty of Court to accept them. Koppuravvari Subbarayudu v. The Guntur Cotton, Jute and Paper Mills Company, Limited, Guntur*, 14 M.L.T. 587=(1914) M.W.N. 153=22 Ind. Cas. 276. See Final Part, 1913, Col. 719.

(8) *Fraudulent decree against insolvent—Whether suit for declaration that decree is fraudulent maintainable. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 22, 12 A.L.J. 925.*

(8-a) *Properties standing in name of persons other than the insolvent—Notice of motion for delivery of those properties to Official Assignee—Jurisdiction. See ACT III OF 1909 (PRESY. TOWNS INSOLVENCY), No. 1, 27 M.L.J. 66.*

Insolvency—(Concluded).

(9) Adjudication — Creditor of insolvent if can enforce claim without leave of Court. See CIV. PRO. CODE (1908), No. 338, 23 Ind. Cas. 755.

(10) Suit instituted by insolvent after adjudication of insolvency—Receiver whether can continue such suit. See CIV. PRO. CODE (1908), No. 376, 23 Ind. Cas. 913.

(11) Judgment-debtor declared insolvent—Appeal by decree-holder against adjudication order whether amounts to a step-in-aid of execution. See LIMITATION ACT (1908), No. 159, 16 Bom. L.R. 612.

Insolvency Act, 1848 (11 and 12 Vict., C. 21).

S. 49. See INSOLVENCY, No. 4, 18 C.W.N. 1058.

Instalments.

(1) Instalment decree—Appeal — Court-fee how to be calculated. See CIV. PRO. CODE (1908), No. 40, 226 P.L.R. 1914.

(2) Consent decree—Payment by instalments—Penalty clause on failure to pay—Penalty whether can be relieved against. See CONSENT DECREE, No. 1, 16 Bom.L.R. 668.

(3) Instalment bond—Waiver—Right of creditor to sue for whole amount or for any instalment on default—Limitation. See LIMITATION ACT (1908), No. 94, 23 Ind. Cas. 830.

(4) Instalment bond—Option to creditor to allow time in case of default—Waiver—Failure to sue—Sufficiency to prove waiver. See LIMITATION ACT (1903), No. 96, 8 S.L.R. 63.

(5) Pro-note payable by instalments—Calculation of limitation for each instalment—Willingness to pay barred instalments in prior suit—Subsequent suit for unpaid instalments—Whether defendant estopped from pleading limitation. See LIMITATION ACT (1908), No. 4, 24 Ind. Cas. 507.

(6) Acceptance of overdue instalment whether amounts to waiver. See WAIVER, No. 1, 23 Ind. Cas. 391.

Insurance.

(1) *Insurance—Contract — Good faith—Disclosure of material facts likely to influence insurer in fixing premium—Information that stock to be insured would be set on fire by incendiary—Non-disclosure of information to insurer—Liability of insurer, discharge of — Obligation to disclose—Thing already known to person to whom disclosure to be made—Wrong declaration— Court can allow a further declaration.*

Inasmuch as insurance contracts are based upon the utmost good faith, every circumstance which would influence or is likely to influence the judgment of a prudent insurer in fixing the premium or would determine whether he will take the risk or not, must be disclosed.

Therefore, in a fire insurance, there is a duty to disclose to the insurer all facts which appear upon there being a possibility of a fire greater

Insurance—(Concluded).

than usual and which consequently may indicate a motive of the assured in effecting the insurance.

Where the assured had the information, at the time of making an application for a policy of fire insurance in respect of certain premises in which jute was stocked and baled, that the stock would be set on fire by an incendiary, and they insured their premises in consequence of the information, a duty was cast upon them, to inform the insurers of the reason which led them to ask for an insurance. The non-disclosure of the information discharges the liability of the insurers.

There is no obligation on any one to disclose things to another person which are already known to that person or which were within the power of that person to know.

A Court can in its discretion allow a party, who has made a wrong declaration, to put in a further declaration and thus put the matter right. **Imperial Pressing Company v. British Crown Assurance Corporation, Limited**, 21 Ind. Cas. 836 = 41 C. 581.

CHAUDHURI, J.

(2) *Insurance—Policy for the benefit of wife or wife and children or any of them—Trust in favour of beneficiaries—Right to enforce claim—Whether exists in beneficiary—Act III of 1874 (Married Women's Property), S. 6—Applicability to Hindus—Ss. 2, 4, 5, 7, 8, 9 of the Act—Gift by way of advancement.* **Pokkunnuri Balamba v. Kakaraparti Krishnayya**, 25 M. L.J. 65 = (1913) M.W.N. 697 = 14 M.L.T. 363 = 20 Ind. Cas. 934 = 37 M. 483 (F.B). See Final Part, 1913, Col. 724.

(3) Insurance policy—Life policy effected by a Hindu for the benefit of wife and children—Policy if can be availed of by assured's creditor. See ACT III OF 1874 (MARRIED WOMEN'S PROPERTY), No. 1, 20 C.L.J. 44.

Interest.

(1) *Interest—Arrears of rent — Absence of contract to contrary—General law as to interest — Bengal Tenancy Act (VIII of 1835), Ss. 67, 68—Mokarari lease.*

In the absence of any express or implied contract to the contrary, a landlord is entitled to the benefit of the general law with regard to the payment of interest on arrears of rent; that is to say, he is entitled to the benefit of Ss. 67 and 68 of the Bengal Tenancy Act.

S. 67 is applicable to *mokarari* leases when there is no contract to the contrary. **Ajeb Bhathi v. Ram Narain Singh**, 23 Ind. Cas. 108.

TEUNON, J.

Reference :—29 C. 674 = 5 C.W.N. 438, R.

(2) *Document providing for compound interest only for a specified period—Party entitled only to simple interest after that period—Presumption—Construction of document.*

Interest—(Continued).

While a person owing money must be deemed to have borrowed it on the understanding that he would pay some compensation for its use either as simple interest or damages, there is no presumption that he agrees to pay compound interest, as that is not an ordinary incident of the borrowing.

Where the provision for compound interest in a document relates only to the period during which the principal remains unpaid, that is, a specified period from the date of the document providing for its payment, and after that date there is no provision in the document for the payment of any interest, the promisee is not entitled to compound interest after the expiry of the specified period, but only to simple interest upon the amount of principal and interest due on that date. **Thathothathil Pokker v. Ramachandra Shenoy**, 16 M.L.T. 478.

WALLIS, OFFG. C.J. and SESHAGIRI IYER, J.

*Reference:—*17 A. 511, *F.*

(3) Interest at enhanced rate of one rupee per cent. per mensem whether penal. See **ACT I OF 1869 (OUDH ESTATES)**, No. 1, 22 Ind. Cas. 129.

(4) Plaintiff not suing on mortgage for a long time—Presumption as to passing of consideration or payment of interest. See **AMENDMENT**, No. 4, 12 A.L.J. 635.

(5) Mortgage—Discretion of Court to reduce interest. See **CIV. PRO. CODE (1908)**, No. 407, 12 A.L.J. 283.

(6) Award of interest—Admittedly illegal—Disallowing interest by order on application under S. 152, Civ. Pro. Code—Illegality—Revision. See **CIV. PRO. CODE (1908)**, No. 196, 7 S.L.R. 196.

(7) Provision for interest when penal. See **CONTRACT ACT**, No. 73, (1914) M.W.N. 154.

(8) Delay caused by plaintiff in deciding case—Discretion not to award interest. See **DEBTOR AND CREDITOR**, No. 2, 98 P.W.R. 1914.

(9) Compound interest—Not at enhanced rate—No penalty. See **EVIDENCE ACT**, No. 24, 82 P.R. 1914.

(10) Sale in execution—Application to set aside sale by another bidder—Stay of proceeding—Sale eventually confirmed—Right of decree-holder to interest from date of sale to date of confirmation. See **EXECUTION SALE**, No. 2, 19 C.L.J. 358.

(11) Interest at 15 per cent. per annum—Whether reasonable. See **HINDU LAW (ALIENATION)**, No. 9, 215 P.L.R. 1914.

(12) Compound interest at 18 per cent. with monthly rests—Whether penal. See **HINDU LAW (JOINT FAMILY)**, No. 11, 16 M.L.T. 499.

(13) Limitation Act (1908), S. 20—Fruits of land allowed to be taken in lieu of interest—Effect—Saving of limitation. See **LIMITATION ACT (1908)**, No. 101, 7 L.B.R. 138.

Interest—(Concluded).

(14) Mortgaged property purchased by prior mortgagee in execution of his mortgage decree—Right of such mortgagee to interest on his money after obtaining possession as purchaser. See **MORTGAGE (GENERAL)**, No. 5, 21 Ind. Cas. 593.

(15) Invalid foreclosure proceedings—Interest allowable for what period—Right to *post diem* interest. See **MORTGAGE (BY CONDITIONAL SALE)**, No. 1, 57 P.R. 1914.

(16) Mortgage by conditional sale—Foreclosure—Right to *post diem* interest. See **MORTGAGE (BY CONDITIONAL SALE)**, No. 3, 23 Ind. Cas. 871.

(17) *Post diem* interest for what period recoverable. See **MORTGAGE (FORECLOSURE)**, No. 1, 116 P.L.R. 1914.

(18) Agreement to pay interest when may be interfered with by Courts. See **MORTGAGE (REDEMPTION)**, No. 8, 73 P.L.R. 1914.

(19) Interest at $1\frac{1}{4}$ per cent. per mensem on part only of mortgage money, whether inequitable or onerous. See **MORTGAGE (REDEMPTION)**, No. 15, 219 P.L.R. 1914.

(20) Higher rate of interest till certain date—Lower rate on punctual payment—Not a penalty. See **PRINCIPAL AND AGENT**, No. 1, 22 Ind. Cas. 597.

(21) Promissory note silent about interest—Oral agreement as to interest if provable—Defendant admitting lower rate of interest than that claimed by plaintiff—Effect. See **PROMISSORY NOTE**, No. 7, 18 C.W.N. 1260.

(22) Stipulations as to—Enforceability. See **SONTHAL PARGANAS**, No. 1, 18 C.W.N. 994.

Interlocutory Order.

(1) Leave to appeal. See **APPEAL TO PRIVY COUNCIL**, No. 1, (1914) M.W.N. 170.

(2) Whether revision lies against an. See **CIV. PRO. CODE (1908)**, No. 180, 23 Ind. Cas. 564.

(3) High Court when will interfere in revision. See **CIV. PRO. CODE (1908)**, No. 197, 20 C.L.J. 426.

Interpleader Suit.

(1) Interpleader suit as to who is entitled to water cess, whether suit for ascertainment of rent. See **ACT I OF 1903 (MADRAS ESTATES LAND)**, No. 61, 27 M.L.J. 734.

Interrogatories.

Right to administer interrogatories. See **CIV. PRO. CODE (1908)**, No. 294, 41 C. 6.

Inventions and Designs Act.

See **ACT V OF 1888**.

Irrigation Cess Act (Madras).

See **MADRAS ACT VII OF 1865**.

Issues.

(1) Issue not raised if can be decided on evidence on other issues. See **ACT VIII OF 1890 (GUARDIANS AND WARDS)**, No. 5, 18 C.W.N. 1089.

Issues—(Concluded).

(2) Suit for redemption—Plaintiff's failure to prove mortgage—Plaintiff's possession through mortgages proved—Decree in plaintiff's favour—Issue remitted by High Court—New case. See ADVERSE POSSESSION, No. 13, 12 A.L.J. 1233.

(3) Trial of issues—Issues of law when to be tried—Application for trial of issues without evidence long after the settlement of issues—Trial of case piecemeal—Effect—Interlocutory order—Revision. See CIV. PRO. CODE (1908), No. 197, 20 C.L.J. 426.

(4) Trial of issues in bar—Issues relating to reliefs claimed undecided—Effect—Preliminary decrees—Appeal. See CIV. PRO. CODE (1908), No. 14, 20 C.L.J. 476.

(5) Pleadings raising issue with sufficient clearness—Whether issue should be in a particular form. See FRAUDULENT TRANSFERS, No. 1, (1914) M.W.N. 695.

(6) Amendment of issues after trial on issues originally framed is completed—Omission to frame specific issue when issues already framed are sufficiently wide—Effect. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 24 Ind. Cas. 72.

Jaghir.

Suit for recovering jaghir income wrongfully realized by defendant from third persons—Limitation. See LIMITATION ACT (1908), No. 91, 46 P.W.R. 1914.

Jalkar.

(1) Jalkar, *Meaning of*—Right to snare water-fowl, if included in jalkar.

As a matter of law, the term *jalkar* does not include a right to snare water-fowl. **G. M. Anderson v. Dr. James Henry George Hill**, 22 Ind. Cas. 844.

COXE and CHATTERJEE, JJ.

References:—24 C. 504=24 I. A. 33=1 C. W. N. 249, R.

(2) Jalkar-rights—Tidal navigable river, grant of exclusive fishery in—Shifting of river from its bed—Grantee's right if confined to water on soil of river at date of grant—Right to "follow the river"—English Law of waters, deviation from, if justified by special circumstances of Lower Bengal—English common law when to be adopted—Right to the soil, if affected—Fishery, right of, in overflowed *jheel*—River's encroachment, if must be gradual to permit extension of fishery rights—Government grant of exclusive fishery—Proof when original grant not forthcoming, by secondary evidence and evidence of user—Foreign Law, extension to India, to be permitted under what safeguards—Rule of law affecting property rights established by Courts in Bengal, if should be upset in the absence of proof that rule unjust or flagrantly inexpedient.

Jalkar—(Continued).

The Indian Courts have in many respects followed the English law of waters. But they have never gone to the point of holding that the exclusive right of fishing in tidal navigable waters granted by Government to private owners is so indissolubly bound up with its ownership of the soil subjacent to those waters, that, no matter how the waters may subsequently change their course while still remaining part of the same river system within the up-stream and down-stream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them.

It must now be taken as decided in Bengal that the grantee in such a case can, follow the shifting river for the enjoyment of the exclusive right of fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant—the right being made to depend on the identity of the river in which it is enjoyed, and not being confined to such waters of the river only as are superimposed on the very land once owned by the grantor of the right.

Even enclosed *jheels* belonging to riparian owners on becoming covered by the shifting river become subject to the grantee's *jalkar* right.

Held that this deviation from the English law is justified by the special circumstances of Lower Bengal.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical social and historical conditions to which that rule is to be adapted.

The Judicial Committee would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as rights of *jalkar*, and unless they could be shown to be manifestly unjust or flagrantly inexpedient they would not supersede them.

The rule which in the United Kingdom connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal.

English tenures and Bengal Zemindari rights unduly assimilated at one time, have never fully corresponded to one another. Above all, the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness.

Jalkar—(Concluded).

Jalkar rights in navigable waters in Lower Bengal settled with a grantee under a Revenue Settlement by the Government are derived from the Crown—the freehold of the bed of navigable rivers being deemed to be in the Crown.

Indian decisions on *jalkar* have followed English analogy closely in holding that, when the bed of a river thus forms part of the public domain, the public at large is *prima facie* entitled to fish, and also that a sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil, though the flooded landowner must, if the water in the new course be in fact navigable (that is capable of being traversed by a boat at all seasons), submit to have his land traversed by the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation.

The right of the owner of the fishery to "follow the river" ought not to be limited to cases where the river's encroachments are gradual as in the case of alluvial accretions to land, the analogy not being in *pari materia*.

The evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear.

In the case of grants of more than a century old, as the original grants are in practice but rarely forthcoming, resort must be had to secondary evidence of them or to the inference of a legal origin to be drawn from long user. *Raja Srinath Roy v. Dinabandhu Sen*, 18 C.W.N. 1217 = (1914) M.W.N. 654 = 12 A.L.J. 1193 = 20 C.L.J. 385 = 16 M.L.T. 319 = 27 M.L.J. 419 = 16 Bom. L.R. 901 (P.C.).

LORD MOULTON, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE, and MR. AMEER ALI.

Reference:—11 C. 434, *Appr.*

Joint Contractors.

Joint contractors—Dismissal of suit in default—Rule in *King v. Hoare*—Applicability. See CIV. PROC. CODE (1908), No. 276, 10 N. L.R. 39.

Joint Promisees.

(1) Payment to one of several joint promisees—Whether valid discharge. See CONTRACT ACT, No. 38, 23 Ind. Cas. 8.

(2) Mortgage debt—Payment of whole to one of two joint mortgagees despite notice to the contrary from other—Mortgagor compelled to pay to other mortgagees—Mortgagee not bound to refund to mortgagor. See MORTGAGE (GENERAL), No. 39, 24 Ind. Cas. 88.

Joint Promisors.

(1) Suit by creditor against joint promisors—Decree against one joint promisor—Another joint promisor exonerated on the ground that suit barred against him—Payment by former—Right to seek contribution from latter. See CONTRACT ACT, No. 41, 16 M.L.T. 569.

Joint Promisors—(Concluded).

(2) Landlord and tenant—Joint tenants—Joint and several liability of tenants—Suit against one tenant to pay the whole rent—Power to order other tenant to be added as a co-defendant—Whereabouts of other co-defendant not known—Discretion of Court—O. I, r. 20, Civ. Pro. Code, See CONTRACT ACT, No. 40, 107 P.R. 1914.

Joint Tenancy.

Creation of. See CUSTOMS (PUNJAB—GIFT), No. 4, 89 P.R. 1914.

Judgment.

(1) Appealable cases—Lower Court to pronounce opinion on all issues. See APPEAL (GENERAL), No. 12, 24 Ind. Cas. 87.

(2) Judgment—Meaning not clear—High Court whether may set it aside in second appeal. See APPEAL (SECOND APPEAL), No. 6, 19 C.L.J. 545.

(3) Foreign judgment—Defendant's failure to answer interrogatories—Defence struck out—Judgment for plaintiff—Judgment whether given on the merits—Right to sue on the foreign judgment—Cause of action. See CIV. PROC. CODE (1908), No. 47, 27 M.L.J. 670.

(4) Copyright in reports and selections of judgments. See COPYRIGHT, No. 1, 18 C.W. N. 1078.

Judicial Decision.

(1) *Judicial decision—Conjecture.* *Nilmadhub Mahta v. Raj Kishore Das*, 18 C.L.J. 220 = 21 Ind. Cas. 413. See Final Part, 1913, Col. 731.

Judicial Proceedings.

(1) Proceedings in execution of decree whether—. See EXECUTION OF DECREE, No. 16, 17 O.C. 309.

(2) Enquiry by Registrar of the Presidency Small Cause Court as to proper service of summons, if judicial proceedings—Sanction to prosecute for false personation in service of summons. See SANCTION TO PROSECUTE, No. 7, 18 C.W.N. 1323.

Jurisdiction.

1.—GENERAL.

2.—OF CIVIL COURTS.

3.—OF CIVIL OR REVENUE COURTS.

4.—OF HIGH COURT.

5.—OF REVENUE COURTS.

6.—OF SMALL CAUSE COURTS.

—1.—General.

(1) *Decree—Execution—Jurisdiction of the Court passing a decree—Decree against a non-resident foreigner—Voluntary submission to jurisdiction—Baroda Court decree.*

In a suit against a non-resident foreigner in a Baroda Court, the defendant contended (1) that the plaintiff had no right to sue; (2) that the suit was defective for want of parties; (3) that the Court had no jurisdiction to hear the

Jurisdiction—(Continued).**—1.—General—(Continued).**

suit for the money dealings relied on took place outside the jurisdiction of the Court; (4) that the suit did not lie as the defendant did not reside and had no property in the Baroda territory. Both parties adduced evidence. The Court negatived the defendant's contentions and decreed the suit. In execution proceedings which were transferred to the British Court, it was held that the Baroda Court had no jurisdiction to pass the decree and dismissed the *darkhast*. The plaintiff having appealed:—

Held, reversing the decree, that the case was clearly one of voluntary submission to the jurisdiction, the defendant taking his chance of getting a decree in his favour. **Harchand Panaji v. Gulabchand Kanji**, 16 Bom. L.R. 620=39 B. 34.

SCOTT, C.J. and SHAH, J.

- (2) *Suit tried by one Court—Venue transferred to another Court after decree—Forum of appeal.*

The contract which gave rise to the litigation in this case was made at Kadiri which was at the time of the suit within the jurisdiction of the Madanapalle District Munsiff. The Munsiff passed a decree on the 30th March 1911. The scheme for redistribution of districts came into force on 1st April 1911, by which Kadiri was added to the jurisdiction of the District Munsiff of Penukonda. From Madanapalle appeals lie to the District Judge of Cuddapah; from Penukonda to the District Judge of Bellary.

Held that, in matters of procedure, uniformity is of the essence of the administration of justice, and as it has been held already that in regard to applications for execution the Court which decided the suit ceases to have jurisdiction by the transfer of territory, the appeal in this case lies to the District Judge of Bellary, as Kadiri is part of the Bellary District. **M. Subhaya v. M. Rachayya**, 37 M. 477.

SESHAGIRI AIYAR, J.

References:—26 M.L.J. 189; (1910) M.W.N. 477; 28 A. 93; 34 C. 636, II.

- (3) *Wrong valuation put upon plaint—Court competent to try suit as valued by plaintiff—Suit beyond jurisdiction according to correct valuation—Trial of suit after extension of Court's pecuniary jurisdiction.* See ACT VII OF 1887 (SUITS VALUATION), No. 8, 21 Ind. Cas. 52.

(4) *Jurisdiction of District Court and of the High Court in respect of infants—Emulations as to—'Infants ordinarily resident within jurisdiction,' meaning of—Person within jurisdiction of Indian High Court if may be ordered to take possession of infants residing in England—Conflict of jurisdiction between Indian and English Court.* See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.

Jurisdiction—(Continued).**—1.—General—(Continued).**

(5) *Jurisdiction to determine that Court has no jurisdiction.* See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 33, 20 C.L.J. 213.

(6) *Munsiff not invested with Small Cause Court jurisdiction trying a case as such Court—Effect—Revision.* See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 6, 12 A.L.J. 109.

(7) *Order returning plaint for presentation to proper Court—Appellate Court setting aside order—Duty of lower Court.* See ACT I OF 1908 (MADRAS ESTATES LAND), No. 1, 16 M. L.T. 244.

(8) *Statute conferring jurisdiction upon tribunal of limited authority—Conditions annexed to the grant must be strictly complied with.* See ACT III OF 1901 (U. P. LAND REVENUE), No. 7, 17 O.C. 224.

(9) *Powers of Panchayats in caste matters—Jurisdiction of Courts.* See CASTE, No. 1, 23 Ind. Cas. 301.

(10) *Question of jurisdiction how to be determined—Decree passed without jurisdiction—Question not to be raised in execution.* See CIV. PRO. CODE (1882), No. 50, 15 M.L.T. 415.

(11) *Jurisdiction—Civil Court—Transfer of jurisdiction from one Court to another—Execution proceedings pending in former Court—Right of latter to continue such proceedings.* See CIV. PRO. CODE (1908), No. 66, 26 M.L.J. 189.

(12) *Suit for declaration of title to immoveable properties situate in different districts—Suit brought in one district—Misjoinder of causes of action—Jurisdiction.* See CIV. PRO. CODE (1908), No. 50, 21 Ind. Cas. 438.

(13) *Irregular assumption of jurisdiction by Sub-Judge in case remanded by High Court to be tried by District Judge—Trial by Sub-Judge with consent of parties—Effect.* See CIV. PRO. CODE (1908), No. 57, 19 C.L.J. 408.

(14) *Inherent jurisdiction wrongly exercised—Interference in revision—Arbitration proceedings—Setting aside of reference during pendency of proceedings.* See CIV. PRO. CODE (1908), No. 202, 12 A.L.J. 529.

(15) *Suit for possession of Colony land—Valuation—Court-fee—Jurisdiction—Suit improperly valued—Procedure.* See CIV. PRO. CODE (1908), No. 269, 194 P.L.R. 1914.

(16) *Jurisdiction denied—Application for determining jurisdiction—Not entertainable.* See CIV. PRO. CODE (1908), No. 53, 12 A.L.J. 896.

(17) *Suit in Mainpuri to set aside decree fraudulently obtained in Calcutta—Cause of action where arises—Jurisdiction.* See CIV. PRO. CODE (1908), No. 51, 12 A.L.J. 955.

(18) *Defendant taking exception to Court's jurisdiction if acquiesces in trial if he does not apply for transfer.* See CIV. PRO. CODE (1908), No. 120, 18 C.W.N. 1310.

Jurisdiction—(Continued).**—1.—General—(Continued).**

(19) Suit tried in wrong place—Lower Court holding that it had jurisdiction to try it—Appellate Court holding the contrary—No failure of justice—Objection as to place of suing when may be disallowed. See CIV. PRO. CODE (1908), No. 52, 87 P.R. 1914.

(20) Foreign judgment—Decree of Cochin Court—Transfer to British Indian Court for execution—Executing Court whether can question jurisdiction of foreign Court—Submission to jurisdiction when voluntary. See CIV. PRO. CODE (1908), No. 48, 27 M.L.J. 535.

(21) Decision as to question of jurisdiction—Whether a preliminary decree. See CIV. PRO. CODE (1908), No. 137, 16 Bom. L.R. 954.

(22) Goods consigned to buyer by railway—Suit for balance of account—Cause of action—Jurisdiction. See CONTRACT ACT, No. 78, 24 Ind. Cas. 423.

(23) Suit for possession of leasehold land—Court-fee—Jurisdiction how determined. See COURT FEES ACT, No. 8, 19 C.L.J. 418.

(24) Privy Council decree—Execution—Jurisdiction of first Court distributed among three Courts—Execution of appellate decree—Jurisdiction. See EXECUTION OF DECREE, No. 18, (1914) M.W.N. 896.

(25) Jurisdiction to entertain suit after remand—Suit originally tried by District Court tried after remand by Sub-Judge with consent of parties—Irrregular assumption of jurisdiction—Effect. See LANDLORD AND TENANT, No. 37, 19 C.W.N. 143.

(26) Power of Court to entertain claim for mesne profits beyond its pecuniary jurisdiction—Presentation of plaint in Court of competent jurisdiction if to be deemed new suit. See MESNE PROFITS, No. 4, 24 Ind. Cas. 232.

(27) Fictitious entry of property to give jurisdiction to Registering officer in Calcutta to register a mortgage of properties in mofussil—Suit on mortgage in original side—Jurisdiction—Decree if binds purchaser after mortgage and before decree—Amendment of description of parcels so as to bring document within Court's jurisdiction if binds strangers. See REGISTRATION, No. 2, 18 C.W.N. 817.

(28) Registration by an officer within whose jurisdiction property not situate—Fictitious property mentioned in deed—Fraud—Effect. See REGISTRATION ACT (1877), No. 8, 12 A.L.J. 913.

(29) Power and jurisdiction to register—No part of the property situate within a Registrar's district—Registration invalid. See REGISTRATION ACT (1908), No. 13, 12 A.L.J. 918.

(30) Venue of suit—Plaintiff's option—Causes for transfer—Preponderance of convenience. See RIGHT OF SUIT, No. 2, 7 Bur. L.T. 1.

(31) Jurisdiction on what depends—Small Cause Court suit—Defence of proprietary title

Jurisdiction—(Continued).**—1.—General—(Concluded).**

raised—Whether jurisdiction ousted. See SMALL CAUSE SUIT, No. 3, 12 A.L.J. 1032.

(32) Mortgage of land in Sonthal Parganas—Stipulation in bond that suit might be instituted at Bhagalpur—Effect—Objection to jurisdiction taken at a late stage when entertainable. See SONTHAL PARGANAS, No. 1, 18 C.W.N. 994.

—2.—Of Civil Courts.

(1) Jurisdiction—Civil Court—Suit for profits of sir by one sir holder—Limitation—Compromise—Admission by right.

The parties were the joint owners of the holding in dispute. The interests of the predecessors-in-title of the plaintiffs were sold and purchased by the defendant, and he, thereupon, became an exproprietary tenant of the holding. The parties were recorded as joint sir holders up to 1896. In a compromise filed in a litigation between the parties in 1909 the defendant admitted the plaintiff's right to the sir. In a suit for damages for being kept out of possession of the holding, held that the Civil Court had jurisdiction to hear the case, inasmuch as it was a suit for profits of immoveable property which had been wrongfully withheld from the plaintiffs. Held further, that the compromise filed in 1909 was an admission of the plaintiffs' right and the suit was not barred by limitation. *Bholo Nath v. Ghure*, 12 A.L.J. 44=22 Ind. Cas. 816.

BANERJI, J.

(2) Land granted as Inam to Manager of the joint Hindu family—Partition—Suit for—Maintainability in Civil Court. See ACT XXIII OF 1871 (PENSIONS), No. 2, 16 M.L.T. 239.

(3) Suit for ejectment by raiyat against under-raiyat—Jurisdiction. See ACT VI OF 1903 (CHOTA NAGPUR TENANCY), No. 2, 23 Ind. Cas. 407.

(4) Sonthal parganas—Suit for enhancement of rent—Jurisdiction. See REGULATION II OF 1886 (SONTHAL PARGANAS), No. 2, 24 Ind. Cas. 1.

(5) To adjudicate rights of private persons litigating over land at disposal of Government. See ACT IV OF 1899 (LOWER BURMA TOWN AND VILLAGE LANDS), No. 1, 23 Ind. Cas. 961.

(6) Inam granted prior to Permanent Settlement—Suit for rent for such land—Jurisdiction. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 6, 26 M.L.J. 258.

(7) Sale of holding under S. 111, Madras Act I of 1908—Suit to set aside—Cognisability, in Civil Court. See MADRAS ACT I OF 1908 (ESTATES LAND), No. 44, 15 M.L.T. 340.

(8) Grant of inam village—Presumption as to grantee being owner of kudivaram at the time of grant—Party seeking to oust jurisdiction of Civil Court must establish his right to do so. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 10, 27 M.L.J. 233.

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Concluded).**

(9) Inam of part of village whether 'estate'—Suit for rent—Jurisdiction. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 12, 28 Ind. Cas. 859.

(10) Permission to repair not granted by Municipality—Appeal against order disallowing repairs—Appellate order final—Maintainability of civil suit. See ACT I OF 1900 (U.P. MUNICIPALITIES), No. 2, 12 A.L.J. 445.

(11) Land let out for grove—Suit for possession—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 5, 12 A.L.J. 1080.

(12) Land on which monastery stands—Suit regarding—Whether lies in Civil Court. See BUDDHIST LAW (GIFT), No. 1, U.B.R. (1913) 3rd Qr., p. 183.

(13) Cantonment Magistrate—Illegal levy of assessment—Jurisdiction of Civil Courts to question. See CANTONMENT TAXING REGULATIONS (POONA), No. 1, 16 Bom. L.R. 121.

(14) Digwari tenure—Powers of Government to determine fitness of heir—Action of Government if open to review by Courts. See DIG-WAYI TENURE, No. 1, 18 C.W.N. 1036.

(15) Party trying to oust the—Burden of proof. See GRANT, No. 8, 16 M.L.T. 596.

(16) Maintainability of suit in Civil Court regarding matter decided by a Settlement Officer. See REGULATION III OF 1872 (SONTHAL PARGANAS SETTLEMENT), No. 10, 20 C.L.J. 103.

(17) Land granted as Desai-inam to manager of undivided family—Presumption—Suit for partition—Maintainability without certificate under Pensions Act—Jurisdiction of Civil Courts whether ousted. See INAM, No. 7, 27 M.L.J. 618.

(18) Jurisdiction to take cognizance of questions relating to rate of assessment on lands. See SHIVAJIAMA TENURE, No. 1, (1914) M.W. N. 388.

(19) Mortgage of land in Sonthal Parganas—Suit in Civil Court at Bhagalpur on mortgage if lies—Exclusive jurisdiction of special officers appointed by Lieutenant-Governor—Stipulation in bond that suit might be instituted at Bhagalpur—Effect. See SONTAL PARGANAS, No. 1, 18 C.W.N. 994.

(20) Government grant free of land revenue—Sale of land in execution—Government refusing sale—Suit against Government and the judgment-debtor—Maintainability—Jurisdiction. See GRANT, No. 8-a, 17, O.C. 369.

—3.—Of Civil or Revenue Courts.

(1) Jurisdiction—Civil and Revenue Courts—Eternal waste granted 30 years back—Onus—S. 3 (2), Estates Land Act.

Where land was eternal waste and granted 30 years before, the presumption will be that it was a grant of both the varams.

Jurisdiction—(Continued).**—3.—Of Civil or Revenue Courts—(Ctd.).**

The onus will be upon those who plead want of jurisdiction in Civil Courts to shew that the property in dispute comes within the definition of estate. *Yegoti Chenglah v. Putta Ramudu*, (1914) M.W.N. 367=23 Ind. Cas. 553.

SESHAGIRI IYER, J.

(2) Jurisdiction of Civil or Revenue Court—Muafi—Punjab Land Revenue Act (XVII of 1887), S. 153 (viii)—Return of plaint.

Held, that the Civil Courts have no jurisdiction to question the authority of the Revenue Officers to settle, in case of resumption of Muafi, land with heirs of the last Muafidar, ignoring the representatives of another joint Muafidar who died earlier (a).

Held, also, that, where it is found after enquiry that a suit is not cognizable by a Civil Court, but by a Revenue Court, the plaint may not be returned for presentation to the proper Court. *Bawa Harcharn Das v. Diwan Chand*, 96 P.W.R. 1914=198 P.L.R. 1914.

JOHNSTONE, J.

Reference :—(a) 25 P.R. 1872, R.

(3) Jurisdiction—Civil and Revenue Court—Rent-free land—Suit for declaration to hold land rent-free.

It is not open to a Civil Court to make a declaration that a party, who has failed to prove that he is the proprietor of a land, is entitled to hold it rent-free. *Mohammad Abdul Gafoor v. Arthur Barbar*, 12 A.L.J. 805.

CHAMIER and RAFIQ, JJ.

(4) Jurisdiction—Partition proceedings—Order by Revenue Court to file a suit—Civil Court seized of the case—Withdrawal with permission to bring it afresh on same cause of action—Second suit filed beyond the time given by Revenue Court.

An order of a Revenue Court directing a party to file a suit in Civil Court within three months having once been complied with, the Civil Court becomes seized of the jurisdiction in the matter, even though this jurisdiction might otherwise have been barred by S. 233 (k) of the Land Revenue Act.

Where the plaintiff was ordered by Revenue Court to file a suit in Civil Court within three months and he did file a suit within time but subsequently withdrew it with permission to file it afresh and filed it beyond the three months' time given by the Revenue Court, held that the Civil Court had jurisdiction to entertain the suit. *Shah Muhammad v. Kadir Bux*, 12 A.L.J. 999.

PIGGOTT, J.

References :—11 A.L.J. 746, F.; 11 O.C. 114; 4 A.L.J. 713, R.

(5) Claim by reversioners of a sonless land owner for possession of land on the ground

Jurisdiction—(Continued).**—3.—Of Civil or Revenue Courts—(Ctd.).**

that he had no right to create occupancy rights—Adverse possession—Limitation—Art. 144 of Act IX of 1908.

Held, that a suit, brought in 1909 by the reversioners of a deceased sonless proprietor C. who died in 1879 and who had given occupancy rights in one plot of land in 1864, and in another in 1872 to G, on the ground that C had no right to alienate the land in that way, is cognizable by a Civil Court; but is barred by limitation under Art. 144 of Act IX of 1908 as G had enjoyed the occupancy rights adversely to plaintiffs from the date of C's death. **Badhawa v. Jallu**, 112 P.W.R. 1914=228 P.L.R. 1914.

SHAH DIN and SCOTT-SMITH, JJ.

(6) *Civil Courts, jurisdiction of—Istmrari patta—Documents, Revenue Courts relying on—Suit for declaration that document is false and void, maintainability of.*

The Civil Courts have jurisdiction to decide that a document, put forward by the defendants in the Revenue Courts in proof of their being perpetual lessees and held as genuine by the latter Courts, is a false and invalid document under which the defendants are not entitled to set up any claim as perpetual lessees. **Dhonde Khan v. Thakurain Har Nath Kunwar**, 24 Ind. Cas. 381.

LINDSAY, J.C.

References :—12 O.C. 164 ; 25 A. 1, R.

(7) *Suit filed before commencement of Madras Estates Land Act—Trial after the Act came into force—Civil Courts' jurisdiction not ousted. See MADRAS ACT I OF 1908 (ESTATES LAND), No. 1, 16 M.L.T. 244.*

(8) *Rent free groves—Suit for resumption—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 29, 12 A.L.J. 449.*

(9) *Lease to cut grass—Suit for arrears of lease money—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 2, 12 A.L.J. 36.*

(10) *Suit for arrears of rent by assignee—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 18, 12 A.L.J. 98.*

(11) *Suit for possession of fixed rate tenancy—Zemindar, a defendant—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 28, 12 A.L.J. 29.*

(12) *Landlord and tenant—Defendant an agricultural tenant—Denial of tenancy—Suit for ejectment—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 25, 12 A.L.J. 902.*

(13) *Suit for declaration by landholder that lease granted by his agent was without authority—Jurisdiction—Prior decision of Revenue Court—Whether *res judicata*. See ACT II OF 1901 (AGRA TENANCY), No. 9, 23 Ind. Cas. 705.*

(14) *Suit for declaration that plaintiff is sole occupancy tenant—Zemindar no party—Jurisdiction. See ACT II OF 1901 (AGRA TENANCY), No. 12, 12 A.L.J. 1322.*

Jurisdiction—(Continued).**—3.—Of Civil or Revenue Courts—(Ctd.).**

(15) *Application to Revenue Court for partition—Subsequent suit in Civil Court for joint possession of certain plots—Jurisdiction. See ACT III OF 1901 (U. P. LAND REVENUE), No. 15, 12 A.L.J. 949.*

(16) *Objections relating to title raised in the course of partition in a Revenue Court—Jurisdiction of Civil Court. See ACT III OF 1901 (U. P. LAND REVENUE), No. 7, 17 O.C. 224.*

(17) *Suit for declaration that plaintiff is entitled to land allotted to defendants in partition—Power of Civil Court to rectify errors in partition by Revenue Court—Order of Revenue Court referring objector in partition proceedings to Civil Court—Effect. See ACT III OF 1901 (U. P. LAND REVENUE), No. 16, 23 Ind. Cas. 860.*

(18) *Petition of compromise filed in mutation proceedings—Estoppel—Consent to entry of one's name in Revenue papers—Effect—Revenue Court's decision on question of title raised in partition proceedings whether bars Civil Courts from re-opening those questions. See ACT III OF 1901 (U. P. LAND REVENUE), No. 12, 23 Ind. Cas. 965.*

(19) *Civil Court's power to decide question of proprietorship after the decision of the Revenue Court. See ACT XXII OF 1886 (ODH RENT), No. 10, 17 O.C. 86.*

(20) *Suit by occupancy tenants against landlords for possession of certain land as a threshing floor—Jurisdiction. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 15, 44 P.R. 1914.*

(21) *Chief Court—Registration of Revenue Court's decree as that of Civil Court—Prejudice to parties—Not to be allowed. See PUNJAB ACT XVI OF 1887 (TENANCY), No. 14, 56 P.R. 1914.*

(22) *Claim by one proprietor against another for establishing occupancy rights—Jurisdiction—When decree of Civil Court cannot be registered in Revenue Court—Procedure—Return of plaint. See ACT XVI OF 1887 (PUNJAB TENANCY), No. 13, 156 P.W.R. 1914.*

(23) *Partition of properties assessed to land revenue—Form of decree. See CIV. PRO. CODE (1908), No. 307, 24 Ind. Cas. 113.*

(24) *Suit for possession *abadi*—Jurisdiction. See LIMITATION ACT (1908), No. 134, 106 P.W.R. 1914.*

(25) *Mortgage with possession—Mortgagor holding the land under mortgagee—Absence of proof of relationship of landlord and tenant—Suit for possession of such land—Jurisdiction. See MORTGAGE (GENERAL), No. 45, 168 P.W.R. 1914.*

(26) *Suit for declaration that defendants are not underproprietors—Accrual of cause of action—Dahyak right—Jurisdiction. See UNDER-PROPRIETARY RIGHTS, No. 2, 29 Ind. Cas. 231.*

Jurisdiction—(Concluded).**—4.—Of High Court.**

(1) *Jurisdiction—High Court—Cause of action arising wholly outside jurisdiction—Secretary of State, whether resides or carries on business within jurisdiction of High Court—Suit against Secretary of State whether maintainable in High Court when cause of action arises outside jurisdiction.* **Rodricks v. Secretary of State for India**, 21 Ind. Cas. 1=40 C. 308. See Final Part, 1913, Col. 739.

(2) See JURISDICTION (GENERAL).

—5.—Of Revenue Courts.

- (1) *Suit by one co-sharer to eject tenant—Other co-sharer made party defendant—Sale prior to suit by tenant of his right in favour of the other co-sharer—Maintainability of suit in Revenue Court—Madras Estates Land Act (I of 1908), S. 151.*

S, one of the two co-sharers of the melwaram right in the plaint land, instituted in the Revenue Court a suit for the ejectment of A, the occupancy tenant of the land, making B, the other co-sharer, a party defendant. It was found that a few days prior to the suit A had sold his rights to B.

Held, that the suit brought in the Revenue Court, and framed as a suit to eject the first defendant, who was not in possession on the date of suit, ought to be dismissed (a).

A suit for joint possession is not contemplated as within the jurisdiction of the Revenue Court under S. 151 of the Madras Estates Land Act, as that section contemplates a suit for khas possession, ejecting a tenant as such; nor can the suit be amended as for partition and possession of half share, as such a suit cannot also be maintained in a Revenue Court. **T. R. M. T. Subramaniam Chettiar v. Periasami Tevar**, 26 M.L.J. 435=24 Ind. Cas. 726.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

References:—(a) 35 C.*807; 18 C.W.N. 328; 29 M. 29; 25 M.L.J. 315; 38 C. 270; 8 A.L.J. 272; 25 M.L.J. 351, R.

- (2) *Landlord purchasing occupancy right—Tenant in possession before the passing of Madras Act I of 1908 (Estates Land)—Suit for rent against—Non-cognisability by Civil Courts—Maintainability in Revenue Courts. See MADRAS ACT I OF 1908 (ESTATES LAND), No. 28, 26 M.L.J. 373.*

(3) *Part of an estate whether an 'estate'—Tenant of part of an estate setting up occupancy rights in defence to action of ejectment—Jurisdiction. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 8, (1914) M.W.N. 763.*

—6.—Of Small Cause Courts.

(1) *Money paid to save property from sale—Suit to recover damages—Jurisdiction. See DAMAGES, No. 5, 12 A.L.J. 1279.*

(2) See JURISDICTION (GENERAL).

Jurisdiction of Jagirdars, Etc., Regulation.

See REG. XIII OF 1830.

Kabuliat.

Admissibility of, as evidence of title. See EVIDENCE ACT, No. 10, 19 C.L.J. 1.

Kalighat Palas.

Transferability—Incidents of. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

Kanom.

(1) *Incidents of kanom mortgage—Right to bring to sale. See MORTGAGE (GENERAL), No. 28, (1914) M.W.N. 618.*

(2) See MORTGAGE.

(3) See MALABAR LAW.

Khazi Act.

See ACT XII OF 1880.

Khewat.

Extract from Khewat produced in proof of legitimacy—Admissibility. See LEGITIMACY, No. 1, 23 Ind. Cas. 972.

Khojas.

How far governed by Hindu Law—Succession and Inheritance—Joint family property—Doctrine of nucleus does not apply to Khojas—Release by a Khoja of the family property—Release binding as family arrangement—Limitation Act (1908), S. 7, Arts. 91, 127—Scope of Art. 91—Art. 127 not applicable to Mahomedans—The article applies qualifiedly to Khojas **Jan Mahomed v. Dattu Jaffar**, 15 Bom. L.R. 1044=22 Ind. Cas. 195=38 B. 449. See Final Part, 1913, Col. 743.

Khorposh Grant.

Impartible estate—Khorposh grant—Subsoil right—Chota Nagpur Encumbered Estates Act (B.C. VI of 1876), S. 8—Plaintiff claiming alternative reliefs obtaining a decree—Right of appeal—Civ. Pro. Code, Ss. 96, 97, O. XLI, r. 33—Lease—Failure of consideration—Refund of consideration money—Limitation Act (1908), Sch. I, Arts. 62, 97, 114, 115 and 116—Money paid under compulsion of legal proceedings cannot be recovered.

The interest of a khorposhdar heritable in the male line was a limited interest liable to be defeated at any time by the failure of heirs and thereupon resumable by the proprietor for the time being, and would not be an interest sufficient to carry with it the subsoil rights.

A plaintiff who claims for alternative reliefs in his plaint can prefer an appeal although he obtained a decree. O. XLI, r. 33, confers on the appellate Court the power to pass such decree as ought to have been passed.

A deed of release executed by a proprietor at a time when his estate was managed, under the Chota Nagpur Encumbered Estates Act, VI (B.C.) of 1876, cannot be operative, as the proprietor was wholly incompetent to make any

Khorposh Grant—(Concluded).

such disposition of his property. It was not a case of a merely voidable agreement.

An admission to that effect in a *chhar sanad* (which did not operate as an alienation) granted by the disqualified proprietor did not bind the estate even as an admission.

When there is total failure of consideration with regard to a lease, a claim to a refund of the consideration money is governed by Art. 62, Limitation Act.

Money paid under compulsion of legal proceedings cannot be recovered (a). **Biswanath Gorain v. Surendro Mohon Ghose**, 19 C.W.N. 102.

CHITTY and TEUNON, JJ.

Reference:—(a) (1797) 7 T.R. 269, F.

Khoti Settlement Act (Bombay).

See BOM. ACT I OF 1980.

Kolavettu.

Suit to recover—Jurisdiction. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 14, 22 Ind. Cas. 144.

Kolhu.

Kolhu fastened to the ground is immoveable property. See IMMOVEABLE PROPERTY, No. 1, 23 Ind. Cas. 250.

Kuri.

Right to continue payment of subscriptions to the—Declaratory suit—Maintainability. See SPECIFIC RELIEF ACT, No. 27, 27 M.L.J. 634.

Laches.

(1) Suit on mortgage—Plaintiff not suing for a long time—Presumption as to passing of consideration or as to payment of interest. See AMENDMENT, No. 4, 12 A.L.J. 635.

(2) Suit for specific performance—Delay and laches of plaintiff—Effect. See SPECIFIC PERFORMANCE, No. 1, 21 Ind. Cas. 35.

(3) Laches or delay in suing—Effect. See SPECIFIC PERFORMANCE, No. 8, 26 M.L.J. 518.

(4) See DELAY.

Lambardar and Co-sharers.

(1) *Landlord and tenant*—Lambardar—Customary agent of proprietary body—Suit to set aside mortgage and to eject transferees—Maintainability by lambardar.

The *lambardar*, as the customary agent of the proprietary body, can bring a suit for the avoidance of a mortgage and for the ejectment of transferees under a voidable title. **Murli-dhar v. Jagannath**, 10 N.L.R. 5 = 23 Ind. Cas. 20.

MITTRA, OFFG. A.J.C.

References:—37 C. 694, Diss.; 11 C.P.L.R. 1; 4 N.L.R. 45; 13 C.P.L.R. 113, R.

(2) *Profits, suit for—Ziladar and Shahna engaged for making collections of rent, whether lambardar entitled to remuneration paid to—Lambardari fee, title of lambardar*

Lambardar and Co-sharers—(Continued).

to claim expenses of collection in addition to—Costs of collection, reasonable, to be allowed—Account-books, lambardar's failure to produce, effect of—Onus of proving actual collections.

A *lambardar* is entitled to the expenses of collection in addition to his *lambardari* fee, which is awardable to him under S. 144 of the United Provinces Land Revenue Act, as a remuneration for his labours. The fee is not intended to recoup him for the expenses incurred by him in making the collections, managing the village and safeguarding the interests of his co-sharers. He is entitled to claim a reasonable sum for the costs of collection actually incurred by him and for the costs of necessary litigation, e.g., in suing for rent or ejecting tenants (a).

A *lambardar* failing to produce his account-books is not entitled to claim a reduction in the gross rental. The onus of proving the actual collection lies on him. **Ubaid Ullah Khan v. Nazir Husain Khan**, 24 Ind. Cas. 15.

KANHAIYA LAL, A.J.C.

Reference:—(a) 6 O.C. 89, R.

(3) *Lambardar—Absolute occupancy holding—Transfer—Power to give consent—Institution of partition proceedings—Whether puts an end to such power—Consent to transfer—Whether falls within S. 52, Transfer of Property Act.*

The mere institution of partition proceedings will not put an end to the customary authority of the *lambardar* to give consent to the transfer of an absolute occupancy holding (a).

Quere: Whether consent to the transfer was a dealing with the property within the meaning of S. 52 of the Transfer of Property Act. **Chowbe Jagopal v. Rameshwar**, 10 N. L.R. 89.

MITTRA, A.J.C.

Reference:—(a) 9 N.L.R. 46, R.

(4) *Lambardar—Agent to represent the proprietary body of a village—Appointment as such—Need not be express—Competency of stranger to be so appointed—Presumption in favour of lambardar being so appointed—Lambardar gomasta—Minor lambardar—His guardian—Presumption—If applies to any of them and to what extent.*

The appointment of an agent to represent the proprietary body of a village for the purposes of the Tenancy Act need not be express. It is customary to appoint the *lambardar* as agent by implication and acquiescence, and this custom is so nearly universal that it may be presumed that the *lambardar* has been appointed the agent of the proprietary body in every village until the contrary is shown. But though there can be no presumption that any person other than the *lambardar* has been appointed the agent of the proprietary body, there is nothing to prevent any person in the world being so appointed. The presumption might extend to

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the case of lambardar gumashta and no further. It would not cover the case of the guardian of a minor lambardar nor that of the minor lambardar himself. **Haljnath v. Raghunath**, 10 N.L.R. 93.

• **HALLIFAX, A.J.C.**

References:—11 Q.P.L.R. 1; 13 C.P.L.R. 113; 10 N.L.R. 5, F.

(5) *Tenant right—Co-sharers—Derelict holding, purchase of—Contribution of expenses—Lambardar.* **Balka Gauntia v. Lochan Gauntia**, 20 Ind. Cas. 872 = 19 C.L.J. 202. See Final Part, 1913, Col. 744.

• (6) *Lambardar, if can settle vacant land—Principal and Agent—Authority conferred by two or more persons, if can be revoked by one—Contract Act, Ss. 203, 204, 208—Revocation of agent's authority, when affects third person—Notice, nature of—Burden of proof—Civ. Pro. Code (1908), O. XXI, r. 4—Parties to appeal.* **Dasarath Patel v. Brojo Mohon Gauntia**, 18 C.L.J. 621 = 22 Ind. Cas. 90. See Final Part, 1913, Col. 747.

(7) *Rights of lambardar—Suit for ejectment of tenant by lambardar—Other co-sharers whether necessary parties.* See ACT II OF 1901 (AGRA TENANCY), No. 23, 12 A.L.J. 606.

Land Acquisition Act.

See ACT I OF 1894.

Land Encroachment Act.

See MADRAS ACT III OF 1905.

Landlord and Tenant.

(1) *Tenancy—Limited interest of tenancy by limitation—Non-transferable holding, transfer of—Transferee in possession for more than 12 years—Rent receipts—'Marfatdar' and 'Gujaratdar'—Recognition by landlord.*

A statute of limitation operates to create a limited interest of tenancy.

The words 'marfatdar' and 'gujaratdar' in rent receipt do not of themselves prove recognition of tenancy. Each case depends on its own circumstances, and the Court should determine in each case whether or not, on a consideration of all the facts—not merely by giving undue weight to words used—a legal inference is or is not to be drawn that there has been a recognition establishing a relationship of landlord and tenant between one who has paid and another who has received rent for a number of years.

A non-transferable holding was transferred more than 12 years before the institution of the suit for ejectment by the landlord; the rent receipts showed that the rents were received from the transferee as *marfatdar*:

Held, that the statute of limitation barred the suit so far as it sought *khas* possession but operated to create a limited interest of tenancy, and the plaintiff was entitled to rent

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from the transferee and not *mesne* profits. **Prophabati Das v. Taibatunnessa Chowdhuri**, 19 C.L.J. 62.

JENKINS, C.J., and MOOKERJEE, J.

(2) *Landlord's failure to repair—Tenant's right to make deductions from the rent—Conditions to pay enhanced rent in default of regular payments.*

Held, that, if a landlord fails to repair the demised premises according to the terms of the lease, and the tenant is thereby deprived of the use of a portion of it and is also put to loss and inconvenience, the latter is entitled to deduct from the rent a reasonable amount with regard to the non-use, loss and inconvenience.

Held, also that a condition to pay enhanced rent in default of regular payments is penal. **Niadar Mal v. B. Borrooah and Co.**, 5 P.W.R. 1914 = 26 P.L.R. 1914 = 23 Ind. Cas. 358.

SHAH DIN and BEADON, JJ.

(3) *Lease of premises a portion of which is already in possession of a tenant—Lessee's giving up entire premises—Sub-tenant.*

Held, that, where a lessee accepts the lease of premises, a portion of which is already in the occupation of a tenant, the latter becomes the sub-tenant of the former; but the lessee's giving back its possession to the lessor at the expiry of the lease amounts to entire vacation of the premises, and the former tenant again becomes the sub-tenant of the lessor. **Niadar Mal v. B. Borrooah and Co.**, 6 P.W.R. 1914 = 30 P.L.R. 1914 = 23 Ind. Cas. 359.

SHAH DIN and BEADON, JJ.

(4) *Suit for compensation for use and occupation without asking for ejectment, if converts defendants into tenants—Subsequent suit for ejectment, if lies.*

If a landlord sues for compensation for use and occupation of land, but does not ask for ejectment of the defendants therefrom, he does not waive his right to eject, and he must not be taken to have recognized the defendant as his tenant (a).

The landlord may, therefore, subsequently, bring a suit for the ejectment of the defendant. **Raj Krishna Rudra v. Fakir Dome**, 21 Ind. Cas. 197.

BEACHCROFT and NEWBOULD, JJ.

References:—(a) 1 Ind. Cas. 312 = 13 C.W.N. 635, D.

(5) *New structures built by tenant on his gote—Right of ejectment.*

Where a tenant erects new structures on his *gotes* without the zemindar's permission, all that the latter can do is to claim the demolition of the new building, but he has no right to eject the tenant, on that ground. **Kehri Singh v. Hulasi**, 12 A.L.J. 175 = 21 Ind. Cas. 967.

RAFIQ, J.

Landlord and Tenant—(Continued).

(6) *Landlord and tenant—Landlord obtaining decree for rent and ejectment against ryot—Landlord taking possession from mortgagee of ryot not in execution of decree—Suit by ryot for possession—Taking possession by landlord from mortgagee of ryot not terminating tenancy—Whether ryot had subsisting title—Chota Nagpur Landlord and Tenant Procedure Act (I B.C. 1879), Ss. 31, 88, 94.*

* A landlord obtained a decree for rent and ejectment against a ryot under Ss. 31 and 88 of the Chota Nagpur Landlord and Tenant Procedure Act of 1879. Instead of taking possession of the land of the holding by executing the decree, the landlord induced the mortgagee of the ryot, who was in occupation as such mortgagee, to attorn to him, and he obtained possession. The ryot then sued to recover possession of the land :

Held, that the effect of the decree obtained by the landlord was not to terminate the tenancy; that, under S. 31, no ryot could be evicted except in execution of a decree; that, as the landlord did not take possession in execution of his decree, the mere circumstance that the mortgagee from the ryot had repudiated the title of the mortgagor and attorned to the landlord did not operate to terminate the tenancy, that the ryot had a subsisting title, and that he was entitled to a decree. *Abdul Rahman Khan v. Madan Dasad*, 21 Ind. Cas. 965.

MOOKERJEE and BEACHCROFT, JJ.

(7) *Ex-proprietary tenancy—Sir land sold in execution of decree—Ex-proprietary rights whether can be given up or taken away—Proof necessary—Right in rem.*

Certain plots of sir land were mortgaged by the owner who afterwards made a perpetual lease of the same in favour of the defendants. The property was sold in execution of decree upon the said mortgage and was purchased by the plaintiff, who brought the present suit for physical possession of the plots. *Held*, that the plaintiff was not entitled to possession but was only entitled to the rent which the ex-proprietary tenant was bound to pay.

A plaintiff in a suit for physical possession must show a right to possession against all the world. When a proprietor's right is sold, he becomes an ex-proprietary tenant of his sir land and this right can neither be given up by the proprietor nor taken away by Court. *Ghura v. Shitab Kuar*, 12 A.L.J. 370=36 A. 248=23 Ind. Cas. 102.

RICHARDS, C.J., and BANERJI, J.

(8) *Raising wet crops—Payment of rent at a certain rate for a number of years—Claim for higher rent for raising wet crops—Absence of notice of demand for higher rent—Estoppel—Liability of tenants to pay.*

Where the suit lands had been cultivated with wet crops for at least 15 years, and during

Landlord and Tenant—(Continued).

the whole of that time *cist* was collected only at the rate of 15 annas 10 pies per acre.

Held, that, in the absence of intimation to the contrary, the tenants were justified in inferring that they would be allowed to cultivate on the same terms for the suit *faisla* also, and that the landlords were estopped from demanding a higher rent for the suit *faisla*. *Rallabamdi Subbiah v. Sri Rajah Venkata-ramiah Appa Rao Zemindar Garu*, 26 M.L.J. 217=23 Ind. Cas. 619.

AYLING, J.

References:—28 M. 891; 27 M. 392, R.

(9) *Landlord and tenant—Payment of rent—Attornment—Estoppel.*

Where a tenant has acknowledged the title of a person as landlord by paying him rent for several months, the tenant can, subsequently, challenge the title of the person only on the ground that the payment of rent by him was due to mistake or ignorance of facts relating to the title of the person or misrepresentation or fraud on the part of the latter. Without proving mistake, fraud or misrepresentation in the payment of rent, the tenant cannot question the payee's title to recover rent. *Girdhari Lal v. Kallu Mestri*, 22 Ind. Cas. 243.

RICHARDS, C.J., and BANERJI, J.

(10) *Sub letting—Forfeiture of lease—Meaning of the word 'Dokandari khud'—Principles in Ss. 108 (J) and 111 (G), Transfer of Property Act, followed.*

Held, that, in the absence of a covenant to the contrary, a tenant is authorised to sub-let.

Held, also, that a breach of a condition of a lease does not effect its forfeiture unless the lease expressly so provides.

Held, further, that the words "*dokandari khud*" (for the purposes of his own shop business) standing alone in the lease do not mean that sub-letting was prohibited. *Allah Ditta v. Mussammat Farz Bibi*, 35 P.W.R. 1914=106 P.L.R. 1914=33 P.R. 1914=23 Ind. Cas. 395.

REID, C.J.,

References:—14 P.R. 1898; 22 M. 157; 28 A. 400, R.

(11) *Ejectment, suit for—Unauthorised sale of a plot within the holding—Recognition by landlord, effect of.*

A certain holding within which the disputed land was situate belonged equally to two persons A and B. A sold the whole plot to the plaintiff. Subsequently B sold half of it to the defendant. The plaintiff's purchase was recognised by the landlord, that of the defendant's was not recognised :

Held, that the transfer in favour of the plaintiff, if effective at all, operated to the extent of the half share.

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That it was not competent to the landlord to recognise the plaintiff to the detriment of the defendant. *Shelkh Sanoo v. Muhammad Sabed*, 19 C.L.J. 462.

JENKINS, C.J., and MOOKERJI, J.

- (12) *Suit not under Bengal Tenancy Act—Uniform rent from a long time—Presumption of fifty of rent—Bengal Tenancy Act (VIII of 1885), S. 50.*

The presumption under S. 50 of the Bengal Tenancy Act, cannot be relied upon in a suit which is not one under that Act, for example, in a suit to eject the defendant as a trespasser. But it does not follow that, in cases to which the section does not apply, it is not open to the Court to draw any appropriate inference from the facts proved by the evidence on the record.

Therefore, in a suit for ejectment of the defendants on the ground that the land in dispute formed a non-transferable occupancy-holding held by defendant No. 2, who had transferred it to defendant No. 1 and had abandoned possession, where the defence was that the holding constituted a *mokurari jama*, the Court may draw an inference as to the *jole* having been held at a fixed rent from the time of the Permanent Settlement from the fact of the land having been held at a uniform rate from a long time, and the fact of the land having been so held may raise the presumption, apart from the Bengal Tenancy Act, that the original contract was a contract to hold at fixed rates, and it would be evidence from which any Judge of fact can reasonably presume that there had been such a contract. *Asutosh Rudra v. Ganga Bishen Banerjee*, 22 Ind. Cas. 367.

CHATTERJEA and TEUNON, JJ.

- (13) *Burden of proof—Suit for possession at end of ticca—Land included in plaintiff's mowjah—Defendant to prove subordinate interest—Statement in plaint that lands bear particular character, whether makes any difference in onus—Limitation—Purchase of holding in execution of rent decree by landlord during ticca for rent accrued due before ticca—Allowing ticcadar to occupy holding—Claim of possession after termination of ticca grant of tenure—Cultivation of land by tenure-holder—Whether tenure-holder becomes raiyat.*

The plaintiffs sued for possession of certain lands included in certain *towjis* at the end of a lease granted to the defendants who, according to the plaintiffs, during the time of the lease, brought the land in suit under their own cultivation as *ticcadars*. The plaintiffs claimed the lands under specific titles, some as old *sirat*, some as bought at execution sales and so forth :

Held, (1) that, as the plaintiffs were the owners of the *towjis* and as the disputed land was in these *towjis*, they were entitled to it

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unless the defendants could prove a subordinate interest that derogates from their title (a) ;

(2) that the fact that the plaintiffs went further and stated that the land bore a particular character did not deprive them of the initial presumption in their favour. If their description of the character of the land was mistaken, it was none the less the duty of the defendants to prove their subordinate interest.

Certain plots were purchased by the plaintiffs, 'during the continuance of the *ticca*, in execution of decrees obtained by them for rent that accrued due before the *ticcas*. The plaintiffs took no steps for taking possession of the land but allowed the defendants to do what they liked with it. This was in 1893 and the *ticca* terminated 13 years later :

Held, that no question of limitation could arise in these circumstances, for, as the defendants were the representatives of the proprietors, the plaintiffs, the possession of the defendants was equivalent to that of the landlords, the plaintiffs, until the expiration of the *ticca*.

When a tenure of a village is granted, the tenure holder does not become a *raiya*t with respect to the land that comes into his direct possession, because the lease authorises him to cultivate such land.

The land covered by a *ticca* far exceeded 100 *bighas* and there were many tenants upon it. It was covenanted in the *ticca* that the *ticcadar* should cultivate the land by sowing indigo or other crops either by means of *khas* cultivation or through tenants :

Held, that this was a tenure and the *ticcadar* was not a *raiya*t with respect to land that came into his direct possession. *H. Manners v. Harihar Dutt Koer*, 22 Ind. Cas. 563.

COXE and CHATTERJEE, JJ.

References :—(a) 20 Ind. Cas. 155 = 18 C.L.J. 544, *Rel.*

- (14) *Tenant's right to leave portion of land uncultivated—Zemindar's right to increase rent on such portion—Enhancement—Stipulation not to cut fruit-bearing trees, whether legal.*

Where the custom in a *zemindari* gives the tenant a right to leave a portion of his holding uncultivated for a year paying rent only for the cultivated portion, the *zemindar* cannot assign on *darkhast* lands remaining uncultivated, and raise rent thereon as that would be, in effect, an enhancement.

A stipulation in a *pattah* not to cut fruit-bearing trees is not improper. *Amirtha Pada-yachi v. Kachi Yuva Rangappa*, 22 Ind. Cas. 572.

WHITE, C.J., and SANKARAN NAIR, J.

- (15) *Non-occupancy holding, if heritable—Bengal Tenancy Act (VIII of 1885), S. 20 (3).*

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The holding of a non-occupancy raiyat is (apart from possible exceptions) heritable. **Midnapur Zemindary Co., Ltd. v. Hrishikesh Ghosh**, 18 C.W.N. 828=19 C.L.J. 505=41 C. 1108 (F.B.).

JENKINS, C.J., STEPHEN, WOODROFFE, HOLMWOOD and D. CHATERJEE, JJ.

- (16) *House of tenant in abadi—Partition—House assigned to one mahal, and cultivatory holding to the other—Right of residence in the house.*

Where, prior to the partition of a village into different mahals, cultivating tenant in that village possessed a right of residence in a house, in the abadi, the fact that on partition his cultivatory holding was assigned to one mahal and his residential house to another would in no way affect his right to reside in the house. **Mukhran Singh v. Kota**, 12 A.L.J. 488=24 Ind. Cas. 22.

PIGGOTT, J.

References:—2 A.L.J. 588; 30 A. 282, R.; A. W.N. (1902) 6, Diss.

- (17) *Tenant's rights not alienable—Death of tenant issueless—Escheat of tenancy to Crown or its lapse to zemindar—Tenant entitled to sell house with landlord's consent—Sale without consent—Vendee entitled to materials—Mauza Serai Hakim in Aligarh district.*

It is only an absolute and alienable right that escheats to the Crown in the event of the person owning the right dying issueless. A ryot who is merely occupying a house has not an absolute and alienable right thereto, and if he dies issueless, the house does not escheat to the Crown but lapses to the zemindar (a).

The occupier of a house in Serai Hakim cannot transfer that house without the permission of the zemindar. If he does, the want of permission vitiates the sale so far only as to prevent the transferee from occupying the house, but entitled him to take and remove the materials. **Nathu Ram v. Rai Dube Lakshmi Narain**, 22 Ind. Cas. 891.

RAFIQUE, J.

References:—7 Ind. Cas. 231=33 A. 111=7 A.L.J. 1011, F.

- (18) *Rent decree against dar-patnidar—Mortgage decree against dar-patnidar by landlord—Execution of mortgage decree—Sale of darpatni mahal subject to encumbrance of rent decree—Execution of rent-decree against other property of dar-patnidar, if allowable—Merger, doctrine of—Intention—Benefit of person in whom the two estates have become vested—Transfer of Property Act, S. 101.*

The superior landlord of a dar-patni mahal got a mortgage-decree against the dar-patnidar in respect of the mahal. In execution of this decree, he put up the mahal to sale and himself purchased it. Previously he had obtained a

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decree for rent due to him from the dar-patnidar on account of the dar-patni. In execution of the mortgage-decree, the sale of the dar-patni mahal was subject to incumbrances including the encumbrance of the rent-decree. The landlord wanted to execute his rent-decree against some other property of the dar-patnidar:

Held, that the landlord was entitled to do so.

In applying the doctrine of merger, the dominating principle by which a Court is guided is the intention, and in the absence of express or implied intention, the Court looks to the benefit of the person in whom the two estates have become vested. **Gopal Lal Roy v. Shaj-lendrabasini Chowdhurani**, 23 Ind. Cas. 893.

IMAM and CHAPMAN, JJ.

- (19) *Abandonment by tenant of holding—Question of intention.*

The question, whether in any individual case there has been an abandonment by a tenant of his holding, is a question to be determined upon the facts of each case. **Chowdhury Babu Mahadeo Pershad v. Mussammat Durgul Sahun**, 23 Ind. Cas. 368.

HOLMWOOD and SHARFUDDIN, JJ.

References:—12 C.W.N. 899=7 C.L.J. 72, Rel. on; 10 C.W.N. 499=3 C.L.J. 232; 9 C.W.N. 379, Expl.

- (20) *Receiver's claim for rent paid in advance to the owner—Transfer of Property Act, S. 50—Such advance payment a condition precedent of letting the premises.*

Where the owner of certain mortgaged premises let them to the applicant after receiving 5 months' rent in advance as a condition precedent of such letting and where a Receiver of these premises accepted subsequently sued for the same rent.

Held, the lessee having paid the rent in advance only as a part of his entering into the contract of hiring the premises, could not be compelled to pay it over again to the Receiver. **Toon Chan v. P. C. Sen**, 7 Bur. L. T. 139=7 L.B.R. 268=24 Ind. Cas. 693.

FOX, C.J.

- (21) *Raiyat executing usufructuary mortgage of holding—Abandonment—Question of fact—Raiyat continuing to pay rent—No intention of leaving village—Receipt of rent by landlord after notice of alleged abandonment—Khas possession, whether landlord entitled to.*

The mere execution of a usufructuary mortgage may not be sufficient to establish abandonment by a raiyat of his holding, which question is principally one of fact (a).

Where a raiyat executed a usufructuary mortgage of his holding but covenanted to continue to pay the rent thereof, and it was found that, though he left the land because he was ill and there was no one to take care of him, yet he intended to come back to the

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village, and that rent was received by the landlord after he came to have notice of the *raiya*ts leaving the place :

Held, that there was no abandonment of his holding by the *raiya*t entitling the landlord to *khas* possession. **Gour Chandra Das Poddar v. Sheikh Azimuddi**, 23 Ind. Cas. 546.

WOODROFFE and WALMSLEY, JJ.

References :—(a) 20 Ind. Cas. 198 = 17 C.W. N. 802, *Rel.*

- (22) *Landlord and tenant—Dispossession of tenant by landlord or person claiming under him, effect of—Dispossession from certain lands of tenure—Suspension of rent of other lands during dispossession.*

When a landlord or a person claiming under him has dispossessed a tenant from certain land of the tenure, he is not entitled to recover rent for the remaining lands in the possession of the tenant, inasmuch as it could not be said in that case that each *bigha* of land is separately assessed and separately chargeable with rent (a).

Where an intermediate tenure has been created by the landlord between himself and his tenants, and that intermediate tenure-holder has dispossessed the tenants of a portion of their land, he cannot recover rent from them. If the landlord tries to step into the shoes of the intermediate tenure-holder and to do that which the intermediate tenure-holder is not entitled to do, he cannot do so. **Fateh Ali Chowdhury v. Parsha Nath Das**, 23 Ind. Cas. 552.

HOLMWOOD and CHAPMAN, JJ.

References :—(a) 28 C. 188 ; (1849) 7 C.P. 266 = 6 D. & L. 567 = 18 L.J.C.P. 189 = 13 Jur. 638 = 137 Eng. Rep. 107 = 78 R.R. 627, *Rel.*; 34 C. 191, D.

- (23) *Landlord and tenant—Ejectment of tenant—Compensation for trees planted.*

Following the rule stated in S. 108 (b) of the Transfer of Property Act as a rule of justice, equity and good conscience, *held*, that a tenant is entitled on ejectment to compensation for trees that he has planted. **Mi Hmat Tok v. Nga Kywe Hla**, U.B.R. (1914), 1st Qr., p. 11 = 24 Ind. Cas. 708.

SHAW, J.C.

- (24) *Rent, assessment of—Rent not realized for many years—Adverse possession—Ijara—Possession without payment of rent after expiry of lease.*

A certain mouza was given in *ijara* to the appellants' predecessor about 50 years ago. They excavated a tank there after taking permission from the respondent's predecessor. Neither the respondent nor his predecessor ever realized rent for the tank and its bank, during the continuance or after the expiry of the lease:

Held, (1) that the *ijara* constituted a good answer to the plea of limitation by adverse possession.

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- (2) That the doctrine laid down in **Damsden v. Dyson** (a) was applicable. **Allabuddin v. Maharaja Birendra Kishore Manikya Bahadur**, 20 C.L.J. 300.

JENKINS, C.J., MOOKERJEE and BEACH-CROFT, JJ.

References :—(a) (1866) L.R. 1 H.L. Eng. & Ir. App. Cas. 129, *Appl.*

- (25) *Rent-free tenure—Inference—Tenant holding without payment of rent for a long series of years—No proof of realisation of rent.*

In a suit for declaration of the Zemindary title to certain lands, for assessment of fair and equitable rent thereon, and for recovery of back rent, it was found that the defendants were in possession for a long series of years without payment of rent and that the plaintiff had not proved that rent had ever been realised in respect of the lands in suit :

Held, that, under the circumstances, it could be inferred that the defendants held under a rent-free title. **Maharaja Birendra Kishore Manikya Bahadur v. Bhoirab Chandra Chakrabarti**, 20 C.L.J. 295.

JENKINS, C.J., MOOKERJEE and BEACH-CROFT, JJ.

References :—(1862) Marshall 215 ; 10 W.R. 461 ; 14 W.R. 108, R.

- (26) *Landlord and tenant—Ejectment suit—Proof of lawful title by plaintiff—Presumption—Holding over of agricultural leases.*

Sadasiva Iyer, J.—A subsequent trespasser whose title has not been perfected by 12 years' possession cannot successfully resist a suit in ejectment brought by a plaintiff who had been in lawful possession of the suit land for however short a time, before the defendant's possession, which is proved to be unlawful, commenced.

Lawful possession, however short, is presumptive evidence of title as owner and of the title to possession and such presumption should be rebutted by the defendant.

The fiction of tenancy by sufferance applying to leases under the Transfer of Property Act does not apply to agricultural leases.

Observations on the practice of letting of agricultural land and the law to be applied to the same. **Ganapathi Mudali v. Venkata-lakshminarasayya**, (1914) M.W.N. 728.

MILLER and SADASIVA IYER, JJ.

- (27) *Landlord and tenant—Possession of plots of land with trees thereon, suit for—Trees planted by tenant on his cultivatory holding before accrual of tenancy, effect of ejectment decree upon—Groves; custom in respect of, as recognised in Oudh.*

When a landlord obtains a decree for ejectment against a tenant, the latter is bound, in the absence of any special rule or custom to the contrary, such as that existing in the case of groves, to deliver over possession of the trees along with that of the cultivatory holding on

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which they stand, even though they were planted by him before he acquired the status of a tenant. *Sardar Singh v. Gaja Singh*, 28 Ind. Cas. 957.

LINDSAY, J.C.

References:—2 O.C. 281, F.; 1 O.C. 231, D.

(28) *Enhancement of rent—Homestead land—Kabulyat executed by tenant—Stipulation that increased rent would be paid on increased area found on measurement—Area in boundaries—Landlord, if entitled to additional rent on excess area being found to be in tenant's possession—Prevailing rate in vicinity—If rent stated in Kabulyat to be enhanced according to prevailing rate in vicinity—Procedure to be adopted by landlord.*

Where there is an express stipulation in a *kabulyat* that the landlord is entitled to excess rent in case the area of the land let out and described within certain boundaries be found on measurement to be more than what is mentioned in the *kabulyat*, the landlord is entitled to rent for the excess land which the tenant is found to hold within the boundaries mentioned in the *kabulyat*.

If the rent of a tenant in respect of a homestead land is not a fixed one and the rent paid by him is inadequate, the landlord can call upon him to pay such rent as is proper and if the tenant does not agree to this, the proper course for him is to give the defendant a proper notice to quit and then to sue him for ejectment.

A landlord is not entitled to a decree for enhanced rent on the ground that the prevailing rate of rent of similar lands in the vicinity was higher than the rate stated in the *kabulyat*. *Jadu Nath Das v. Manindra Chandra Nandi*, 23 Ind. Cas. 967.

CHATTERJEA and BEACHCROFT, JJ.

(29) *Joint liability for rent of two plots comprised in a holding—Landlord distributing the rent on each plot separately—Effect—Right of tenant to pay arrears of rent on one of such holdings—Rent decree passed in respect of holding on which no arrear is due—Effect on rights of mortgagee in possession—S. 85, C.P. Tenancy Act (1898).*

Where there are two plots comprised in a holding and the landlord agrees to distribute the rent on each parcel separately, the parent holding is split up into two holdings.

There is no authority for the proposition that, without the order of a Settlement Officer, no holding can be split up by the landlord and the tenant with mutual consent.

S. 85 of the Tenancy Act contemplates ejectment only from the holding in respect of which an arrear is due. In other words, it would be open to a tenant to pay up the arrears on one holding and save it from forfeiture, though he is unable to pay what is due on another holding (a).

Where the tenant does not plead that no arrear was due in respect of the holding and

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allows a decree to be passed for rent, the decree and the order for ejectment would be binding on the tenant, but cannot prejudice a mortgagee when the mortgage is not void as against the landlord.

The tenant's consent to the decree places that decree on no higher footing than a voluntary surrender (b).

Such a surrender by the tenant will not prejudice a mortgagee when the mortgage is not voidable at the instance of the landlord. In such a case the tenancy has, in consideration of law, a continuance (c). *Tikaram v. Seth Ghasiram*, 10 N.L.R. 129.

MITTRA, OFFG. A.J.C.

References:—(a) 29 A. 18, R. (b) 32 C. 288, R. (c) 2 N.L.R. 170; 15 C.P.L.R. 99, R.

(30) *Agricultural lease—Denial of landlord's title—Forfeiture of tenant's rights—English and Indian Common Law—What constitutes 'disclaimer'—Tenant admitting in good faith superior title of third person to portion of lands included in the tenancy—Effect—Forfeiture—S. 111, Transfer of Property Act—Ss. 9, 151, 153, Madras Estates Land Act.*

Per *Sadasiva Iyer, J.*—As regards the forfeiture of a tenant's rights on account of his denial of the landlord's title, the Indian Common Law is not so strict against the tenant as the English Common Law. It is on this ground, among others, that, both under the Bengal Tenancy Act and the Madras Estates Land Act, mere denial of the landlord's title will not entitle the landlord to eject a ryot.

Even in cases not coming under the Madras Estates Land Act, where the landlord claims to eject on the ground of the denial of his title, in the case of an agricultural lease, such a claim should not be viewed by the Courts in India with much sympathy, and the right of the landlord to eject should be recognized only to the extent to which by long-established precedents he has become so entitled.

To constitute a disclaimer there must be a distinct and unequivocal renunciation of the tenancy, and the application of the doctrine should not be extended to a case in which the tenant does not set up a title to the whole in himself or a title to the whole in others, but merely questions the extent of the interest of the landlord and his title to receive the entire rent.

The case is even stronger where a tenant never denied the landlord's title to receive the entire rent, but only admitted in good faith the superior title of a third person to a portion of the lands included in the tenancy. There is no disclaimer and no forfeiture will be incurred in such a case. *Abbakka Shetti v. Sesamma*, 16 M.L.T. 442 = (1914) M.W.N. 915.

SADASIVA IYER and NAPIER, JJ.

References:—(1918) M.W.N. 655; 34 M. 161; 17 C. 196; 20 C. 101; 2 C.L.J. 389, R.

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- (31) *Suit for rent—Sale of tenure for arrears—Liability to pay rent between date of decree and date of sale—Personal liability of old tenant—Purchase by landlord.*

Where a tenure is sold for arrears of rent under the provisions of the Bengal Tenancy Act, the old tenant is personally liable for the rent between the date of the decree and the date of the sale, where there are no surplus proceeds of the sale; and the mere fact of the purchaser being the landlord is not sufficient to cast upon the landlord himself the liability of paying the rent between the date of the decree and the date of the sale. **Maharajadhiraj Sir Bejoy Chand Mahatap Bahadur v. Hari Mandal**, 24 Ind. Cas. 52.

FLETCHER and RICHARDSON, JJ.

Reference:—6 C.W.N. 877, D.

- (32) *Landlord and tenant—Grove planted by proprietor with consent of general body of proprietors—Subsequent loss of status as proprietor, effect of.*

A grove planted by a proprietor with the consent of the general body of proprietors in a village remains the property of the person planting it, although he may no longer be proprietor in the village (a).

Quære.—Whether interests of a grove-holder as such, in land granted to him for the purpose of planting the grove, can be treated as forming a tenant holding of any of the descriptions defined in the Agra Tenancy Act (b)? **Khan Chand v. Musammat Chandun**, 24 Ind. Cas. 81.

PIGGOTT, J.

References:—(a) 14 Ind. Cas. 582 = 9 A.L.J. 672; 30 A. 134 = 5 A.L.J. 99 = 3 M.L.T. 191 = A.W.N. (1908) 51; 14 Ind. Cas. 799 = 9 A.L.J. 483; 9 A. 83, R. (b) 16 Ind. Cas. 455 = 10 A.L.J. 73 = 34 A. 545; 19 Ind. Cas. 416 = 11 A.L.J. 236 = 35 A. 200, R.

- (33) *Ejectment—Construction of lease—Non-payment of rent, effect of—Fazendari tenure incidents of.*

A lease under which a plot of land was demised on *Fazendari* tenure provided *inter alia*. "I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession and if the land be required, you are to pay me the value of the said house whatever the same may come to. Otherwise I shall pull down my house and remove it." The landlord, whilst yet in possession of the Wadi, sued to eject the tenant from the land:

Held, that the landlord had not, under the circumstances, the right to eject the tenant.

A mere non-payment of rent by a tenant if the tenancy is not determined does not give him a right to the property as against his landlord.

Observations of Farran, J., in *Parmanandas Jivandas v. Ardeshtir* (a) as to the import of the term "*fazendari*" occurring in a written document embodying the contract between parties,

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referred to. **Yeshwant Vishnu Nagne v. Keshavrao Bhaiji**, 16 Bom. L.R. 720.

SCOTT, C.J., and DAVAR, J.

Reference:—(a) 16 Bom. L.R. 723 (Note), R.

- (34) *Patta—Construction—No period fixed—Conditions that after a certain year rent shall be so much—Permanent tenure—Enhancement—Consolidation of two items, whether constitutes enhancement.*

A *patta*, which, without specifically limiting the period, provides that from a certain year onwards the rent shall be so much, fixes the rent for all time and creates a permanent tenure.

The consolidation of two items payable or believed to be payable by a tenant does not constitute any variation or enhancement. **Haradas Acharyea Chaudhuri v. Abhoy Charan Dhupi**, 24 Ind. Cas. 58.

TEUNON, J.

- (35) *Tenant brought on land by lessee for term of years—Expiry of lease—Tenant holding over—Acceptance of rent by second lessee—Position of tenant—Creation of new tenancy—Transfer of Property Act, Ss. 2, cl. (c), 106, 116—"Legal representative," meaning of—Mode in which rent reversed—Presumption.*

When a tenant has been brought for residential purposes on the land by a landlord who is himself a lessee for a limited term of years under the proprietor, his right would *prima facie* come to an end upon the expiry of the lease of his landlord (a).

If, after the termination of the first lease under the proprietor, the tenant continues in occupation of the land, and is treated as a tenant by the next lessee under the proprietor, who accepts rent from him, a new tenancy is created in favour of the tenant, which is affected by the provisions of the Transfer of Property Act then in force (b).

The expression "legal representative," in S. 116 of the Transfer of Property Act, is not defined in the Act, but it clearly implies a person who occupies the same position as the lessor. It cannot include the second lessee who had transferred to him only a fraction of the interest possessed by the lessor.

The effect of the section is that the lease of the person from whom rent is accepted is renewed from year to year, or from month to month, according to the purpose for which the property is leased as specified in S. 106; and where the tenancy is for residential purposes, the lease must be deemed to have been a lease from month to month.

The mode in which rent is expressed to be reserved affords a presumption that the tenancy is of a character corresponding thereto (c).

Therefore, whenever rent is claimed annually the presumption is that the tenancy is from year to year.

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But this rule is not of universal application (*d*). **Dargi Nikarini v. Gobarthan Bose**, 24 Ind. Cas. 183=20 C.L.J. 448.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 2 W.R. 155; 22 W.R. 274; 26 C. 546=3 C.W.N. 336; L.R. 4 Q.B. 170=10 B. & S. 183=38 L.J.Q.B. 73=19 L.T. 601=17 W.R. 519, *Rel.* (b) 4 Camp. 275=16 R.R. 792; Ir. Rep. 7 Eq. 467; L.R. 4 Q.B. 170=10 B. & S. 183=38 L.J.Q.B. 73=19 L.T. 601=17 W.R. 519, *R.* (c) 3 Bing. (N.C.) 508=4 Scott. 301=3 Hodges. 56=6 L.J. (N.S.) O.P. 82=132 Eng. Rep. 506=43 R.R. 728, *Rel.* (d) 10 L.J.C.P. 113=2 Man. and G. 511=134 Eng. Rep. 850; 3 B. & C. 88=4 D. & R. 693=2 L.J. (O.S.) K.B. 215=107 Eng. Rep. 667, *Rel.*

(36) *Landlord and tenant, dispute between, as to possession of specific plot—Onus of proof—Zerait, necessity of proving disputed land—Khas land other than zerait—Tenure or holding—Lease to ticcadar to cultivate—Lands cultivated if raiyati land of ticcadar—Ticcadar's possession of land outside ticca, if adverse to landlord.*

The owner of a tauzi is entitled to recover possession of lands within it, unless the defendants whom he sues can prove a subordinate interest that derogates from his title. The fact that he has failed to prove certain specific titles which he in addition asserted in the disputed lands, does not deprive him of his initial presumption in his favour. The onus which is on the defendants must be discharged by them. The fact that the defendants were raiyats holding other lands of the village would make them settled raiyats of the disputed lands, if they proved that these lands were held by them as raiyats, but not, if they fail to prove this.

3 C. W. N. 763 did not apply to this case, in which the defendants held a number of separate holdings and did not claim to hold the land in suit as a part of any specific holding.

Where a ticcadar took a lease of lands far exceeding 100 bighas in area to "cultivate by sowing indigo or other crops either by means of khas cultivation or through tenants."

Held, that it was a tenure.

A tenure-holder does not become a raiyat with respect to all land that comes into his direct possession, because the lease authorises him to cultivate these lands.

A proprietor may hold other lands besides *zerait* lands in *khas* possession, and because he recovers possession of lands on the basis of the presumption arising from his proprietorship, it does not follow that the land is *zerait*, nor does the fact that he fails to prove the land to be *zerait* prevent him from claiming the land, if the defendant fails to establish a subordinate interest in it.

Where the proprietors having purchased certain holdings suffer them without any arrangement to be taken possession of by their ticcadars,

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the ticcadar's possession of such holding does not become adverse to the proprietors. **H. Manners v. Harihar Koer**, 19 O.W.N. 149.

COXE, and D. CHATTERJEE, JJ.

(37) *Landlord and tenant—Suit by former in ejectment—Burden on latter to prove land held in tenancy—Jurisdiction to entertain suit after remand—Suit originally tried by District Judge, after remand tried with consent of parties by Subordinate Judge—Irregular assumption of jurisdiction no objection.*

Where a suit valued at Rs. 1,868 was heard in the first instance before the District Judge and dismissed as barred by limitation, but on appeal the High Court remanded it for trial on the other issues, and thereafter the case having been transferred to the file of the Subordinate Judge, the latter officer with the consent of the parties tried and disposed of the suit.

Held, that if the order of the High Court did not place any restrictions on the power of the District Judge to transfer the case, the transfer was authorised by S. 24 of the Civ. Pro. Code. But if the remand order was interpreted to have directed the District Judge himself to try the suit, it was not a case of the trying Court not having local or pecuniary jurisdiction but of that Court assuming jurisdiction in an irregular manner, and the parties having consented to the trial by the Subordinate Judge were not entitled to object to it on that ground on appeal; and it was immaterial that, as a consequence of such trial, appeal from his decision on facts lay before the District Judge and not before the High Court.

What was held in 3 C.W.N. 763 was that, when a tenant has been in possession of land ostensibly as part of an admitted tenure, it lies upon the landlord in a suit in ejectment to prove in the first instance that the land is his *khas* property.

It is not the law that, because a defendant is found to be a tenant of some land under the plaintiff, the burden is thereby cast upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant. The burden would ordinarily be on the defendant to prove the tenancy under which he claims to hold it. **Protap Chandra Roy v. Judhistir Das**, 19 C.W.N. 143.

MOOKERJEE and BEACHCROFT, JJ.

References :—6 C.W.N. 1905; 12 C.L.J. 376, *R.*

(38) *Denial of relationship by tenant in previous suit—Tenant, whether can take up inconsistent plea in subsequent suit—Litigants—Practice.*

Parties litigant cannot be allowed to take up inconsistent positions in Court.

Therefore, where, in a previous suit for rent by plaintiff against the defendant, the latter successfully pleaded that he was not a tenant

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of the plaintiff, and the plea was accepted by the Court with the result that the suit for rent was dismissed :

Held, that the defendant cannot be now permitted in a suit by the plaintiff for declaration of title and recovery of possession, to take up an inconsistent plea and to urge that he is a tenant who should have been made liable for rent in the previous litigation contrary to his false defence; and if the title of the plaintiff is proved, the defendant must be deemed a trespasser in occupation of the land and he is liable to be ejected at the instance of the plaintiff. **Shashi Bhusan Mandal v. Ram Sebak Mandal**, 24 Ind. Cas. 181.

MOOKERJEE and BEACHCROFT, JJ.

References:—8 Ind. Cas. 660=13 C.L.J. 1=15 C.W.N. 335; 5 Ind. Cas. 708=14 C.W.N. 339; 2 C.W.N. 755; 6 C.W.N. 575; 2 C.L.J. 389=9 C.W.N. 928; 3 C.L.J. 201, R.

(39) *Title—Long possession without payment of rent—Inference of rent-free-title—Limitation—Tank.*

Long possession without payment of rent may justify, in the circumstance of a particular case, an inference of rent free title (a).

Where a tank has been in the occupation of the defendants and their predecessors for more than half a century, and it is called after the original holder who lived about a century ago and excavated the tank, and rent has never been claimed or realised in respect of the property.

Held, that a proper inference may be drawn that the defendants hold under a rent-free title :

Held, also, that, as the plaintiff treats the defendants as trespassers and they on their part set up a title by adverse possession and claim to hold the property rent-free and repudiate their liability to pay rent to the plaintiff, the latter's suit for assessment of rent is barred by limitation. **Jafar Ahmed v. Maharaja Birendra Kishore Manikya Bahadur**, 24 Ind. Cas. 319.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 10 W.R. 61=1 B.L.R. (S.N.) ii; 14 W.R. 108, F.

(40) *Lease by landlord to a third person—Lease subsisting—Landlord's right to sue to eject a trespasser.*

A landlord, though he has given a lease to a third person, is entitled, for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser. The plaintiff's right to eject the defendant cannot be defeated simply because the plaintiff does not disclose in his plaint the fact that a lessee from him is entitled to get possession from him or the fact that the purpose of his suit is to put such lessee in possession. The defendant can succeed only if he shows that the plaintiff or his lessee has no right to possession because the defendant is himself entitled to possession either through a

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title paramount to the plaintiff or derived from the plaintiff or his lessee, or that the lessee is unwilling that the plaintiff should get possession during the term of the lease. **Somai Ammal v. Yellayya Sethuramam**, 16 M.L.T. 532=(1915) M.W.N. 12.

SADASIVA IYER and HANNAY, JJ.

References:—25 M. 587; (1912) M.W.N. 669 (680); 33 M. 499 (501); 10 C. 1076; 13 C.L.J. 284, R.

(41) *Title—Rent-free title—Tank—Non-payment of rent for four generations—Presumption.*

Where a tank is popularly known by the name of the great grand-father of the defendants and the family of the defendants has been in occupation of the tank for four generations and no rent has ever been paid or claimed:

Held, that the inference may legitimately be drawn that the defendants held the property under a rent-free grant. **Maharaja Birendra Kishore Manikya Bahadur v. Chandi Charan Dey**, 24 Ind. Cas. 354.

MOOKERJEE and BEACHCROFT, JJ.

References:—10 W.R. 61=1 B.L.R. (S.N.) 1; 14 W.R. 108. *Appl.*

(42) *Title—Rent-free grant—Long possession without payment of rent—Presumption.*

Where the defendant himself and his father and grandfather before him were in possession of a tank for more than half a century, and no rent was ever claimed or realised in respect of the same, a rent-free grant may be reasonably inferred from the long possession without payment of rent. **Nawab Ali v. Maharajah Birendra Kishore Manikya Bahadur**, 24 Ind. Cas. 424.

MOOKERJEE and BEACHCROFT, JJ.

References:—10 W.R. 61=1 B.L.R. (S.N.) ii; 14 W.R. 108, F.

(43) *Under-raiyati if transferable—Transfer of under-raiyati, effect of relinquishment—Right of raiyati to enter on land—Bengal Tenancy Act (VIII of 1885), S. 49, application of—Ejectment of under-raiyat.*

An under-raiyati holding is not transferable.

Where an under-raiyat transfers his whole holding, the landlord of the holding can sue in ejectment without reference to S. 49 of the Bengal Tenancy Act which in such a case has no application. **Srimati Aminunnessa v. Jinnat Ali**, 19 C.W.N. 43=20 C.L.J. 548.

HOLMWOOD and CHAPMAN, JJ.

(44) *Long possession without payment of rent—Grant, rent-free—Presumption.*

The principle that long possession without payment of rent may justify the inference that the possessor holds under a rent-free grant, has no application where the fact of possession without payment of rent may be attributed to

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a lawful origin other than a rent-fee grant. **Girija Nath Roy Chowdhury v. Chandi Charan Laha**, 24 Ind. Cas. 286.

MOOKERJEE and BEACHCROFT, JJ.

- (45) *Non-transferable holding—Transfer—Ejectment by landlord—Limitation Act (1908), S. 18.*

A landlord suing in ejectment a purchaser of a non-transferable holding cannot succeed unless he makes out a case under S. 18, Limitation Act, where the purchase took place more than 12 years before the suit. **Panchakari Chatterjee v. Maharaj Bahadur Singh**, 19 C. W.N. 136.

MOOKERJEE and BEACHCROFT, JJ.

- (46) *De facto landlord—Tenant let into possession bona fide, whether trespasser.*

A tenant let into possession bona fide by a de facto landlord is not a trespasser but has a good title. **Sukumari Ghose v. Haladhar Mandal**, 24 Ind. Cas. 434.

CARNDUFF and CHAPMAN, JJ.

Reference:—20 C. 703, Appl.

(47) *Adjustment of accounts—Money left in deposit with tenant for payment to superior landlord—Default by tenant—Suit by superior landlord against landlord of tenant and realization of amount—Subsequent suit by landlord for amount paid to superior landlord, against tenant—Character of amount left with tenant, whether rent or not—Subsequent suit, whether one for rent or damages—Limitation—Contract Act, S. 46—Limitation Act, 1877, Art. 115. **Lachmi Misir v. Deoki Kuar**, 19 Ind. Cas. 752=19 C.W.N. 174. See Final Part, 1913, Col. 748.*

(48) *Suit for possession—Plea of tenancy and limitation—License—Status of tenant if may be obtained by possession—User of land—Erection of structures to reside—Consent of plaintiff's predecessor—License, different kinds of. **Moti Lal Roy v. Kalu Mandar**, 19 Ind. Cas. 853=19 C.L.J. 321. See Final Part, 1913, Col. 749.*

(49) *Enhanced rent, claim for—Contract—Garden and bastu land—Garden converted into bastu land—Tenant, if liable to pay fair rent. **Maharaja Manindra Chandra Nandi v. Jagannath Khan**, 18 C.L.J. 324=21 Ind. Cas. 527. See Final Part, 1913, Col. 750.*

(50) *Possession without a patta—Property hypothecated for payment of rent—Suit to enforce hypothecation, maintainability of. **Sri Kishun Das v. Yakub Khan**, 11 A.L.J. 769=35 A. 505=21 Ind. Cas. 456. See Final Part, 1913, Col. 751.*

(51) *Presumption—Rent free—'Belagan' entry of, in settlement record—Kabillagan,—'Lakheraj'. **Keerwar Bhagat v. Sheo Prosad Lal**, 18 C.L.J. 166=21 Ind. Cas. 415=18 C. W.N. 918. See Final Part, 1913, Col. 751.*

(52) *Presumption—Rent, fixity of—Long payment of rent at uniform rate—Patta found false*

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—*Abandonment and surrender—Non-transferable occupancy holding, transfer of, effect of—Bengal Tenancy Act (VIII of 1885), Ss. 85, 87—Sub-lease by a raiyat, invalid—Under-raiyat's position—Court, if can accept part of written statement. **Prao Krishna Saha v. Mukta Sundari Dassya**, 18 C.L.J. 193=21 Ind. Cas. 544. See Final Part, 1913, Col. 752.*

(53) *Danacandi and batai systems of tenancy—Presumption as to contract of tenancy from contract of tenancy in respect of adjoining lands—Record of rights published after institution of suit, if can be relied on—Non-attendance of landlord at apportionment—Liability of tenant, if he appropriates whole of crops—Bengal Tenancy Act (VIII of 1885), S. 69. **Raja Kamaleshwari Pershad Singh v. Kanhari Singh**, 17 C.W.N. 1159=20 Ind. Cas. 171=19 C.L.J. 348. See Final Part, 1913, Col. 753.*

(54) *When implied contract presumed—Consideration—Right to revert to waram rate. **Sitharamrazu Lingarazu v. Raja Venkatadri Appa Row Bahadur**, (1913) M.W.N. 645=21 Ind. Cas. 36. See Final Part, 1913, Col. 754.*

(55) *Raiyat at fixed rates—Pleading—Higher status pleaded—If tenant can prove lower status of occupancy raiyat. **Ichhamoyee Debee v. Krishna Kamini Debee**, 18 Ind. Cas. 377=18 C.L.J. 536=18 C.W.N. 358. See Final Part, 1913, Col. 754.*

(56) *Prescription—Acquisition of limited interest of tenant by 12 years' possession. **Kali Charan Shaha v. Dabiruddin Ahammad**, 18 Ind. Cas. 616=18 C.W.N. 654. See Final Part, 1913, Col. 756.*

(57) *Taluk—Permanent tenure—Purchaser of portion—Rent suit—Purchaser not made party if affected. **Budayar Rahman v. Karam Ali**, 18 C.L.J. 271=21 Ind. Cas. 47. See Final Part, 1913, Col. 758.*

(58) *Raiyati interest—Land not agricultural or horticultural—Garden not permanent—Act VII (B. C.) of 1868, Ss. 12, 14. **Chandra Kumar Aich v. Chaitanya Charan De**, 18 C.L.J. 233=21 Ind. Cas. 542. See Final Part, 1913, Col. 758.*

(59) *Holding consisting of sir land—Position of tenant—Suit for ejectment—Jurisdiction—Ss. 62, 63, 69, C.P. Tenancy Act. **Narayan v. Bisram**, 9 N.L.R. 158=21 Ind. Cas. 607. See Final Part, 1913, Col. 772.*

(60) *Adverse possession—Agent of landlord collecting rents and accounting for them to landlord—Adverse title by the agent during continuance of tenancy—Non-payment of rent by agent to landlord—Landlord's right to recover lands at the end of tenancy. **Krishna-dixit Balidixit v. Balidixit Wamandixit**, 15 Bom. L.R. 1016=21 Ind. Cas. 763=38 B. 53. See Final Part, 1913, Col. 772.*

(61) *Estoppel—Non-transferable holding—Mortgages and purchaser of equity of redemption*

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—Mortgagee, if can question transfer of rights. **Sheikh Jamahar v. Sheikh Nazir**, 18 C.L.J. 512=21 Ind. Cas. 960. See Final Part, 1913, Col. 773.

(62) *Rent, suspension of—Tenant, dispossession of—Dispossession.* **Godai Molla v. Amjuddi Howladar**, 18 C.L.J. 509=21 Ind. Cas. 957. See Final Part, 1913, Col. 773.

(63) *Right to improvements—Buildings to be removed when—Right of ownership in them—English and Indian Law.* **Angammal v. Malic Muhammed Syed Islami Saheb**, (1913) M.W. N. 974=14 M.L.T. 418=25 M.L.J. 625=21 Ind. Cas. 583. See Final Part, 1913, Col. 774.

(64) *Civ. Pro. Code, 1908, S. 98—High Court Judges, difference between—Practice as to reference to third Judge, change of—Case to be conditionally decided and point only to be referred—Bengal Tenancy Act (VIII of 1885), S. 153—Suit by lessee of landlord for rent against tenants, making landlord party—Tenants contesting validity of lease—Decree, if appealable—Ex parte rent decree, if res judicata on the question of relationship of landlord and tenant.* **Muhammad Gauhar Ali v. Samiruddin Sheikh**, 18 C.W.N. 33=22 Ind. Cas. 383. See Final Part, 1913, Col. 775.

(65) *Agreement between patnidar and another to sell patni—Receipt of profits by intending purchaser—Liability of intending purchaser for rent—Transfer of Property Act, S. 54—Admissions of intending purchaser that he is owner, whether can give him title.* **Ananda Chandra Roy v. Syed Abdulla Hossein Chowdhury**, 20 Ind. Cas. 679=41 C. 143. See Final Part, 1913, Col. 775.

(66) *Disclaimer, what is—Denial of relationship of landlord and tenant, if amounts to disclaimer of landlord's title—Forfeiture—Adverse possession—Limited interest.* **Protap Narain Mukerjee v. Srimati Biraj Dasi**, 20 Ind. Cas. 823=19 C.L.J. 77. See Final Part, 1913, Col. 777.

(67) *Service tenure—Darmilla inam lands—Dispensation of services—Right to eject tenants.* **Gajapathi Maharaju Garu v. Sondi Prahlada Bissoyi Ratpo**, 14 M.L.T. 562=21 Ind. Cas. 833=(1914) M.W.N. 179. See Final Part, 1913, Col. 777.

(68) *Lease prior to passing of Transfer of Property Act—Non-payment of rent—Relief against forfeiture.* **Ramakrishna v. Baburaya**, 23 M.L.J. 715=12 M.L.T. 656=17 Ind. Cas. 947=24 Ind. Cas. 139. See Final Part, 1912, Col. 717.

(69) *What amounts to adverse possession by tenant.* **Raja of Venkatagiri v. Mukku Narasayya**, 8 M.L.T. 258=7 Ind. Cas. 202=37 M. 1. See Final Part, 1910, Col. 767.

(70) *Rent, suit for—Limitation—Date when rent becomes due according to tenancy—End of Fasli—Computation from former date—Suit for rent for Faslis prior to 1908—Suit instituted after Madras Act I of 1908 (Estates Land)—*

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Tender of patta—Not necessary. **T. Z. Khanthimathinatha Pillai v. Muthusamia Pillai**, 12 M.L.T. 437=(1912) M.W.N. 960=16 Ind. Cas. 934=37 M. 540. See Final Part, 1912, Col. 712.

(71) *Rent-free tenure—Tenure holder if liable to pay rent for accreted land—Settlement of alluvial land by trespasser—Rights of raiyat bona fide taking settlement.* See ACCRETION, No. 1, 19 C.L.J. 595.

(72) *House fallen in earthquake—Liability of tenant for rent.* See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 8, 54 P.W.R. 1914.

(73) *Landlord assisting in dispossessing tenant—Suit by tenant—Limitation.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 105, 21 Ind. Cas. 367.

(74) *Meaning of—Usufructuary mortgagee if a landlord—Co-sharer landlords, who are—Usufructuary mortgagee of a portion from a co-sharer if a co-sharer landlord—Decree for rent obtained by such mortgagee how to be executed.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 78, 18 C.W.N. 1016.

(75) *Kabuliat taken at enhanced rate on promise to grant pattach including extra land in tenants holding—Grant of pattach but not including promised land—Promised land in tenant's possession—Suit for recovery—Pattach invalid—Oral settlement before pattach whether effectual.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 17, 23 Ind. Cas. 579.

(76) *Alteration of rent in respect of alteration in area—Suit for assessment of rent—Maintainability.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 31, 20 C.L.J. 296.

(77) *Suit for additional rent for increased area—Excess of land found in tenants' possession—Standards of measurements same on both occasions—Allowance for difference in systems of measurement if to be granted.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 32, 23 Ind. Cas. 794.

(78) *Non-transferable holding—Mortgage of portion if operates as forfeiture—Mortgagee if entitled to make deposit to prevent sale of holding in execution of rent decree—Contract of tenancy made after passing of Act VIII of 1885 (B.C.) but before commencement of the Act—Effect.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 96, 24 Ind. Cas. 9.

(79) *Transfer of permanent tenure—Tenant whether transferor or transferee—Tender of rent by transferee coupled with demand of statutory receipt if valid tender.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 5, 19 C.W.N. 112.

(80) *Joint landlords, who are—Revenue paying estates—Lands falling under more than one estate—One estate sold for arrears of revenue—Purchaser whether joint landlord with proprietors of other estates.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 62, 24 Ind. Cas. 281.

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(81) *Vāram patta*—Utilization of portion of nanjai holding as seed bed—Landlord's right to claim damages for non-cultivation of the Nathankal plots—Burden on landlord. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 1, 27 M.L.J. 414.

(82) *Vāram* agreement—Condition that ryot should cultivate the land in due season—Validity—Breach of condition—Measure of damages. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 2, 27 M.L.J. 415.

(83) 'Under-tenure holder,' meaning of—Mortgagee with possession—Intermediate landholder—Tenant's right to pay him. See ACT V OF 1984 (MADRAS LOCAL BOARDS), No. 2, (1914) M.W.N. 939.

(94) Tenant's rights—Common law principle. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANT'S IMPROVEMENTS), No. 5, (1914) M.W.N. 160.

(85) Landlord whether bound to tender patta before suing for rent—Excessive distraint whether can be set aside altogether. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 39, 16 M.L.T. 440.

(86) Tenant failing to cultivate holding held on rent payable in kind—Landlord's remedy. See ACT XXII OF 1886 (ODDU RENT), No. 3, 17 O.C. 55.

(87) Rent payable—Suit for recovery of immoveable property from tenant—Valuation of suit—Court-fee. See ACT II OF 1901 (AGRA TENANCY), No. 21, 12 A.L.J. 933.

(88) Payment of rent to third person—Denial of landlord's title to his knowledge—Adverse possession. See ADVERSE POSSESSION, No. 4, 22 Ind. Cas. 796.

(89) *Agraharamdars*—Suit to eject tenants—Jurisdiction—Presumption—Land revenue alone granted—Terms of grant—Evidence—Tenants whether affected. See AGRAHARAMDARS, No. 1, 26 M.L.J. 99.

(90) Rent deed in the name of benamidar—Payment of rent to real owner—Effect. See BENAMI TRANSACTIONS, No. 4, 26 M.L.J. 597.

(91) Suit for possession of house against trespasser—Decree on compromise in which defendant admitted plaintiff's right on condition of his allowing him to remain in possession as tenant—Effect—Dispossession of tenant, suit for. See CIV. PRO. CODE (1908), No. 69, 12 A.L.J. 31.

(92) Lease—Dispossession—After-acquired title of lessor—Right of lessee—Defendant found to be tenant of some land—Under-plaintiff—Burden of proving that land sought to be recovered is outside the tenancy. See CIV. PRO. CODE (1908), No. 57, 19 C.L.J. 408.

(98) Lease for 15 years—Determination of tenancy—Provision for notice to quit after expiry of 15 years—Notice given prior to the

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expiry—Invalidity—Tenancy not determined. See CIV. PRO. CODE (1908), No. 177, 26 M.L.J. 467.

(94) Landlord suing to recover possession under forfeiture clause—Second suit to recover rent—Same cause of action—Second suit barred. See CIV. PRO. CODE (1908), No. 248, 16 Bom. L.R. 454.

(95) Rule *res judicata*, whether applicable, to all stages of suit—Suit for rent—Defence of eviction and consequence suspension of rent—Previous suit by tenant against landlord for possession of land as included within tenancy—Dismissal of suit. See CIV. PRO. CODE (1908), No. 39, 24 Ind. Cas. 243.

(96) Creation of relation of landlord and tenant by decree—Law applicable. See CONSENT DECREE, No. 1, 16 Bom. L.R. 668.

(97) Water tax paid to Government by landlord—Not entitled to recover from tenant. See CONTRACT ACT, No. 65, (1914) M.W.N. 66.

(98) Zemindar's suit for ejectment of tenant—Compromise of suit—Tenant agreeing to pay a certain sum of money—Whether opposed to public policy. See CONTRACT ACT, No. 21, 12 A.L.J. 331.

(99) Rent decree against tenant for certain mouza—Subsequent purchase of mouza by stranger—Payment of decretal amount by the stranger—Liability of tenant for such amount. See CONTRACT ACT, No. 57, 22 Ind. Cas. 795.

(100) Money spent by landlord under orders of Municipal Board—Liability of tenants—Suit for the money whether of Small Cause nature. See CONTRACT ACT, No. 58, 12 A.L.J. 931.

(101) Agreement to forego portion of rent—Validity—No consideration necessary. See CONTRACT ACT, No. 49, 16 M.L.T. 184.

(102) Joint tenants—Joint and several liability of tenants—Suit against one tenant to pay the whole rent—Power to order other tenant to be added as a co-defendant—Whereabouts of other co-defendant not known—Discretion of Court—O. I, r. 10, Civ. Pro. Code. See CONTRACT ACT, No. 40, 107 P.R. 191A.

(103) Landlords collecting separately their sharers of rent if can jointly sue the tenants. See CONTRIBUTION, No. 5, 20 C.L.J. 305.

(104) Letting out by one co-sharer—Jungle and waste land—Land reformed—Acquiescence. See CO-SHARERS, No. 3, 19 C.L.J. 118.

(105) Right to crush the sugarcane and the expression and boiling of the juice—Customary easement. See EASEMENTS ACT, No. 6, 12 A.L.J. 963.

(106) Suit by yearly tenant for ejectment—Suit brought 8 years after dispossession—Defendant also yearly tenant—Proof of title—Present right to possession—*Jus tertii* relied on by defendant. See EJECTMENT, No. 2, 16 Bom. L.R. 132.

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(107) Suit for possession — Custom — *Ikrar malikan deh*—Estoppel by acquiescence—Construction of deed. See EJECTMENT, No. 1, 21 Ind. Cas. 256.

(108) Suit in ejectment based on tenancy not proved—Proof of title to eject as trespasser not permissible. See EJECTMENT, No. 3, 21 Ind. Cas. 560.

(109) Unregistered Kabuliya—Rent payable—Admissibility of oral evidence. See EVIDENCE, No. 4, 19 C.L.J. 428.

(110) Execution of muchilika by tenant whether estops him from raising plea of occupancy. See INAM, No. 1, 22 Ind. Cas. 369.

(111) Landlord's right to interest on arrears of rent—Effect of Ss. 67, 68, Bengal Tenancy Act. See INTEREST, No. 1, 23 Ind. Cas. 108.

(112) Suit by one co-sharer to eject tenant—Other co-sharer made party defendant—Sale prior to suit by tenant of his right in favour of the other co-sharer—Maintainability of suit in Revenue Court. See JURISDICTION OF REVENUE COURTS, No. 1, 26 M.L.J. 435.

(113) Expiration of lease—Lessee's right to eject a trespasser—Acquiescence of landlord—Effect. See LEASE, No. 10, 37 M. 281.

(114) Registered lease—Suit for rent—Limitation. See LIMITATION ACT (1908), No. 106, (1914) M.W.N. 323.

(115) Fixed rate holding—Sub-tenancy in *sir* holding—Acquisition of fixed rate holding—Land mortgaged by sub-tenant of *sir*—Effect of mortgagee continuing in possession. See MORTGAGE (GENERAL), No. 34, 23 Ind. Cas. 864.

(116) Mortgage—Tender of full amount due—No cessation of relationship of mortgagor and mortgagee—Suit by latter against the former for recovery of possession and for rent—Tender no defence to such suit—Court Fees Act, S. 7, cl. XI (cc), suit under—Title whether can be decided in such suit. See MORTGAGE (GENERAL), No. 38, 27 M.L.J. 475.

(117) Mortgagee purchasing in execution of mortgage decree—Landlord obtaining rent decree against tenant—Purchase by landlord in execution of rent decree—Priority of title—Right of purchaser in execution of mortgage decree to redeem rent decree. See MORTGAGE (REDEMPTION), No. 4, 21 Ind. Cas. 126.

(118) Occupancy tenant transferring holding and giving notice of transfer to landlord—Liability for rent subsequent to transfer. See OCCUPANCY, No. 5, 16 M.L.T. 192.

(119) Patni tenure—Sale under Reg. VIII of 1819—Possession taken by Zamindar—Realisation of rent by him—Sale set aside subsequently—Suit for rent by *darpatnidar* against raiyats for period between sale and its setting aside—Whether relationship of landlord and tenant between *darpatnidar* and raiyats ceases. See REGULATION VIII OF 1819 (PATNI), No. 7, 22 Ind. Cas. 908.

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(120) Land of permanent tenure^a washed away—Abatement of rent—Re-formation *in situ*—Title to land—Right of landlord to enhance rents. See REGULATION XI OF 1825 (BENGAL ALLUVION AND DILUVION), No. 2, 18 C.W.N. 369.

(121) Decision as to quantity of land by Revenue Officer—Non-acceptance of rent—Relationship of—Jurisdiction of Civil and Revenue Courts. See RES JUDICATA, No. 7, 19 C.L.J. 244.

(122) Temporary settlement—Permanent lease—Omission to make entry in settlement records—Effect—Contractual obligation. See SETTLEMENT, No. 1, 19 C.L.J. 308.

(123) Assignee from tenant if may sue landlord for recognition of his tenant rights and declaration of incidents of tenancy. See SPECIFIC RELIEF ACT, No. 21, 18 C.W.N. 596.

(124) Tenant by suffrance—Notice to quit determines tenancy—Position of tenant after determination of tenancy—Liability for damages after determination—*Res judicata*—Rent suit—Basis of title a *thika*—Suit dismissed for want of proof—Subsequent suit for posterior period. See TRANSFER OF PROPERTY ACT, No. 90, 22 Ind. Cas. 7.

(125) Putli and mokurari—Mokurari created before T.P. Act—Both interests kept alive and separate—Acquisition of both interests piecemeal at different time—Merger—Putni—Kabuliya—Construction—Land acquired for "culverts, embankments or roads"—Words whether illustrative or exhaustive. See TRANSFER OF PROPERTY ACT, No. 6, 22 Ind. Cas. 966.

(126) Non-payment of rent and transfer—Grounds of forfeiture—Payment in Court when suit filed—Discretion of Court—Transfer by one of several lessees—Right to eject other lessees. See TRANSFER OF PROPERTY ACT, No. 101, 12 A.L.J. 650.

(127) Homestead land—Transferability—Tenancy created before T.P. Act. See TRANSFER OF PROPERTY ACT, No. 5, 23 Ind. Cas. 246.

(128) Right to cut trees planted by tenant. See TRANSFER OF PROPERTY ACT, No. 94, 16 Bom. L.R. 595.

(129) Improvements by tenant—Fixtures—Right to remove after determination of tenancy—Equitable right. See TRANSFER OF PROPERTY ACT, No. 93, 23 Ind. Cas. 762.

(130) Tenancy from year to year for a fixed period—Tenant holding over—Nature of tenancy—Tenancy how determinable—Forfeiture—Waiver, what amounts to. See TRANSFER OF PROPERTY ACT, No. 88, 12 A.L.J. 1139.

(131) Suit for ejectment—Holding over—Presumption of yearly payment of rent—Calculation of 15 days' notice—Exclusion of day of service—Notice sent by post—Presumption—Admissibility in evidence. See TRANSFER OF PROPERTY ACT, No. 89, 20 C.L.J. 455.

Landlord and Tenant—(Concluded).

(192) **Suit for rent**—No issue between parties set up by the tenant as to right to receive rent—Tenant if can invite Court to decide as to the ownership of rent. See WILL, No. 6, 20 O.L.J. 148.

(188) See LEASE.

Land "Redemption and Foreclosure" Regulation.

See REG. XVII OF 1806.

Land Registration Act.

See BEN. ACT VII OF 1876.

Land Revenue Act.

See C. P. ACT XVIII OF 1881.

See N.W.P. ACT III OF 1901.

See PUN. ACT XVII OF 1887.

Land Revenue Assessment Act (Madras).

See MAD. ACT I OF 1876.

Land Revenue Assessment Regulation.

See REG. I OF 1801.

See REG. II OF 1819.

See REG. III OF 1828.

Land Revenue Code (Bombay).

See BOM. ACT V OF 1879.

Land Revenue Sales Act (Bengal).

See BEN. ACT XI OF 1859.

See BEN. ACT VII OF 1863.

Land Revenue Settlement Regulation.

See REG. VII OF 1822.

Land Settlement Act.

See BEN. ACT XXXI OF 1858.

Laws Act.

See BUR. ACT XIII OF 1898.

See OUDH ACT XVIII OF 1876.

Law Reports.

Copyright in. See COPYRIGHT, No. 1, 18 C.W.N. 1078.

Lease.

(1) *Lease for a term—Clause allowing removal of fixture after expiry of lease, if a renewal clause—Notice of a lease—Notice of terms of a lease—Estoppel—Ouster—Suit for joint possession.*

Terms in a lease giving the lessee if unwilling at the end of the term to take a fresh settlement, the right to take away the fixtures put on the land, cannot operate as a covenant under which the lessee could compel the lessor to grant a fresh term.

A party having notice of a lease must be taken to have notice of the terms of the lease.

The doctrine of estoppel by conduct does not apply in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact.

Lease—(Continued).

A suit for joint possession is not maintainable unless there is actual ouster.

If it is stated by the defendant in possession that the plaintiff has no right and if he is refused leave to enter the land, it is a case of actual ouster and a suit for joint possession will lie. **Sarat Chandra Mukhopadhyaya v. Rajendra Lal Mitra**, 18 C.W.N. 420=21 Ind. Cas. 920.

FLETCHER and CHATTERJEA, JJ.

(2) *Lease—Forfeiture clause—Re-entry, right of—Stipulation to grant fresh lease on onerous terms on application—Lessee, transfer by, after forfeiture and pending application—Title of purchaser.*

A executed a *kabuliat* in favour of the Government. The lands to which it related were in the Sunderbuns and the lease was for the purpose of reclamation. There was a provision that, on failure to comply with the condition as to clearing contained, in the lease, the lessee was to forfeit all rights in the land under the existing lease, while the Government should have the right of immediate re-entry. But this was subject to a provision that, if the lessee gave up the lease to the Sunderbuns Commissioner or other officer appointed by the Government within one month of the date on which notice of the forfeiture should be given to him, and should demand a fresh lease, that fresh lease should be given to him on the conditions that the lessee should forfeit all claims to continue possession of the land free of assessment and that his holding should at once become liable to an annual payment at the lowest rate of assessment therein indicated, and should continue liable to payment at such rate for the remaining free term of the lease, and should also be liable to a payment at a rate of 20 per cent. higher than that which had been fixed in the existing lease for each period up to the termination of the settlement. There was a failure to comply with the cleaning condition.

Notice was given to the sons of the original lessee on the 22nd August 1906, the original lessee having died prior to this. Within one month, the application was made by the sons for which provision was made in the above clauses. This led to a prolonged negotiation which resulted on the 9th February 1907, in a new lease. In the meantime, however, the second defendant purchased at a sale for arrears of cesses on the 19th March 1906, and in February 1907, the sons of the original lessee sold their interest under the lease to the plaintiff. The sale to defendant No. 2 in execution was of no valid effect for lack of observance of the statutory requirement. In a suit brought by the plaintiff for a declaration that the auction sale in execution of the certificated decree was fraudulent and irregular and that the sale might be set aside:

Held, that the plaintiff was entitled to possession, as claiming under the original lessee and his sons.

Lease—(Continued).

That the plaintiff, even before the formal lease was granted in performance of the obligation, was entitled to possession by virtue of his right to possession under the lease in the circumstances that happened. **Upendra Nath Bose v. Sallendra Nath Ghose**, 19 C.L.J. 219=28 Ind. Cas. 622.

JENKINS, C.J., and MOOKERJEE, J.

- (3) *Unregistered lease deed—Admissibility in evidence to prove nature of lessee's possession.*

In a suit for recovery of a house site from defendants, the defendants pleaded that it belonged to them and that plaintiff was in possession of the site under an unregistered rental agreement alleged to have been executed by plaintiff. *Held* that the lease required registration and was not admissible to prove the nature of plaintiff's possession. **Yuruba Venkata Reddy v. Maddi Veeranna**, 15 M.L.T. 192=23 Ind. Cas. 376.

SANKARAN NAIK and BAKEWELL, JJ.

Reference:—17 M.L.J. 469, R.

- (4) *Lease—Not registered—Whether admissible to prove agreement to lease—Registration Act, S. 49, cl. (c).*

An unregistered lease cannot be used as evidence of even an agreement to lease. **Yasudev Reddi alias Ramasami Reddi v. Nallappa Reddi**, 15 M.L.T. 220=23 Ind. Cas. 336.

SADASIVA AIYAR and TYABJI, JJ.

Reference:—35 M. 63, R.

- (5) *Lessor and lessee—Can a lessor get a decree for same rent both against lessee and sub-lessee—English doctrine of lease of remainder of term amounting to an assignment.*

* Where the lessor of certain paddy lands sought to obtain decrees for the same rent against both the lessee and the sub-lessee:

Held, that the plaintiff can have judgment only against one and not against both; and he, in this case, having already obtained a decree against the lessee, cannot get one against the sub-lessee.

Held, it is unnecessary and inappropriate to import into Indian Law the technical rule of English Law, viz.—a sub-lease of the remainder of a term would operate as an assignment of the term. **Arachan v. Maung Po Win**, 7 Bur. L.T. 85=24 Ind. Cas. 51.

ORMOND, J.

Reference:—3 L.B.R. 90, Diss.

- (6) *Lease for a term—Heritability—Transferability.*

Where a lease is created for a definite term, it is heritable (a).

A granting of lease for general purposes and for a term of 105 years from 1862 to 1967 is sufficient to show that the interest is assignable; but it is much more so, when the conduct of the parties points to its having been regarded

Lease—(Continued).

on both sides as transferable and treated as such (b). **Khitish Chunder Roy v. Bhikan Mamud Pramanik**, 19 C.L.J. 448.

JENKINS, C.J., and MOOKERJEE, J.

References:—(a) 3 M.I.A. 261=6 W.R. (P.C.) 48, F. (b) 7 B.L.R. 152=12 W.R. 495, F.

- (7) *Document—Construction—Agreement between lessor and lessee—Compensation to go to lessor if land acquired by Municipality or Board of Local Government—Acquisition, by Government of Bengal—Compensation payable to lessee.*

The terms of a lease were that "if in future the entire land or any portion thereof be acquired at any time by the Municipality or by any Board of any Local Government, the Compensation awarded should go to the lessor." A portion of the land was acquired by the Government of Bengal for the purposes of a Muhammadan Hostel.

Held, that, as the question in construing a deed always is, what is the meaning of what the parties have said and not what the parties meant to say, the compensation should be awarded to the lessee. **Dwarkanath Sen Gupta v. Secretary of State for India in Council**, 22 Ind. Cas. 956.

CARNDUFF and RICHARDSON, JJ.

References:—(1961) 9 H.L.C. 114 (146)=31 L.J.Ch. 269=11 Eng. Rep. 671=131 R.R. 72, F.

- (8) *Lessee's title under expired lease—Trespasser, right to obtain decree in ejectment against.*

At expiry of a lease does not necessarily imply a determination of the right to possession. A lessee holding under a time-expired lease can, therefore, maintain a suit in ejectment against a mere trespasser. **Bhogavalli Venkayya v. Kudapa Sattaya**, 22 Ind. Cas. 789.

ABDUR RAHIM and SPENCER, JJ.

References:—32 L.J. Ex. 156=1 H. & C. 736=9 Jur. (N.S.) 207=8 L.T. 87=11 W.R. 880; 15 Q.B.D. 494=54 L.J.Q.B. 509=50 J.P. 84, R.

- (9) *Nim-howla lease, stipulation in, against voluntary alienation by tenant to person other than landlord—Purchase of tenure by stranger at sale in execution of money-decree—Purchaser if acquires good title—Landlord if can sue original tenants for rent and obtain decree binding on tenure.*

The plaintiff purchased at an execution sale the right, title and interest of the tenants in a *nim-howla* tenure. Notwithstanding the purchase by the plaintiff which was duly notified to the landlord, the latter brought a suit for rent against the tenants and obtained a decree. The plaintiff brought a suit for declaration that this decree was not binding on him and that the tenure in his hands was not liable to be sold in execution thereof. The lease which treated the *nim-howla* provided as

Lease—(Continued).

follows: "Let it be known that if you find it necessary to transfer the *nim-howla* tenure, you will transfer it to me for proper price. You will not be at liberty to transfer it to any person other than myself. If you transfer it to any other person, such transfer will be invalid."

Held, that there being no covenant against involuntary alienations and no covenant for re-entry, the plaintiff acquired a good title by his purchase, and consequently it was not open to the landlord to sue the original tenants with a view to obtain a decree whereby he could proceed against the tenure in the hands of the plaintiff. **Promode Ranjan Ghosh v. Aswin Kumar Nag**, 18 C.W.N. 1138.

MOOKERJEE and BEACHCROFT, JJ.

(10) Expiration of lease—Lessee's right to eject a trespasser—Acquiescence of landlord.

The expiration of the lessee's lease deed does not necessarily imply the expiration of his right to possession, and as against parties who are in no better position than trespassers, he is entitled to a decree in ejectment, especially when the landlord acquiesces in the lessee getting a decree, and the trespassers are not in a position to resist the landlord's right. **B. Venkayya v. K. Sateyya**, 37 M. 281.

ABDUR RAHIM and SPENCER, JJ.

References:—(1863) L.J. 32 Exch. 156; (1885) 15 Q.B.D. 294, R.

(11) Res judicata—Ejectment—Lease for certain period—Before expiry of period new lease executed—Condition to enhance rent on completion of certain repairs, etc.—Suit for ejectment—Decision that rent could not be enhanced under second lease as no repairs had been made—Second suit for ejectment—Question whether tenant held in continuation of first lease or as trespasser—Decision in first suit not res judicata—Interpretation of second lease—Payment of additional rent for additional rooms built under new lease—Defendant not bound to occupy unless rooms duly completed.

The premises in suit consisted of an original building and a new building which was erected some time in 1909. The defendant had been a tenant of the original building under a lease for three years from the 1st of April 1907 to 1st March 1910 at a rental of Rs. 110 per mensem. During the continuance of this lease in April 1909 the plaintiff, the proprietor of the premises, entered into a further contract in writing with the defendant to let him the said premises from the 1st of October 1909 to the 30th September 1917 at an enhanced rent of Rs. 170 per mensem. There were various conditions in this second lease as to completion of certain repairs and additions to the existing building.

In January 1910 the plaintiff sued to eject the defendant, but it was held that the defendant had not incurred any forfeiture of his rights to hold as a tenant, the condition for the payment of enhanced rent not having come into force,

Lease—(Continued).

because the plaintiff had not carried out the additions agreed upon.

The plaintiff again sued for ejectment and recovery of rent and damages. In this suit the contention of the plaintiff was that the second lease never came into effect at all and that, as the first lease determined on the 31st March 1910, the defendant was in possession as a trespasser and liable to ejectment. In support of this contention plaintiff relied on the judgment in the previous case. The defendant contended that the second lease was a mere modification and in continuation of the first, that by it the period fixed in the earlier lease was extended and that he was entitled to occupy the building at the original rent of Rs. 110 per mensem until the 30th September 1917:

Held, that all that was held in the previous case was that the defendant was not holding under the new lease so far as the condition as to enhanced rent was concerned; but there was no necessity in that case to come to any decision about the period for which the defendant was holding and there was no discussion of any sort upon the point; and that the question whether the defendant's tenancy determined on the 31st March 1910, therefore, was not *res judicata*.

Held further, that there was nothing whatever in the second lease to show that the term of eight years was to be dependant on the plaintiff carrying out the additions and repairs specified and that such could never have been the intention of the parties:

Held, also, that the defendant was not bound to occupy the new rooms erected in accordance with cl. 8 of the second lease and to pay a rent for them until they had been duly completed. Moreover the defendant could hardly be expected to spend money on occupying and furnishing the rooms during the pendency of the previous case. **Haji Abdur Rahman v. Mr. W. O'Brien**, 257 P.L.R. 1914 = 146 P. W. R. 1914.

JOHNSTONE and SCOTT-SMITH, JJ.

(12) Registration Act (1908), Ss. 3, 17—Memorandum of arrangement between lessor and lessee, if must be stamped and registered—Reclamation of lease—Rent if enhanceable beyond the maximum fixed—Maurasi mukurari lease—Lease by agent—Apparent authority—Ratification—Knowledge of principal, if necessary for ratification.

A document, dated the 8th March 1885, which did not demise any property and was neither a lease nor an agreement to lease, but was and purported to be a memorandum of an arrangement which had been made with the grantees by the agent of the lessors on their behalf and under which the grantees had taken possession with effect from the 12th April 1884, was admissible in evidence although neither stamped nor registered.

Lease—(Continued).

When land was let out for purposes of reclamation to be effected by the lessees at their expense, though the lessors also undertook to make a contribution thereto, and was to be held for the first four years, without rent, which was thereafter to be progressive till a maximum was reached, and there was no provision for a further rise, the reasonable inference to draw from these circumstances was that the parties intended that when the specified maximum was reached, there would be no further increase.

Every act done by an agent in the course of his employment on behalf of his principal and within the apparent scope of his authority binds the principal, unless the agent is in fact unauthorized to do the particular act and the person dealing with him has notice that in doing so he is exceeding his authority. The grantees in this case were entitled to presume that the agent who had admittedly authority to grant reclamation leases had acted with regularity and within the scope of his authority.

Where ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction by the agent.

Before the principal can be held bound by ratification, he must be proved to have had full knowledge or at any rate means of knowledge of all the essential facts of the transaction into which his agent had entered on his behalf. **Katyayani Debi v. Port Canning and Land Improvement Co.**, 19 C.W.N. 56.

MOOKERJEE and BEACHCROFT, JJ.

- (13) *Covenant, breach of—Covenant not to excavate tank by tenure-holders—Breach of covenant by raiyat—Raiyat unaware of covenant—Who is liable—Bengal Tenancy Act (VIII of 1885), Ss. 178, sub-S. (i), Cl. (d) and 194—Nominal damages—Right, infringement of—No actual damage suffered.*

A tenure-holder undertook in a lease not to excavate tanks in the property. He granted to a raiyat a lease of some land within the tenure, but there was no restrictive covenant as to the excavation of the tank. The raiyat was unaware of any restrictive covenant in the lease of the tenure-holder:

Held, that the tenure-holder and not the raiyat was liable in damages to his lessor for excavation of tank by the raiyat.

S. 178, sub-S. (i), Cl. (d) of the Bengal Tenancy Act is controlled by S. 194.

There is neither privity of contract nor privity of estate between the head lessor and the under-lessee, and hence the under-lessee is not personally liable for the rent reserved by, nor on the covenants contained in, the head lease (a).

Whenever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific damage (b).

Lease—(Continued).

Where there has been a breach of a covenant not to excavate any tank, a plaintiff, though he may not suffer any actual damage, is entitled to nominal damages which is not necessarily small damages. **Akshoy Kumar Chatterjee v. Akman Molla**, 20 C.L.J. 551.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) (1791) 2 Ridgeway Parl. Rep. 310 (831); (1779) 1 Doug. 183, R. (b) (1651) 1 Saunders 346 (b); (1796) 1 Saunders 346 (b) note, R.

- (14) *Lease—Building site—Ejectment—Agreement—Disobedience of orders to occupy—Forfeiture clause—Effect—Charity property—Trustees—Right to sue. Sevathamuthu Asari v. Reverend Masquite*, 13 M.L.T. 506=24 M.L.J. 642=19 Ind. Cas. 721=(1914) M.W.N. 67. See Final Part, 1913, Col. 788.

- (15) *Penalty—Lease, construction of—Agreement, non-performance of. Mir Abdul Aziz v. Karu*, 18 C.L.J. 95=21 Ind. Cas. 443. See Final Part, 1913, Col. 788.

- (16) *Ground rent due by Company under a lease which gave charge for arrears of rent on buildings to be erected on land—Rent forms charge on buildings—Rent to be paid up in priority of unsecured creditors. See ACT VI OF 1882 (COMPANIES), No. 15, 16 Bom. L.R. 643.*

- (17) *Notification issued by Government exempting agricultural leases from registration—Registration Act, subsequently passed—Effect. See ACT X OF 1897 (GENERAL CLAUSES), No. 4, 12 A.L.J. 792.*

- (18) *Sub-lease by under-raiyat—Permanent lease—Validity. See ACT VIII OF 1885 (BENGAL TENANCY), No. 47, 18 C.W.N. 882.*

- (19) *Under-raiyat—Written lease for a term of years—Death of tenant before expiry of term—Heritability of under-raiyati holding—Expiry of lease—Suit for ejectment—Heir if entitled to notice to quit. See ACT VIII OF 1885 (BENGAL TENANCY), No. 21, 20 C.L.J. 328.*

- (20) *Suit for declaration by landholder that lease granted by his agent was without authority—Jurisdiction of Civil or Revenue Court—Res judicata. See ACT II OF 1901 (AGRA TENANCY), No. 9, 23 Ind. Cas. 705.*

- (21) *Defendants lessees within twelve years—No acquisition of title by prescription. See ADVERSE POSSESSION, No. 11, 24 Ind. Cas. 95.*

- (22) *Agreement for partnership in respect of a lease for the farm and sale of drugs—Validity—Agreement by lessee to transfer a portion of the profits or losses resulting from the lease—Discretion of Court in passing preliminary decree. See AGREEMENT, No. 2, 17 O.C. 193.*

- (23) *Agreement by managing director of Company to grant permanent lease—Whether binding on company—Right to specific performance. See COMPANY, No. 6, 24 Ind. Cas. 209.*

Lease—(Concluded).

(24) Suit for possession of leasehold land—Court-fee—Jurisdiction. See COURT FEES ACT, No. 8, 19 C.L.J. 418.

(25) Inamdar and lessee—Increase in quit-rent consequent on enfranchisement—Tenant whether liable for increase. See INAM, No. 5, 28 Ind. Cas. 765.

(26) Lease—Failure of consideration—Suit for refund of consideration—Limitation. See KHORPOSH GRANT, No. 1, 19 C.W.N. 102.

(27) Mining lease—Rights of lessor and lessee. See MINING LEASE, No. 1, 20 C.L.J. 538.

(28) Mortgagor taking benami in Revenue sale—Subsequent sale in execution of mortgage decree—Right of a *bona fide* lessee. See MORTGAGE (GENERAL), No. 46, (1914) M.W. N. 916.

(29) Perpetual lease—Plenary proprietary right transferred—Nominal *malikana* reserved—Deed whether one of sale—Right to pre-emption. See PRE-EMPTION, No. 17, 167 P.L.R. 1914.

(30) Lease—Palmyra trees—Right to take toddy and fruit from—Whether requires registration. See REGISTRATION ACT (1908), No. 7, 16 M.L.T. 237.

(31) 'Term' of the lease—Period for which lessee protected if he fulfils the conditions—Lease by Government in the ordinary way of business—Application of Crown Grants Act. See REGISTRATION ACT (1908), No. 12, 12 A.L.J. 219.

(32) Agreement to grant permanent lease—hereafter—Whether vague and uncertain—Postponement of grant of lease whether refusal to perform contract. See SPECIFIC PERFORMANCE, No. 10, 23 Ind. Cas. 360.

(33) Oral lease for a year with delivery of possession—Renewal every year by annual oral leases—Leases if valid—Non delivery of possession—Holding over—Effect. See TRANSFER OF PROPERTY ACT, No. 92, 18 C.W.N. 858.

(34) Leases created prior to passing of Transfer of Property Act—Vesting of superior and leasehold interests in one person after passing of Act—Doctrine of merger in *mofussil*. See TRANSFER OF PROPERTY ACT, No. 98, 23 Ind. Cas. 612.

(35) Lease—Condition that lessee should dwell on land—Lessee to have no interest on failure to dwell—Failure of lessee to dwell after taking possession whether entails forfeiture. See TRANSFER OF PROPERTY ACT, No. 99, 24 Ind. Cas. 354.

(36) Long lessee whether under-proprietor. See UNDER-PROPRIETARY RIGHTS, No. 1, 22 Ind. Cas. 125.

(37) See LANDLORD AND TENANT.

Legacy.

(1) *Residuary legatee—Right to claim accounts for ascertaining the residuary share—Suit to recover legacy—Limitation—Art. 123, Limitation Act (1908).*

Legacy—(Concluded).

A residuary legatee is entitled to get such an account as is necessary for the purpose of ascertaining what the residuary share is, to which he becomes entitled under a will.

The fact that the executor has filed certain accounts in the testamentary jurisdiction is not a sufficient answer to a suit brought against him for the purpose of enforcing a right to the residue under a will (a).

A suit by a residuary legatee to recover his legacy comes within Art. 123, Limitation Act (1908), and must be instituted within 12 years from the time when the share became payable. *Khetramani Dasee v. Dharendra Nath Roy*, 41 C. 271.

JENKINS, C.J., and MOOKERJEE, J.

References :—(a) (1688) 2 Vern. 47 = 23 E.R. 641 ; 39 C. 597, R.

(2) Administration suit by annuitant legatee—Legacy paid into Court by executor—Power of Court to dismiss suit. See ADMINISTRATION SUIT, No. 1, 26 M.L.J. 312.

(3) Hindu widow holding life estate as legatee—Enlargement of estate by grant from Government subsequent to expiry of original lease—Effect of such grant. See GRANT, No. 6, 12 A.L.J. 717.

Legal Practitioners Act.

See ACT XVIII OF 1879.

Legal Representative.

(1) Judgment-debtor dying without heirs—Property escheating to Zemindar—Zemindar whether legal representative of judgment-debtor. See CIV. PRO. CODE (1908), No. 15, 23 Ind. Cas. 969.

(2) Meaning of the term. See LANDLORD AND TENANT, No. 35, 24 Ind. Cas. 183.

(3) Suit instituted against dead man—Substitution of heirs of defendant—Jurisdiction. See SUBSTITUTION, No. 1, 24 Ind. Cas. 112.

Legitimacy.

(1) *Burden of proof—Illegitimacy of plaintiff set up by defendant—Presumption—Kheval extract from, produced in proof of legitimacy—Admissibility in evidence—Relevancy.*

It is for the defendants, if they set up a case of illegitimacy, to prove that the plaintiffs are illegitimate, for the legal presumption being in favour of legitimacy and marriage, the burden of proving illegitimacy lies on the person interested in making out the illegitimacy (a).

Where an extract from the *kheval*, showing that the plaintiffs were reputed to be the sons of a certain person, was put in evidence to prove the plaintiffs' legitimacy :

Held, that, although it was not shown that the defendants were parties to the mutation proceeding upon which the *kheval* entry was founded, yet the extract was relevant in proof of the legitimacy, inasmuch as it showed that the plaintiffs had succeeded to their reputed

Legitimacy—(Concluded).

father's estate and had been regarded as entitled to succeed. *Aparbal Singh v. Narpat Singh*, 23 Ind. Cas. 972.

LINDSAY, J.C.

Reference :—(a) A.W.N. (1905) 214, F.

(2) Pedigree extracted from settlement record—Presumption—Legitimacy—Parentage as given in memorandum of appeal—Whether proof of legitimacy—Reversion, what must prove. See EVIDENCE ACT, No. 20, 21 Ind. Cas. 374.

(3) Proof of. See EVIDENCE ACT, No. 68, 49 P.L.R. 1914.

(4) Illegitimate son of Hindu by Mahomedan concubine, treated as Hindu and living and marrying a Hindu lady according to Hindu rites—If issue legitimate. See WILL, No. 2, 18 C.W.N. 401.

Letters of Administration.

(1) Grant of letters of administration—Probate and Administration Act (V of 1881), S. 23—Title to property, if Court would go into, in granting administration—Practice. *Nishi Kanta Chatterjee v. Ashu Toah Mukherjee*, 17 C.W.N. 613 = 23 Ind. Cas. 296. See Final Part, 1913, Col. 793.

(2) Order refusing grant of Letters of Administration with will annexed—Decree—Appeal—Court-fee. See ACT X OF 1865 (SUCCESSION), No. 15, 22 Ind. Cas. 98.

(3) Apply equally to real property as much as to personality—Administration when complete. See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), No. 1, 16 M.L.T. 231.

(4) Intestate professing the Hindu religion though he was of a mixed parentage—Grant of letters. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 4, 7 Bur. L.T. 133.

(5) Letters of administration without copy of will—Court if has jurisdiction to decide as to inaccurately drawing up of Letters of Administration. See WILL, No. 6, 20 C.L.J. 148.

(6) Application for—Court will not go into question of title. See WILL, No. 8, 20 C.L.J. 307.

Letters Patent.

1.—BOMBAY.

2.—CALCUTTA.

3.—MADRAS.

—1.—Bombay.

Letters Patent (Amended, cl. 39—Civ. Pro. Code (1908), Ss. 109, 110—Leave to appeal to His Majesty in Council—Interlocutory order—Final order.

An appeal does not lie to His Majesty in Council, under cl. 39 of the Amended Letters Patent, from an order passed by the High Court, rejecting the application made by the legal representatives of a deceased party to an appeal pending before it to have their names brought on the record, inasmuch as the order is not final but interlocutory, and does not affect the

Letters Patent—(Continued).**—1.—Bombay—(Concluded).**

merits of the appeal nor decide any matter in dispute between the parties. *Gangappa Revanshiddappa Hundekar v. Gangappa Malleshappa Hundekar*, 16 Bom. L.R. 195 = 38 B. 421 = 23 Ind. Cas. 373.

HEATON and SHAH, JJ.

—2.—Calcutta.

(1) S. 10—Proceedings under—Sanction to prosecute—Sanction by whom to be granted. See SANCTION TO PROSECUTE, No. 3, 41 C. 446.

(2) Cl. 10—Disciplinary action against Attorney—Procedure to be followed—Scope of the High Court Rules. See ATTORNEY, No. 1, 14 Cr. L.J. 305 = 41 C. 113.

(3) Cls. 10, 39—Review—Civ. Pro. Code, 1908, S. 114, O. XLVII, r. 1—Crim. Pro. Code, S. 195—Order of High Court—Disciplinary jurisdiction—High Court's power to grant leave to appeal to Privy Council against order under cl. 10 of Letters Patent—Privy Council, appeal to—Public Prosecutor of Calcutta—Order granting leave to appeal whether may be reviewed at instance of Public Prosecutor.

Cl. 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter not being of criminal jurisdiction, if it is a final judgment, decree or order of the Court made on appeal or in the exercise of original jurisdiction. A proceeding under cl. 10 of the Letters Patent, under which the High Court is empowered to deal with professional misconduct, does not fall under any of the jurisdiction specified in the Letters Patent, and, therefore, is not governed by cl. 39.

Therefore, no leave to appeal to the Privy Council can be given by the High Court in such a proceeding.

Where the High Court, in a proceeding under cl. 10 of the Letters Patent, has granted sanction to the Public Prosecutor to prosecute an Attorney for alleged perjury, the High Court cannot, under cl. 39 of the Letters Patent, grant leave to the Attorney to appeal to the Privy Council against the order of the High Court.

Where such a sanction was granted to the Public Prosecutor, and under some misconception the High Court granted leave to the Attorney to appeal to the Privy Council :

Held, that the order granting leave was clearly an order affecting the authority which the Public Prosecutor had under the sanction to prosecute the Attorney, and an application for review of the order of the High Court was maintainable at the instance of the Public Prosecutor. *Mr. Hume v. Poreah Chandra Ghosh*, 15 Cr. L.J. 52 = 22 Ind. Cas. 324 = 41 C. 734.

IMAM and CHAPMAN, JJ.

Letters Patent—(Continued).**—2.—Calcutta—(Concluded).**

- (4) *Cls. 15, 16, 39—Order under Chap. VII of the Presidency Small Cause Courts Act—Single Judge of High Court interfering in revision with such order—Order of High Court Judge whether a 'judgment'—Appeal from such order if lies—S. 115, Civ. Pro. Code (1908)—Meaning of 'jurisdiction'—Interference in revision when justifiable.*

Per *Jenkins, C. J.*—The Presidency Small Cause Court is subject to the High Court's appellate jurisdiction. The fair reading of the Charter Act, the Letters Patent and the Presidency Small Cause Courts Act leads to the result that the High Court has a right to interfere by way of revision, and if that interference takes the form of a judgment by a single Judge, that the High Court has the power to deal by way of an appeal with that judgment.

Per *Woodroffe, J.*—An appeal lies, for the revisional is a form of the appellate jurisdiction.

The term 'jurisdiction' in S. 115, Civ. Pro. Code (1908), is used in the ordinary sense, that is, a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit.

In this case an application was made to the Presidency Small Cause Court under Ch. VII of the Presidency Small Cause Court Act. The application was dismissed on the ground that the plaintiff had failed to establish the relationship of landlord and tenant and he had no right to eject the defendants. Plaintiff applied to the High Court under S. 115, Civ. Pro. Code (1908), and a single Judge of the High Court set aside the judgment of the Small Causes Court. *Held*, that this order of the single Judge of the High Court is a 'judgment' within the meaning of cl. 15 of the Letters Patent and an appeal lies from such a judgment (a).

Held, also that, even, assuming that the judgment of the Small Cause Court was erroneous the High Court was not justified in interfering under S. 115, Civ. Pro. Code (1908), and that, therefore, the judgment of the single Judge of the High Court must be set aside (b). *Shew Prosad Bungashidhur v. Ram Chunder Haribux*, 41 C. 323 = 23 Ind. Cas. 977.

JENKINS, C. J., and WOODROFFE, J.

References:—(a) 22 M. 68, F.; 22 B. 891, D.; 21 W.R. 263; 17 M. 100; 13 C.L.J. 90, R (b) 11 C. 61 (P.C.), F.; 20 C. 8, D.; 15 C. W.N. 872, *Expl.*

(5) Cl. 16. See No. 4, *supra*.

(6) Cl. 39. See Nos. 3 and 4, *supra*.

(7) *Cls. 39, 44. See LIMITATION ACT (1908), No. 80, 18 C.W.N. 1066.*

(8) Cl. 44. See No. 7, *supra*.

—3.—Madras.

- (1) *S. 10—Vakil writing a letter to another—Suggestion of his ability to influence Magistrate by improper means—Professional misconduct—Mere glorification of himself and of his powers of advocacy—Effect.*

Letters Patent—(Concluded).**—3.—Madras—(Concluded).**

Where, by a letter written by a Vakil to another soliciting the latter to get him an engagement in a case pending before a particular Magistrate, the writer intended to convey to the mind of the person to whom it was written that the writer was in a position to influence the Magistrate by indirect and improper means.

Held, that the Vakil was guilty of professional misconduct.

A mere glorification of himself and of his professional powers may not constitute an act of professional misconduct. *The President, Vakils' Association, High Court, Madras v. A Vakil of the High Court*, 26 M.L.J. 429 = 23 Ind. Cas. 789 (F.B.).

WHITE, C. J., SANKARAN NAIR and OLDFIELD, JJ.

- (2) *Cl. 12—Suit for damages for trees cut and carried away—Whether suit for 'land'—Jurisdiction—Test.*

Where, on the allegation in the plaint, the title to a land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit, the suit is one for land within the meaning of the words in cl. 12 of the Letters Patent. A suit was brought in this case for the recovery of damages for plaintiff's trees cut and removed by the defendants. *Held*, that this was a suit for land within the meaning of cl. 12. *Srinivasa Aiyangar v. Cunniappa Chetti*, 26 M. L.J. 567 = 15 M.L.T. 411 = 24 Ind. Cas. 895.

SANKARAN NAIR, J.

References:—3 M. 192; 37 B. 675, R.

(3) *Cl. 13—Jurisdiction of District Court and of the High Court in respect of infants. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 5, 18 C.W.N. 1089.*

- (4) *S. 15—Meaning of the term "judgment"—Order as to costs—"Judgment" even if discretionary—Test for awarding costs.*

An order awarding costs, even if discretionary is nevertheless a "judgment" within the meaning of S. 15 of the Letters Patent and is appealable (a).

Where both parties to a case are to blame for litigation, costs should not be awarded to either. *Nathir Sahib v. Kadir Moldeen Rowther*, 22 Ind. Cas. 551.

SADASIVA AIYAR and SPENCER, JJ.

References:—(a) 8 Ind. Cas. 340 = (1910) M. W.N. 696 = 8 M.L.T. 458 = 21 M.L.J. 1 = 35 M. 1; (1908) 1 K.B. 24 = 77 L.J. K.B. 10 = 97 L.T. 769 = 24 T.L.R. 14, F.; 17 M.L.J. 569, Diss.

(5) *Cl. 15—Appeal as to costs when may be preferred. See COSTS, No. 2, 26 M.L.J. 356.*

License

License to use trade-mark—Licensee if may question title of the licensor—Estoppel. See TRADE-MARKS, No. 1, 19 C.W.N. 1.

Licensee.

Licensee building permanent structure—Liability to ejectment. See EASEMENTS ACT, No. 9, 12 A.L.J. 455.

Light.

- Ancient lights—Nature of right—What amounts to infringement—Act done should amount to nuisance. See EASEMENTS, No. 4, 18 C.W.N. 939.

Limitation.

- (1) *Suit filed on last date—Addition of plaintiff after limitation—Minor member of joint Mitakshara family, effect of addition of—Original plaintiff used to collect rent—Civ. Pro. Code, 1882, Ss. 27, 32.*

A suit for rent, which fell due on the 24th September, 1904, was instituted on the 24th September 1907. Subsequently, on the 28th April, 1908, the plaintiff intimated to the Court that he had an infant nephew who was a member of a joint Mitakshara family along with him and was interested in the property of which the rent was claimed. To avoid any possible objection the plaintiff prayed that his nephew might be joined as co-plaintiff and he himself was appointed his next friend :

Held, that the order was not made under S. 27, but under S. 32 of the Code of Civil Procedure of 1882.

That, as the original plaintiff, who alone had always collected rent as the head of the joint Mitakshara family, was competent to maintain the suit, the addition of the infant as co-plaintiff did not affect the right of the original plaintiff to continue the suit and the claim was not barred (a). *Bhola Roy v. Jung Bahadur Singh*, 19 C.L.J. 5=22 Ind. Cas. 798.

JENKINS, C.J., and MOOKERJEE, J.

References :—(a) 28 B. 11, F.; 14 C. 400, D. & Doubled.

- (2) *Limitation—Procedure—Law applicable to suit—Application for execution—Law applicable—Whether right to application for execution is substantive right—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6, as amended by Act I of 1907 (B. C.). S. 61.*

The law of limitation is a law relating to procedure and the law applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary (a).

A co-sharer landlord obtained a decree for rent in 1908. Execution of the decree was taken out in 1904 and again in 1907 before the Bengal Tenancy Act (I of 1907) was passed.

After that Act was passed, execution was taken out by the decree-holder in 1910 within three years of the date of the previous application for execution :

Held, that the last application was governed by Art. 6 of Sch. III of the Bengal Tenancy Act as amended by S. 61 of the Act of 1907.

Limitation—(Continued).

For some purposes proceedings in execution of a decree are proceedings in the suit in which the decree is made. But when the law makes a special provision in regard to the period within which an application for execution must be made, that special provision must be applied to each successive application, and if the provision is amended, the provision as amended will *prima facie* govern applications for execution made subsequently (b).

The right to have a decree executed is not a substantive right (c). *Narendra Lal Khan v. Upendra Nath*, 21 Ind. Cas. 113.

RICHARDSON and NEWBOULD, JJ.

References :—(a) 5 M.I.A. 234=18 Eng. Rep. 884; 19 Ind. Cas. 291=17 C.W.N. 605=35 A. 227=13 M.L.T. 437=11 A.L.J. 889=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom. L.R. 489=25 M.L.J. 131=40 I.A. 74; 3 Ind. Cas. 389=10 C.L.J. 463, Rel. (b) 16 C. 267 (F.B.), R. (c) 32 B. 337=10 Bom. L.R. 330=4 I.A. 127=3 C. 47; 8 C. 51=11 C.L.R. 113=8 I.A. 123, D.

- (3) *Burden of proof—Limitation—Burden of proving age to bring suit within time—Plaintiff to prove his age under 21 at date of institution of suit—Proof to be affirmative and clear—Court reluctant to throw out case as barred by time if suit just or equitable—Medical evidence.*

Held, that, for the purposes of limitation, it is for the plaintiff to establish affirmatively and clearly that he was under the age of 21 at the date of institution of his suit, and where he fails to do this and has been able merely to show that he was possibly under that age at that time, it must be held he has failed to discharge the burden of proving that his suit is within time. The medical evidence is not conclusive on the question of age.

A Court of justice will be naturally reluctant to throw out a claim as barred by limitation when it is satisfied that it is a just or equitable one. *Charanjit Singh v. Bishen Singh*, 78 P.W.R. 1914=167 P.L.R. 1914=23 Ind. Cas. 462.

KENSINGTON, C.J., and RATTIGAN, J.

- (4) *Cause of action—Partition proceedings—Party referred to civil suit—Cause of action arising by institution of partition proceedings—Effect of entry in Revenue papers—Several plaintiffs suing jointly—Withdrawal of suit with permission to bring fresh suit—Separate claims—Not barred.*

The land in suit had been shown in the Revenue Records for many years past as joint. Defendant, a recorded co-sharer, applied to the Revenue Authorities for partition. The plaintiff, who claimed the land in suit as his whole property, was referred to a civil suit for declaration of title :

Held, that the cause of action arose only when the defendant applied for partition, and

Limitation—(Continued).

the suit was not time-barred by reason of the land having been recorded for many years past as joint.

Where several plaintiffs had sued jointly, but, with a view to avoid difficulties as to misjoinder, had withdrawn the suit with permission to bring a fresh suit, and subsequently filed separate claims:

Held, that the former suit did not bar the subsequent claims. **Natha Singh v. Ishar Singh**, 163 P.L.R. 1914=99 P.W.R. 1914=23 Ind. Cas. 458.

SHAH DIN and CHEVIS, JJ.

- (5) *Limitation—Conciliation system—Termination of the system by Government—Time taken up in conciliation—Exclusion of time—Excuse of delay.*

The money due on a bond became payable on the 31st May 1910. The plaintiff applied to the conciliator for a certificate on the 28th March 1913, but before he could get it, Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed a suit to recover the money on the 30th June 1913, and claimed to exclude the time between 28th March 1913, from the period of limitation:

Held, that, though the plaintiff was not entitled to deduct the time claimed, he was entitled to such extension of time as might be necessary to give him a reasonable opportunity to enable him to file the suit in time.

Where the law creates a limitation and the party is disabled to conform to that limitation without any default in him, and he has no remedy over, the law will ordinarily excuse him. This rule is subject to the limitation that it will excuse him so far as it is necessary and not beyond. **Saytabhamabai Janardan Khare v. Govind Janku Bade**, 16 Bom. L.R. 441=38 B. 659.

HEATON and SHAH, JJ.

- (6) *Limitation—Exclusion of time—Time taken up in obtaining conciliator's certificate—Conciliation system abolished after grant of certificate and before date of suit—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 48.*

The money advanced on two bonds became repayable on the 24th February 1910. The plaintiff applied on the 13th February 1913 to obtain a conciliator's certificate, which he obtained on the 26th April 1913. The Court was closed for the summer vacation from the 29th April to the 8th June 1913. In the meanwhile Government abolished the conciliation system with effect from the 30th May 1913. The plaintiff filed the suit to recover the money on the 9th June and claimed to exclude the time occupied in obtaining the conciliator's certificate.

Held, that the plaintiff was entitled to deduct the period between his application and the grant of the certificate, because the suit, though filed

Limitation—(Continued).

on the 9th June when the conciliation system was abolished, was substantially one to which the provisions of Chap. VI of the Dekkhan Agriculturists' Relief Act were applicable throughout the period of limitation which expired during the vacation. **Rupchand Makandis v. Mukunda Mahadev**, 16 Bom. L.R. 444=38 B. 656.

HEATON and SHAH, JJ.

- (7) *Limitation—Minority, no privilege under general law except by statute—Ss. 6 and 7, Limitation Act (1908), do not govern S. 48, Civ. Pro. Code (1908)—Ascertainment of mesne profits—Execution—Limitation. Repala Ramana Reddi v. Rebala Babu Reddi*, 13 M. L.T. 79=(1913) M.W.N. 114=24 M.L.J. 96=18 Ind. Cas. 586=37 M. 186. See Final Part, 1913, Col. 798.

- (8) *High Court—Original Side—Date of decree and judgment—Limitation. Hajoo Aboobucker Rahimtulla Sait v. The Official Assignee of Madras*, (1913) M.W.N. 968=25 M.L.J. 560=21 Ind. Cas. 545. See Final Part, 1913, Col. 799.

- (9) *Certificate issued by Administrator-General—Claims covered by the certificate if may be considered as barred. See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), No. 7, 22 Ind. Cas. 262.*

- (10) *Plea of limitation involving a mixed question of law and fact not to be raised for the first time in revision. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 3, 27 M. L.J. 728.*

- (11) *Suit filed by two plaintiffs—One alone signing plaint—Return of plaint—Representation of plaint with signature of the other after expiry of period of limitation—Effect. See ACT XXVI OF 1881 (NEG. INSTRUMENTS), No. 4, 26 M.L.J. 494.*

- (12) *Revenue sale of entire estate—Persons holding portions of estate for over 12 years adversely to the then owners, if may maintain possession against purchaser—Limitation when commences. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.*

- (13) *Suit filed with insufficient Court-fee—No mistake—Court not to give time to file deficient Court-fee—Extension of period of limitation. See ACT XI OF 1859 (BENGAL REVENUE SALE LAW), No. 7, 24 Ind. Cas. 276.*

- (14) *Decree incapable of execution—Amendment of decree—Limitation for execution—Time if runs from date of amendment. See ACT VIII OF 1885 (BENGAL TENANCY), No. 103, 18 C.W.N. 266.*

- (15) *Suit for arrears of rent—Limitation—Time runs from end of Fasli—Suit for possession—Limitation not saved. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 42, 23 Ind. Cas. 912.*

- (16) *Leave asked for in plaint under Cl. 12 of the Chapter—Error of procedure—Rectification within time—Delay in completion of order*

Limitation—(Continued).

and recording the re-presentation of plaintiff—Limitation of suits against persons in fiduciary position. See ADMINISTRATOR, No. 1, 18 O.W.N. 631.

(17) Trust—Representation of estate by one of three administrators—Compromise by him—Effect on sale—Rights of bona fide auction-purchaser—Limitation to set aside sale. See ADMINISTRATOR, No. 2, (1914) M.W.N. 921.

(18) Change of relief asked for after expiry of limitation—Power of Court to order amendment. See AMENDMENT, No. 4, 12 A.L.J. 635.

(19) Suit brought in wrong name—Amendment of plaintiff—Limitation. See AMENDMENT, No. 6, 23 Ind. Cas. 764.

(20) Sale in execution subject to mortgage lien—Mortgagee suing on mortgage—Defence that mortgage was fraudulent—Limitation. See CIV. PRO. CODE (1882), No. 32, 16 Bom. L.R. 648.

(21) Uncertified payment or adjustment—Cannot operate to prolong the limitation applicable for execution—Right of decree-holder to certify payment made out of Court after decree is time-barred. See CIV. PRO. CODE (1908), No. 311, 12 A.L.J. 825.

(22) Limitation—Rules of—Applicability to action taken under O. XLI, r. 20, Civ. Pro. Code (1908). See CIV. PRO. CODE (1908), No. 445, 79 P.R. 1914.

(23) Judgment of the Full Bench of the Presidency Small Cause Court on question of limitation—Revision. See CIV. PRO. CODE (1908), No. 182, 16 M.L.T. 488.

(24) Execution of decree—Uncertified payment whether can save limitation. See CIV. PRO. CODE (1908), No. 310, 24 Ind. Cas. 215.

(25) Decision as to question of—Whether a preliminary decree. See CIV. PRO. CODE (1908), No. 137, 16 Bom.L.R. 954.

(26) Suit by creditors against two joint promisors—Decree against one joint promisor—Other joint promisor exonerated on the ground that suit barred against him—Payment by former—Right to seek contribution from latter. See CONTRACT ACT, No. 41, 16 M.L.T. 569.

(27) Appeal as to costs—Limitation—Time occupied in review not deducted—What is reasonable cause for non-presentation within time. See COSTS, No. 2, 26 M.L.J. 356.

(28) Erroneous entry in Revenue papers—Refusal of settlement officer to correct the entry—Declaratory suit—Limitation. See DECLARATORY SUIT, No. 2, 22 Ind. Cas. 608.

(29) Execution application—Non-compliance with formalities—None the less in accordance with law to save limitation. See EXECUTION OF DECREE, No. 4, (1914) M.W.N. 372.

(30) Member of Hindu joint family becoming outcaste and excluded from enjoying coparcenary properties for more than 12 years—Effect. See HINDU LAW—ALIENATION, No. 5, 15 M.L.T. 186.

Limitation—(Continued).

(31) Alienation by father—Suit by son for possession—Limitation to run from possession by vendee. See HINDU LAW (ALIENATION), No. 12, 231 P.L.R. 1914.

(32) Insolvent's after-acquired property—Possession of insolvent for more than 12 years—Official Assignee's claim not barred. See INSOLVENCY, No. 2, 22 Ind. Cas. 271.

(33) Suit for profits of *sir* by one *sir* holder—Compromise—Admission of right—Limitation. See JURISDICTION OF CIVIL COURTS, No. 1, 12 A.L.J. 44.

(34) Creation of limited interest of tenancy by limitation. See LANDLORD AND TENANT, No. 1, 19 O.L.J. 62.

(35) Ijara—Rent not realised for many years—Possession without payment of rent after expiry of lease—Adverse possession. See LANDLORD AND TENANT, No. 24, 20 C.L.J. 300.

(36) Appellate Court can take cognizance of limitation when no further evidence required for decision. See LIMITATION ACT (1908), No. 3, 259 P.L.R. 1914.

(37) Mortgages in possession—Trespasser—Dispossession of mortgagee—Whether adverse possession against mortgagor—Declaratory suit—Limitation. See MORTGAGE (GENERAL), No. 2, 15 M.L.T. 112.

(38) Limitation of a suit for sale on a mortgage not affected by a subsequent transaction between the mortgagee and a third person who paid off the mortgage-debt—Right of priority—Limitation for enforcement of right—Purchaser of property subject to a mortgage—Right to raise plea of limitation when mortgagee neglects to recover money within limitation. See MORTGAGE (GENERAL), No. 8, 17 O.C.38.

(39) Amendment of decree—Execution—Limitation. See MORTGAGE (REDEMPTION), No. 5, 22 Ind. Cas. 283.

(40) Partnership—Suit for share of collections made by other partners—Institution within 3 years from date of collection but more than 3 years from dissolution of partnership—No bar. See PARTNERSHIP, No. 2, 26 M.L.J. 221.

(41) Paper possession of *banjar* land—Effect—Limitation. See RES JUDICATA, No. 6, 19 P.W.R. 1914.

(42) Sale—Voidable—Vendee disturbed from possession by third party—Entitled to avoid the sale—Suit for refund of purchase-money—Institution within one year from date of dispossession—Not barred by limitation. See SALE, No. 5, 15 M.L.T. 240.

(43) Prerogative right of the Crown whether can be extinguished by limitation. See SHROTRIAM GRANT, No. 1, 15 M.L.T. 277.

(44) Limitation not merely a question of law—Limitation not pleaded—Suit whether to be dismissed on ground of. See SPECIFIC PERFORMANCE, No. 10, 23 Ind. Cas. 360.

Limitation—(Concluded).

(45) Culvert closed—Flood water remaining on land for long time—Impossibility of sowing crop—Suit for damages after 5 years—Limitation. See WATER, No. 2, 21 Ind. Cas. 392.

Limitation Act (XIV of 1859).

S. 12—Nature of right to Malikana—Right when barred. See MALIKANA, No. 1, 21 Ind. Cas. 779.

Limitation Act (1871).

- (1) *Limitation—Act of 1871—Reversioner's suit to recover property—Setting aside adoption—Right once barred cannot be revived—Res judicata.*

Where a widow represented the whole estate and she put forward all pleas open to a reversioner, held, the suit operates as *res judicata* in a suit by the reversioners.

Under the Limitation Act of 1871, a suit for recovery of immoveable property which involved the displacing of an adoption should be filed within twelve years from the death of the adoptive father.

A later Act cannot revive a right of suit which had become barred under an earlier Act. *Yenkoba Row v. Thunia Nataraja Chettiar*, (1914) M.W.N. 903.

SANKARAN NAIR and SPENCER, JJ.

- (2) Art. 132—Nature of right to Malikana—Right when barred. See MALIKANA, No. 1, 21 Ind. Cas. 779.

Limitation Act (1877).

(1) Ss. 7, 8—Art. 44—*Suit to set aside sale by guardian—Whether Ss. 7 and 8 apply to a suit governed by Art. 44—Hindu Law—Effect of alienation by guardian—Date of alienation—Date of majority—No separate causes of action on these dates—Suit to set aside sale more than 3 years after the elder son attained majority—Limitation. Doraisamy Sirumadan v. Nondisami Saluvan*, 25 M.L.J. 405=14 M.L.T. 401=21 Ind. Cas. 410 (F.B.). See Final Part, 1913, Col. 805.

- (2) S. 8. See No. 1, *supra*.

- (3) S. 19—*Acknowledgment of liability—Admission of right involves admission of legal consequences of that right—Acknowledgment, whether necessary to be addressed to person entitled to right.*

If a person admits a right, it is a necessary implication that he also admits the legal consequences of that right (a).

Therefore where a person admits that land of which he is in possession at the time is the property of another, he admits that he is liable to restore it to that other.

An acknowledgment to whomsoever made, if it be an acknowledgment pointing with reasonable certainty to the liability in dispute or the rights out of which that liability arises as a legal consequence, is an "acknowledgment" of liability within the meaning of S. 19 of the

Limitation Act (1877)—(Continued).

Limitation Act, 1877 (b). *Guru Charan Saha v. Surendra Krishna Roy*, 22 Ind. Cas. 650 19 C.W.N. 263.

CARNDUFF and RICHARDSON, JJ.

References:—(a) 33 C. 1047 (P.C.)=4 C.L.J. 94=8 Bom. L.R. 501=10 C.W.N. 874=1 M.L.T. 139=8 A.L.J. 525=16 M.L.J. 300=2 N.L.R. 120=33 I.A. 165, *Rel.*; 18 Ind. Cas. 909=13 M.L.T. 415=(1913) M.W.N. 428=11 A.L.J. 432=17 C.L.J. 474=15 Bom. L.R. 483=37 B. 326=25 M.L.J. 101=40 I.A. 68=17 C.W.N. 573, *Rel.*

- (4) S. 19—*Acknowledgment—Suit for redemption—Statement in the plaint that co-mortgagors had a right to redeem—Admission of co-mortgagor's right.*

In a suit for redemption of a mortgage, a statement in the plaint made by some of the mortgagors, that certain other mortgagors, who did not join in that suit as plaintiffs, had a right to redeem the mortgage, was an admission in respect of the latter's right with regard to the mortgaged property and was an acknowledgment within the meaning of S. 19, Limitation Act. *Balesar v. Ram Das*, 12 A.L.J. 674=36 A. 408=24 Ind. Cas. 104.

RAFIQ and PIGGOTT, JJ.

Reference:—25 I.A. 95, R.

- (5) S. 20—*Payment of interest by mortgagor after parting with equity of redemption—Effect upon purchaser. See MORTGAGE (GENERAL), No. 16, 22 Ind. Cas. 510.*

- (6) Art. 29. See No. 8, *infra*.

- (7) Art. 36. See Nos. 8 and 11, *infra*.

(8) Arts. 39, 29, 36—*Attachment of land with standing crop—Wrongful attachment—Attachment of land raised—Suit for damages for loss of crop—Limitation—'Standing crop,' whether 'moveable' or 'immoveable' property. Kotagiri Venkataramanujam v. Patibanda Basavayya*, 14 M.L.T. 225=25 M.L.J. 447=(1913) M.W.N. 869=21 Ind. Cas. 213 (F.B.). See Final Part, 1913, Col. 809.

- (9) Art. 44. See No. 1, *supra*.

(10) Art. 47—*Order of Magistrate under S. 145, Crim. Pro. Code—Suit for possession on title. Paladugu Parasuramayya v. Yalli Ramachandrarau*, 14 M.L.T. 392=(1913) M.W.N. 871=21 Ind. Cas. 564. See Final Part, 1913, Col. 809.

(11) Arts. 115, 120, 36—*Untrue representation that a person is the authorised agent of another—Suit for damages against such a person—Limitation—Meaning of 'implied contract' in Art. 115—S. 235, Contract Act. Vairavan Chettiar v. Avicha Chettiar*, 25 M.L.J. 256=14 M.L.T. 360=(1913) M.W.N. 884=21 Ind. Cas. 65. See Final Part, 1913, Col. 813.

(12) Arts. 118, 119, 144—*Suit to recover possession of property as adopted son—Adoption denied—Limitation. See ADOPTION, No. 2, 104 P.W.R. 1914.*

Limitation Act (1877)—(Continued).(13) Art. 119. See No. 12, *supra*.(14) Art. 120. See No. 11, *supra*.(15) Arts. 120, 132—*Suit for money charged on immoveable property—Mortgage—Surplus sale-proceeds, suit to recover—Civ. Pro. Code (1882), S. 295.*

Certain mortgaged property was sold in execution of a mortgage-decree. After the decree was satisfied, the balance of sale-proceeds was deposited in the Court. A, who held a decree on the basis of another mortgage, drew out of Court this balance in execution of his decree. B who had a mortgage entitled to priority over the charge of A sued A for recovery of the money drawn out of Court by A.

Held, that the suit was one to enforce payment of money charged upon immoveable property within the meaning of Art. 132, Limitation Act (1877), and was governed by twelve years' limitation. **Barhamdeo Prasad v. Tarachand**, 15 M.L.T. 62=21 Ind. Cas. 961= (1914) M.W.N. 38=19 C.L.J. 132=18 C.W.N. 345=12 A.L.J. 82=16 Bom. L.R. 89=26 M.L.J. 243=41 C. 654 (P.C.).

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(16) Art. 124—Hindu widow succeeding to *shebaitship*—Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself—Suit by widow to set aside decree and sale as fraudulent—Suit dismissed as barred under S. 244, Civ. Pro. Code (1882)—Suit by reversioner for declaration of his right to surplus income—Limitation. See **SHEBAIT**, No. 1, 18 C.W.N. 1029.

(17) Art. 131—*Periodically recurring right—Suit for—Applicability of.*

Art. 131 of Sch. II of the Limitation Act applies to suits brought to recover sums due under a periodically recurring right.

Ayling and Tyabji, JJ.—On a consideration of the various articles in the schedule, Art. 131 is inapplicable. **Manavikrama Zamorin Raja v. Achutha Menon**, (1914) M.W.N. 228=15 M.L.T. 226=26 M.L.J. 377=23 Ind. Cas. 806 (F.B.).

WHITE, C.J., SANKARAN NAIR and OLD-FIELD, JJ.

References:—26 M. 221, F.; 34 B. 349, Appr.

(18) Art. 132. See No. 15, *supra*.

(19) Arts. 135, 142, 144—*Applicability—Mortgagee in possession subsequently losing possession—Suit to recover possession from mortgagor—Limitation—Permissive possession changed into adverse possession—Effect.* **Anjuman Islami v. Husamul**, 9 N.L.R. 179=22 Ind. Cas. 65. See Final Part, 1913, Col. 816.

(20) Art. 142. See No. 19, *supra*.

(21) Sch. II, arts. 142, 144—*River shifting course—Dobas in old bed remaining joined with new channel at all seasons—Grantee of*

Limitation Act (1877)—(Continued).

fishery right in river—Exercise of fishery, right in new channel—Possession of dobas.

Where a river shifts its course, leaving *dobas* in its old bed, the grantee of the exclusive right of fishery in the river retains his right over such *dobas* so long as the latter remain in communication with the main channel at all seasons of the year (a).

Therefore, so long as the grantee has been fishing in the new channel, he cannot be said to have ceased to be in possession of the *dobas* and if he exercised his rights in the channel within the period of limitation, Art. 142 of the Limitation Act is no bar to a suit by him for possession of the *dobas*. In such circumstances, the plea of limitation would prevail only if the defendant can show that he has held adverse possession of the *doba* portions of the fishery for more than twelve years; that is to say, the defendant must rely on Art. 144 and the *onus* is on him and not on the plaintiff. **Hem Chandra Chaudhri v. Secretary of State for India**, 23 Ind. Cas. 136.

CARNDUFF and RICHARDSON, JJ.

Reference:—(a) 33 C. 15=9 C.W.N. 994, F.

(22) Arts. 143, 144—*Limitation—Forfeiture—Denial of landlord's title.* **Bhairab Chandra Naskar v. Kadam Bewa**, 18 C.L.J. 553=22 Ind. Cas. 28. See Final Part, 1913, Col. 816.

(23) Art. 144—*Adverse possession—Cause of action—Partition proceedings—Claim to chak—Admission—Suit for possession of land allotted at partition—Limitation.*

In certain partition proceedings B set up a claim to a certain *chak* in the estate which was being divided. A, who was then a young man, just come to his property, at first resisted the claim, but, subsequently in 1883, put in a petition withdrawing the objections he had made to it.

The partition proceedings lasted till 1903, when A was awarded possession of a part of the land claimed by B. A found B in possession and then brought this suit for possession as *chakdar*. There was no evidence to show that B was in possession before 1903.

Held, (1) that the petition of 1883 did not amount to an admission of the claim to the *chak* set up by B, as A simply for the sake of convenience withdrew the objections and prayed that the partition might be proceeded with;

(2) that, as the land in suit was allotted to A in 1903, his cause of action arose in that year, because at that time he acquired the right for the first time to sue B on his own behalf as separate owner of the land in suit;

(3) that B could not be held to have been in adverse possession before 1903. **Bapin Bary Chakidar v. Jagat Kishore Acharji**, Ind. Cas. 575.

STEPHEN and HOLMWOOD, JJ.

(24) Art. 144, See Nos. 12, 19, 21 and 22, *supra*.

Limitation Act, (1877)—(Continued).

- (25) *Sch. II, Art. 148—Suit for redemption of mortgage by conditional sale, limitation—Time, running of, from end of term or from time of payment where there is option to pay before end of term—Possession, right to recover, accrual of.*

Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property.

So where, in a case of mortgage by conditional sale, there was a condition that the mortgagors were to be entitled to recover the property within nine years on the liquidation of the debt with the usufruct of the property, and the plaintiff mortgagors brought a suit for redemption and stated that the mortgage-debt had been satisfied by the usufruct eight years after the mortgage, but the suit was brought just within sixty years computed from the end of the said term of nine years but after more than sixty years from the time of the satisfaction of the mortgage as aforesaid :

Held, that the time ran from the time of satisfaction of the mortgage-debt, the rights to recover possession having accrued then ; the suit was, therefore, barred by limitation. **Musammat Bakhtwar Begam v. Musammat Hosani Khanam**, 18 C.W.N. 586 = 26 M. L. J. 474 = 12 A.L.J. 473 = 19 C.L.J. 477 = 36 A. 195 = (1914) M. W. N. 411 = 15 M. L. T. 389 = 16 Bom. L.R. 944 = 28 Ind. Cas. 355 (P.C.).

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- (26) *Art. 178—Right to apply for order absolute barred under—Not revived by O. XXXIV, r. 5, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 412, (1914) M.W.N. 251.*

- (27) *Sch. II, Art. 179—Order of Registrar of Privy Council dismissing appeal for non-prosecution, if decree or order of Appellate Court—Limitation.*

When a petition of appeal of His Majesty in Council was not lodged by the appellant, and the Registrar dismissed the appeal for non-prosecution under r. 5 of the Standing Order in Council of the 13th June, 1853, and no Order in Council was thereupon made.

Held, that the Registrar's order dismissing the appeal was not a decree or order of the Appellate Court under Art. 179 of the Limitation Act, 1877, and did not extend the period of Limitation therein prescribed. **Batuk Nath v. Musammat Munnai Dei**, 18 C.W.N. 740 = 19 C.L.J. 574 = 16 Bom. L.R. 360 = 12 A. L. J. 596 = (1914) M.W.N. 437 = 27 M.L.J. 1 = 16 M.L.T. 1 = 23 Ind. Cas. 644 = 36 A. 284 (P.C.).

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Limitation Act (1877)—(Concluded).

- (28) *Art. 179—Appeal against adjudication order whether amounts to a step-in-aid of execution. See LIMITATION ACT (1908), No. 159, 16 Bom. L.R. 612.*

- (29) *Arts. 179, 180—Execution of decree—Limitation—Order of His Majesty in Council dismissing an appeal for want of prosecution—Such an order is not an affirmation of the decree created from—Decree nisi for sale—Application for an order absolute for sale—Code of Civil Procedure (1908) would not revive a right already barred before its passing.*

An order of His Majesty in Council dismissing an appeal for want of prosecution is not an order of His Majesty in Council within the meaning of Art. 180, Limitation Act (1877).

An order in Council dismissing an appeal for want of prosecution is not an order adopting or affirming the decision appealed from, and therefore, when such an order is made, the only decree capable of execution is the decree appealed from (a).

Where a right to enforce a decree nisi for sale made in a suit on mortgage had, before the passing of the Code of Civil Procedure (1908), become barred by Art. 179, Limitation Act, 1877, *held* that no provisions of the Code would operate to revive it. **Chaudhri Abdul Majid v. Jawa-Hir Lal**, 16 Bom. L.R. 395 = 12 A.L.J. 624 = 19 C.L.J. 626 = 18 C.W.N. 963 = 27 M.L.J. 17 = 16 M.L.T. 44 = (1914) M.W.N. 485 = 36 A. 350 = 23 Ind. Cas. 649 (P.C.).

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Reference :—(a) 33 A. 154, *reversed*.

- (30) *Art. 180. See No. 29, supra.*

Limitation Act (1908).

- (1) *Application of—Appeals from decisions of Revenue Courts to District Judge—Rent Act (Oudh), S.119-A, appeal under—S. 40, General Clauses Act.*

Held, that the provisions of the Indian Limitation Act apply to appeals from the decisions of Courts of Revenue to a District Judge.

Where the limitation for an appeal under S.119-A of the Oudh Rent Act expired on a holiday and the appeal was filed on the day following, *held*, that the appeal was filed within time. **Binda Parshad v. Ram Bhajan**, 17 O.C. 254.

PANDIT KANHAIYA LAL, A.J.C.

- (2) *Provisions of—Applicability to suits under Registration Act. See REGISTRATION ACT (1908), No. 20, 15 M.L.T. 223.*

- (3) *S. 3—Limitation—Appellate Court can take cognizance of limitation when no further evidence required for decision.*

An Appellate Court can take cognizance of the question of limitation for the first time, if it arises upon the pleadings or upon the allegations, and if upon the facts already on the

Limitation Act (1908)—(Continued).

recorded the suit is clearly barred by time, and no question of fact has to be inquired into so as to enable the Court to decide the point of limitation. **Gulab Mal v. Shujawal**, 259 P.L.R. 1914.

• **CHEVIS and SHADI LAL, JJ.**

(4) Ss. 3, 19, *Sch. I, Arts. 74, 75, 80, 120—Instalments, payment of—Willingness to pay barred instalments, expression of—Acknowledgment—Suit to recover unpaid instalments—Estoppel—“Default”—“Waiver,” meaning of.*

In a suit for the recovery of unpaid instalments due under a promissory note payable by instalments, it was found that, in a previous suit to set aside the agreement under which the promissory note was executed, the defendant expressed his willingness to pay though on that date the instalments were barred by limitation:

Held, (1) that, in a subsequent suit for the unpaid instalments, the defendant is not estopped from pleading limitation, as there can be no estoppel against the Act of the Legislature (a);

(2) that an admission of a barred debt is not an acknowledgment of the debt within S. 19 of the Limitation Act (b);

(3) that, where a defendant has expressed his willingness to pay, there cannot be said to be “a default” within the meaning of Art. 75, *Sch. I* of the Limitation Act;

(4) that the period of limitation for the recovery of instalments commences from the date on which each instalment becomes due, even where it is provided that, on failure to pay three instalments, the whole shall become payable;

(5) that the provision as to waiver is enacted only in favour of the promisee and that it is open to him to waive its benefit. **T. Sitarama Chetty v. Cotha Krishnasamy Chetty**, 24 Ind. Cas. 507.

WHITE, C.J., and OLDFIELD, J.

References:—(a) 4 Ind. Cas. 414=36 C. 920; 10 Ind. Cas. 467=13 C.L.J. 693=38 C. 512, *F.* (b) 18 Ind. Cas. 595=17 C.W.N. 518, *F.*; 19 M. 416; 25 M. 55=11 M.L.J. 318; 10 C.W.N. 959; 5 M.L.A. 43=7 Moo. P.C. 85=14 Jur. 253=1 Sar. P.C.J. 394=18 P.R. 810; 11 M.I. A. 468=9 W.R. 9 (P.C.)=4 Suth. P.C.J. 107=2 Sar. P.C.J. 920=20 E. R. 177, *D.*

(b) Ss. 4, 31—*Suit on mortgage—Grace period of two years expiring on Sunday—Suit instituted on Monday, in time—S. 10, General Clauses Act.*

A suit on a mortgage governed by S. 31 of the Limitation Act (1908) was instituted on the 8th August, 1910, the grace period of two years expiring on Sunday the 7th August, 1910:

Held that the suit was in time.

Limitation Act (1908)—(Continued).

S. 4 of the Limitation Act can be invoked in the case of a suit governed by the limitation period prescribed by S. 31 (prescribed whether as a matter of grace or otherwise) and not merely the periods prescribed in the first Schedule (a). **Murugesu Mudali v. Ramaswamy Chettiar**, 26 M.L.J. 23=21 Ind. Cas. 770.

SADASIVA AIYAR and SPENCER, JJ.

References:—(a) 14 Ind. Cas. 154=9 A.L.J. 439=34 A. 375, *F.*; 36 B. 268, *Diss.*

(6) S. 5—*Appeal filed with delay—Sufficient cause—Appeal filed in wrong Court—Gross carelessness of pleader.*

Where, owing to gross carelessness of a pleader, the appeal which should have been filed in the Chief Court was filed in the Divisional Court but was returned to be presented in the Chief Court, and the same was filed long after expiry of period of limitation prescribed for appeals.

Held, that the provisions of S. 5 of the Limitation Act were not applicable to the case, and the appeal must be rejected as barred by limitation; for the appellant, under the circumstances of the case, had no sufficient cause for not presenting the appeal within the prescribed period. **Mahamda v. Ladha Singh**, 9 P.L.R. 1914=23 P.W.R. 1914=23 Ind. Cas. 86.

KENSINGTON and BEADON, JJ.

References:—118 P.R. 1908, *F.*; 28 A. 414; 29 A. 638, *Not F.*; 81 P.R. 1886; 13 M. 269, *R.*; 23 C. 526; 21 B. 552; 5 A. 51; A.W.N. (1903), p. 32; 184 P.R. 1889; 66 P.R. 1891, *cited*.

(7) S. 5—*Practice—Application for substitution of names made beyond time—Abatement order—Code of Civil Procedure (1908), O. XXII, rr. 4, 9.*

S. 5 of the Limitation Act does not apply to an application made for substitution of the name of respondent under O. XXII, r. 4, made beyond six months of his death. An application for substitution made beyond the period of limitation must therefore be rejected. It is, however, open to the appellant, after the order of abatement is made, to apply under O. XXII, r. 9, and show that he was prevented by any sufficient cause from continuing the suit. **Secretary of State for India v. Jawahir Lal**, 12 A.L.J. 299=36 A. 235.

RICHARDS, C.J., and BANERJI, J.

(8) S. 5—*Circumstances of delay not explained in affidavit—Discretion—Interference in appeal—Judgment in criminal proceedings—Admissibility in civil action.*

An appeal was filed before a District Judge thirty seven days beyond time and in the affidavit the only reason given was that papers were made over to a counsel who returned them after the time for filing the appeal had expired. No other explanation was given of the delay and it was not shown that the defendants took any steps to expedite the filing of the appeal.

Limitation Act (1908)—(Continued).

The Judge in the exercise of his discretion admitted the appeal. *Held*, that it was for the defendants to make out very cogent grounds for excusing this long delay and the reasons given for delay in this case were not sufficient within the meaning of S. 5 of the Limitation Act (a).

When the lower appellate Court does not subject the explanation of the delay to any scrutiny, the High Court can interfere in appeal in the exercise of its discretion.

• A criminal prosecution was lodged against the plaintiffs by one of the defendants and was found to be false. A civil action for damages was brought against the prosecutor and certain others, as instigators. A copy of the judgment of the criminal proceedings was filed in evidence and accepted by the Judge. *Held* that the judgment, not being *inter partes*, was not admissible in evidence (b). **Dewan v. Buddhu**, 12 A.L.J. 837.

SUNDER LAL, J.

References:—(a) (1897) L.R. 1 K.B. 1; 30 B. 330, R. (b) 12 A. 1, R.

(9) S. 5—*Memorandum of appeal—Some respondents' names omitted—Bona fide mistake—Time extended—Respondents' names added—Evidence—Mortgage deed, admission of receipt of consideration in—Purchaser of mortgaged property—Admissibility in evidence.*

Where the omission from a memorandum of appeal of the name of a respondent to that appeal was due to a *bona fide* mistake and oversight on the part of the clerk of the counsel appearing for the appellant, *held*, that, under S. 5 of the Limitation Act, the Court could extend the period of limitation in favour of the appellant, and the respondent's name could be brought on the record after the expiry of the prescribed period for filing appeals (a).

Held also that the recital as to the receipt of consideration contained in a mortgage deed was admissible in evidence against a purchaser by private treaty of the mortgaged property (b). **Gaya Prasad v. Chotoo**, 12 A.L.J. 941.

RAFIQ, J.

References:—(a) (1888) A.W.N. 58; 18 M. L. J. 461; 10 C. 445, R. (b) 17 A. 482; 35 A. 194, R.

(10) S. 5—*Ex parte order of predecessor excusing delay and admitting appeal—Jurisdiction of successor to consider question of delay at the final hearing of appeal after notice.*

A Court has jurisdiction to consider, at the final hearing of the appeal after notice, the question whether the delay in the filing of the appeal had been adequately explained, notwithstanding the *ex parte* order of his predecessor excusing the delay and admitting the appeal. **Malli Reddy v. Beddakka**, 16 M.L. J. 100=27 M.L.J. 147=(1914) M.W.N. 619.

SADASIYA AIYAR and TYABJI, JJ.

References:—9 M. 405; 21 M. 228; A.A.O. No. 71 of 1911; 34 C. 216 (221), F.; 5 C. 1, R.

Limitation Act (1908)—(Continued).

(11) S. 5—*Failure to apply for copies at proper place—Negligence of pleader's clerk—Delay in filing the appeal—No ground to excuse delay.*

Neither delay in obtaining copies owing to the party's fault in not applying for them at the proper place, nor delay in presenting the memorandum of appeal caused by negligence of the pleader's clerk is sufficient cause to excuse delay within the meaning of S. 5 of the Limitation Act. **Syed Allahdadshad v. Mukhdum Amin Mahomed**, 7 S.L.R. 201=24 Ind. Cas. 977.

HAYWARD, J.C.

References:—13 C. 62; 9 Bom. L.R. 893, R.

(12) S. 5—*Memorandum of appeal signed by the pleader—Vakalatnama not signed by the appellant—Whether omission fatal—Appeal not void and inadmissible—Appeal to be admitted under S. 5 of the Limitation Act. Habeeb v. Nosh Ali*, 11 A.L.J. 779=21 Ind. Cas. 444. See Final Part, 1913, Col. 819.

(13) S. 5—*Amendment—Plea of Limitation—Deprivation of by reason of such amendment—Such amendment not to be allowed—Appeal against person already dead—Applicability of Q. XXII, Civ. Pro. Code (1908)—Proper course for appellant 'Reasonable diligence in discovery of names of legal representatives—Sufficient cause.' Mi Ein Zi v. Mi Ni*, U.B.R. (1913), 2nd Qr., 175, =21 Ind. Cas. 306. See Final Part, 1913, Col. 819.

(14) S. 5—*Appeal—Failure to file copy of decree—Further time allowed for appeal—'Sufficient cause.'* See APPEAL (GENERAL), No. 1, 2 P.W.R. 1914.

(15) S. 5—*Poverty—Not sufficient cause.* See APPEAL (GENERAL), No. 2, 7 L.B.R. 90.

(16) S. 5. See APPEAL (GENERAL), No. 8, 16 Bom. L.R. 516.

(17) S. 5—*Decree defective and not capable of being enforced—Review—Time spent in applying for review—Saving of limitation.* See CIV. PRO. CODE (1908), No. 807, 24 Ind. Cas. 113.

(17a) S. 5. See No. 32, *infra*.

(18) Ss. 5, 12—*Appeal filed beyond time—Sufficient cause—Application for copies—Time allowed.*

A Munsif gave his judgment on the 1st of October 1913. The 2nd of October was a working day and the Court was open. From the 3rd of October to the 2nd of November the Court was closed for long vacation. The Court re-opened on the 3rd of November and on that day the defendants applied for copies of the judgment and decree. These were ready and delivered to them at Muzaffarnagar on the 14th of November. They filed the appeal at Meerut on the 15th of November:

Held, that the application for copies of the judgment and the decree was made within the time allowed by law for the filing of the

Limitation Act (1908) — (Continued).

appeal and hence the time spent in obtaining the copies should be excluded in computing the period of limitation.

Held, further, that, under the circumstances of the case, there was "sufficient cause" within the meaning of S. 5 of the Limitation Act to explain the delay in filing the appeal. **Badhu v. Sultan**, 23 Ind. Cas. 874.

TUDBALL, J.

(19) Ss. 5, 14—Admission of appeal presented after time — Discretion of Court—What is 'sufficient cause.' See **APPEAL (GENERAL)**, No. 9, 7 Bur. L.T. 250.

(20) Ss. 5, 18—Applicability to cases under S. 47, Civ. Pro. Code. See **CIV. PRO. CODE** (1908), No. 72, 23 Ind. Cas. 240.

(21) S. 5 and Art. 171—Application to set aside abatement and to bring legal representative on record—Limitation—Effect of delay. See **CIV. PRO. CODE** (1908), No. 378, 16 M.L. T. 547.

(22) S. 6—*Punjab Limitation (Ancestral Land Alienation) Act* (I of 1900)—*Suit by plaintiff who was minor on date of mutation—Plaintiff entitled to sue within three years of majority.*

Under the provisions of the Punjab Limitation (Ancestral Land Alienation) Act, time begins to run from the date of mutation, and where the plaintiff in a suit governed by that Act was a minor on the said date, he would be entitled under S. 6 of the Indian Limitation Act to bring his claim within three years of attaining majority. **Natha Singh v. Kishen Singh**, 84 P. L. R. 1914=47 P. W. R. 1914=22 Ind. Cas. 637.

RATTIGAN and BEADON, JJ.

(23) S. 6—*Guardian ad litem or next friend, effect of existence of, on minor's actions after his attaining majority*—'Ba mah Jeth ada karde-wen' meaning of.—*Limitation, payment allowed at any time within.* **Jagat Narain (minor) v. Musammatt Narbada Kunwar**, 16 O. C. 206=21 Ind. Cas. 365. See Final Part, 1913, Col. 821.

(24) Ss. 6, 8, Arts. 134, 144, 148—*Limitation—Possession—Minor—Exemption*—Ss. 6 and 8—Art. 148—60 years' limitation period. **Maung Shwe Pe v. Ma Yu Ma**, 6 Bur. L. T. 196=21 Ind. Cas. 348=7 L. B. R. 97. See Final Part, 1913, Col. 823.

(25) S. 7—*Karar executed by karnavan of Malabar tarwad—Right of another in uraima right of a temple acknowledged by karar—Suit by members of tarwad to set aside the karar—Fraud of Karnavan—Minority of some members—Power of Karnavan to give discharge—Limitation—Not saved—Amendment—Powers of—Civ. Pro. Code* (1908), O. VI, r. 17.

Plaintiffs, the members of a Malabar tarwad, brought, in 1910, a suit for a declaration that the karar executed by the plaintiffs' Karnavan the first defendant, in favour of the second

Limitation Act (1908) — (Continued).

defendant, in 1899, acknowledging the sight of the second defendant's tarwad to a half-share in the uraima right in the plaint dewaswam, was obtained by the second defendant by fraud, and that the agreement is not binding upon the plaintiff's tarwad, and the plaint also contained a prayer for an injunction restraining the second defendant and the members of the tarwad from interfering with the dewaswam affairs.

Held, that the suit was barred by limitation and that S. 7 of the Limitation Act (1908) does not save the bar of limitation (a).

Per **Sadasiva Iyer, J.**—As the Karnavan and all the adult members of the family fully represent the tarwad including the minor members for all purposes, they fully represented the tarwad for the purpose of giving a discharge also, and the latter part of S. 7 of the Limitation Act (1908) applies.

Per **Napier, J.**—"I should hesitate to hold that a Karnavan whose contract was sought to be impeached could by himself be held to be able to give a discharge within the meaning of S. 7.

Under the Civ. Pro. Code, 1908, O. VI, r. 17, all amendment shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Therefore cases decided before the enactment of the Civil Procedure Code (1908) ruling that it is not desirable to allow amendments at a very late stage or so as to oust the jurisdiction of the Court in which the suit was instituted, are no longer of much value on the question of the amendment of plaints. **K. M. P. Parameswaram Nambudripad v. K. M. S. Sankara Nambudripad**, 16 M. L. T. 241=(1914) M. W. N. 689.

SADASIVA IYER and NAPIER, JJ.

References:—(a) 14 M. L. T. 401=25 M. L. J. 405; (1914) M. W. N. 231 and 25 M. 26, R.

(26) S. 7, Art. 44—*Guardian de facto—Appointment by father in a joint Hindu family—Appointment by a Will—Alienation by guardian—Ward's power to impeach alienation—Limitation.* **Mahableshwar v. Ramchandra**, 15 Bom. L. R. 982=21 Ind. Cas. 350=38 B. 94. See Final Part, 1913, Col. 824.

(27) S. 8—*Applicability to execution proceedings.* See **EXECUTION OF DECREE**, No. 2, (1914) M. W. N. 159.

(27-a) S. 8. See No. 24, *supra*.

(28) S. 10—*Express trust—Fiduciary relation between father-in-law and son-in-law—Solicitors and client—Depositor and banker—Principal and agent—Creditor and debtor.*

A mere deposit of moveables or money by A with B would not make B the trustee of A on an express trust so as to attract the provisions of S. 10 of the Limitation Act, nor is a depositary or a banker or an agent or a debtor to whom a loan is made and who promises to

Limitation Act¹ (1908)—(Continued).

return the loan, an express trustee within the meaning of the section.

A relation between a son-in-law and a father-in-law is not at all similar to the relation between a solicitor and his client, i.e., a son-in-law by his new matrimonial relationship does not stand in a fiduciary relation to his father-in-law as a solicitor does to his client. **Rajammal v. Lakshammal**, 22 Ind. Cas. 936 = (1914) M. W.N. 606 = 16 M.L.T. 199.

SADASIVA IYER and SPENCER, JJ.

References:—5 Ind. Cas. 331 = 33 M. 15½ = 7 M.L.T. 266 = (1910) M.W.N. 130; 6 Ind. Cas. 427 = 7 M.L.T. 402 = (1910) M.W.N. 421 = 34 M. 125; 1 Ind. Cas. 712 = 6 M.L.T. 164 = 32 M. 68; 13 B. 338, R.

(29) Ss. 10, 28, Arts. 120, 134—Alienation by trustee—Suit for declaration of alienation being invalid—Limitation—Voluntary transferee—Transferee for consideration but not in good faith—Transferee for consideration and in good faith—Distinction. See CIV. PRO. CODE (1908), No. 129, 26 M.L.J. 537.

(30) S. 12—Application for leave to appeal to Privy Council—Time taken for obtaining copy of decree if may be excluded—Indian Statute permitting exclusion, if ultra vires—Order in Council of 1838—Government of India Act of 1858, S. 64—Letters Patent, Cls. 39, 44—Privy Council Appeals Act (VI of 1874).

An application for leave to appeal to His Majesty in Council is not time-barred, if, excluding the time taken for obtaining a copy of the decree appealed from, it is found to have been made within 6 months.

S. 12 of the Limitation Act of 1908 is within the Legislative powers of the Government of India in permitting such exclusion. **Syed Abdullah Hussain Chowdhry v. Ananda Chandra Ray**, 18 C.W.N. 1006 = 24 Ind. Cas. 273.

JENKINS, C.J., and WOODROFFE, J.

(31) S. 12—Application for copy, by whom to be made.

S. 12 of the Limitation Act does not require that an application for copy should be made by the party himself. **Babu Rudra Pratab Singh v. Raghuraj Gir**, 23 Ind. Cas. 209.

LINDSAY, J.C.

References:—29 A. 264 = 4 A.L.J. 152 = A. W.N. (1907) 67, F.; 12 M.L.J. 385, Diss.

(31-a) S. 12. See No. 18, *supra*.

(32) Ss. 12, 5—Duty of person applying for copies of Civil Court judgment and decree—Application through agent—Application through post office—Calculation of time spent in obtaining copies—Time when may be extended—Discretion of Appellate Court—Revision.

In order to obtain copies of a Civil Court judgment and decree, the applicant must perform two acts, namely:—

Limitation Act (1903)—(Continued).

(1) he must present an application accompanied by the prescribed fees at a proper time and place to the appointed official; and

(2) he must be prepared to take delivery of the copies at the time and place fixed for delivery.

Unless the applicant discharges both these duties, he fails to exercise the due diligence required to obtain the copies. But he may do these acts personally or by an agent duly empowered. Where, however, he elects to work through an agent, he cannot claim credit for any delay caused by taking that course. He cannot include, as time requisite for obtaining the copies, any period occupied in sending his application or instructions to the agent, or by the agent in proceeding to the copying office and presenting the application, or in the transmission of the copies by the agent to him. In other words, the time allowed for copies obtained through an agent will be the same as would have been allowed if the principal had himself applied for and taken delivery of them, namely, from the date when the application is duly presented, to the date when the copies are duly tendered for delivery; and this will be so irrespective of the question whether or not the agent's delay was or was not beyond the control of the principal. A principal who elects to use an agent in working against strict rules of time does so at his risk. The computation of time is subject to strict rules, and must not be confused with cases where, for sufficient cause, an extension of time is allowable. There is no rule for discretionary extensions of time in computing the time requisite for obtaining copies of judicial records.

One of the agents whom an applicant for such copies may employ is the post office: and the time which he will be entitled to in such a case will be measured from the date when the post office has delivered the application and the necessary money to the official appointed to receive the same, and the day on which the official appointed to deliver the copies makes such delivery to the post office. All time occupied by the post office in conveying the application and fees to the copying office, and in carrying back the copies to the applicant, is outside that computation.

Abnormal and unexpected failures of the post office, like such failures on the part of any other agent—failures for which the applicant is in no way responsible—may be sufficient ground for extending time in cases where time may be extended—but they cannot affect the computation of time.

The exercise of the Appellate Court's discretion in not extending time is not open to consideration in revision. **Raghu v. Madghia**, 10 N.L.R. 139.

STANYON, A.J.C.

References:—4 N.L.R. 184; 7 N.L.R. 67; 8 N.L.R. 11; 8 N.L.R. 72; 4 C.P.L.R. 166; 4 C.P.L.R. 188; 6 C.P.L.R. 13; 14 C.P.L.R. 40; 12 A. 461; 23 B. 442; 12 C.L.R. 541; S.A. No. 75-B. of 1911 (Unrep.), R.

Limitation Act (1908)—(Continued).

(33) Ss. 12, 29—Application to modify official Receiver's order under S. 22, Act III of 1907—Time for obtaining copy of the order—Not to be excluded. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 26, 16 M.L.T. 246.

(34) S. 14—*Under-valuation of property if not deliberate, reckless or mala fide, whether a ground for exclusion of time.*

The plaintiff instituted a suit for pre-emption in respect of a sale-deed executed for an alleged consideration of Rs. 2,000. The plaintiff valued his claim at 400 but subsequently admitted that the marked value of the disputed property was Rs. 1,000. The Sub-Judge relying on the plaintiff's statement returned the plaint for presentation to the proper Court and it was presented on the same day in the Court of the Munsif.

Held, that as there was nothing to show a deliberate or reckless under-valuation of the property in order to secure some improper advantage or a *mala fide* desire to institute the suit in a wrong Court, S. 14, Limitation Act, applied to the case and the plaintiff was entitled to the exclusion of time during which he had been prosecuting the proceedings in the Court of the Sub-Judge. **Ram Dayal v. Sarju Prasad**, 17 O.C. 210.

PANDIT KANHAIYA LAL, A.J.C.

(34-a) S. 14. See No. 19, *supra* and 90, *infra*.

(35) Ss. 14, 19. Art. 135—*Suit filed after period of limitation—Suit prima facie barred—Plaintiff bound to show in the plaint the ground upon which he claims exemption from law of limitation.*

Plaintiff sued on 15-2-1911 for possession as mortgagee of land mortgaged to him by the defendant on 23-9-1898, i.e., more than 12 years from the date on which he was entitled to possession under the mortgage deed. Defendant pleaded, *inter alia*, that it was barred by limitation. In the plaint plaintiff simply referred to a previous litigation between the parties in the Revenue Court, with the object of showing that he relied upon S. 14 of the Limitation Act (though the section was not mentioned in the plaint) to claim exemption from the operation of Art. 135 of the Limitation Act; but there was no reference in the plaint at all to any acknowledgment of liability by the defendant so as to make S. 19 of the Limitation Act applicable.

Held that the suit as laid in the plaint was *prima facie* barred by limitation, and under O. VII, r. 6, Civ. Pro. Code, the plaintiff was bound to show in the plaint the ground upon which exemption from the law of limitation was claimed, and the plaintiff cannot now be allowed to rely upon a ground of exemption from the law of limitation upon which the plaint was wholly silent (a).

Held also that S. 14, Limitation Act, did not apply as the litigation in the Revenue

Limitation Act (1908)—(Continued).

Court did not fall within the purview of that section. **Gobinda Mal v. Santa**, 83 P.R. 1914.

SHAF DIN and BEADON, JJ.

References:—(a) 31 C. 195, F.; 10 Bom. L.R. 346, D.

(36) S. 15—*Decree—Stay of execution—Period of stay to be excluded in counting the period of limitation for execution.* **Bai Ujam v. Bai Rukhmani**, 15 Bom. L.R. 936=21 Ind. Cas. 713=38 B. 153. See Final Part, 1913, Col. 827.

(37) S. 15—Stay by injunction—Injunction order set aside—Time whether excluded. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 61, 27 M.L.J. 734.

(38) S. 15—Applicability to the period of limitation provided in S. 48, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 92, 27 M.L.J. 25.

(38-a) S. 17. See No. 93, *infra*.

(39) S. 18—*Person aggrieved kept out of knowledge of right to have relief by reason of fraud—Execution sale—Fraud of decree-holder and collusion with Court Officers—Suppression of notices—Judgment-debtor kept out of knowledge of sale—Applicability of S. 18—Fraud subsequent to sale, if necessary to be proved.*

To determine the applicability of S. 18 of the Limitation Act to the circumstances of a particular case, the Court must determine whether the person aggrieved by the alleged fraud has been, as a matter of fact, kept out of knowledge of his right to have relief by reason of the fraud.

If it is proved that, subsequent to an execution sale, the judgment-debtor was, as a matter of fact, aware of the sale, notwithstanding the fraud, he is clearly not entitled to the benefit of S. 18, because, in spite of the fraud, he has not been kept out of the knowledge of his right to have relief on the ground of fraud.

To entitle a person to avail himself of the provisions of S. 18, he is not bound to allege and prove fraud subsequent to the date of the execution sale (a).

A judgment-debtor alleged that his decree-holder fraudulently and in collusion with the officers of the Court caused a suppression of the notices with the result that he was not apprised of the sale as he would otherwise have been in due course, in other words, by means of fraud he was kept from the knowledge of the sale.

Held, that his right to have the sale set aside accrued the very moment the sale took place, and if he was by means of fraud kept from the knowledge of the sale, he was necessarily kept from the knowledge of his right to have the sale set aside and S. 18 of the Limitation Act would apply to such a case. **Jotindra Mohun Rai Chowdhury v. Brojendra Kumar Datta Munshi**, 24 Ind. Cas. 249.

MOOKERJEE and BEACHROFT, JJ.

Reference:—(a) 20 I.A. 1=17 B. 341 at p. 347, R.

Limitation Act (1908)—(Continued).

(40)*S. 19—Transfer of non-transferable holding—Ejectment by landlord. See **LANDLORD AND TENANT**, No. 45, 19 C.W.N. 186.

(40-a) S. 18. See No. 20, *supra*.

(41) S. 18, Art. 62—Debt due to two brothers jointly—Collection by one before partition—Misrepresentation to the other brother's representative that debt is outstanding—Suit to recover half share of money so collected—Knowledge of fraud—Institution within three years from date of—Not barred—Interest on money retained by fraud—Whether allowable—Act XXXII of 1839. **Avanah Lakshminarasamma v. Avaneh Lakshamma**, 14 M.L.T. 325=(1913) M.W.N. 636=25 M.L.J. 531=21 Ind. Cas. 394. See Final Part, 1913, Col. 830.

(42) S. 18, Art. 166—Execution proceedings started against deceased judgment-debtor—Sale if may be set aside—Purchaser of occupancy holding, if may apply—Limitation—Fraud—Abuse of process of Court—Onus. See **CIV. PRO. CODE (1908)**, No. 73, 18 C.W.N. 1266.

(43) S. 18 and Arts. 166 and 181—Application to cancel sale by Insolvency Court on the ground of fraud—Inherent power of Court to entertain such an application—When time begins to run.

Held, that an application either of the Insolvent or his creditor for cancelling, on the ground of fraud, a sale of immoveable property of the insolvent conducted by the Insolvency Court in realizing assets of the insolvent under Ss. 20 and 23 of Act III of 1907, is governed by Art. 191 and not by Art. 166, Act IX of 1908.

Held, also, that S. 18 of the Act is general and under its force the time for making such an application begins to run only when the fraud becomes first known to the applicant.

Held, further, that the Court has inherent power to entertain such an application. **Mir Afzal Ali v. Mir Aman Ali**, 36 P.W.R. 1914=107 P.L.R. 1914=23 Ind. Cas. 397.

SCOTT-SMITH, J.

(44) S. 19—Execution of decree, application for—Acknowledgment of liability in writing by one of several judgment debtors, whether gives fresh start against all.

An acknowledgment of liability in writing by some of several judgment-debtors made within three years from the last application for execution of the decree, saves limitation as against them. **Ban Behary Kapur v. Jananendranath Gosh**, 22 Ind. Cas. 709.

FLETCHER and CHATTERJEE, JJ.

(45) S. 19—Decree debts are not within purview—Right barred under old statute—New statute cannot revive.

Acknowledgments of decree debts are not acknowledgments within the meaning of S. 19 of the Limitation Act and have not the effect of initiating a new period of limitation.

Limitation Act (1908)—(Continued).

A right barred under an old Act cannot be revived by a new Act without express words. **Akkamma v. Kopparam Rangappa**, (1914) M.W.N. 875.

SADASIVA IYER and NAPIER, JJ.

Reference:—5 M. 171 (F.B.), Appl.

(46) S. 19—Acknowledgment of liability—Plea in written statement—Set off in the alternative—How far acknowledgment. **K. Shaik Meera Sahib and Company v. Shaik Nainar Lubbay Marayyar**, (1913) M.W.N. 632=25 M.L.J. 259=21 Ind. Cas. 90. See Final Part, 1913, Col. 833.

(47) S. 19—Letter saying that writer will sign after looking into account—Whether acknowledgment. See **ACCOUNTS**, No. 4, 23 Ind. Cas. 587.

(48) S. 19—Admission of liability on a mortgage contained in a written statement—Acknowledgment. See **CIV. PRO. CODE (1908)**, No. 250, 12 A.L.J. 374.

(49) S. 19—Right of judgment-debtor to apply to have adjustment recorded as certified—Acknowledgment. See **CIV. PRO. CODE (1908)**, No. 312, 19 C.L.J. 126.

(50) S. 19—Statement by mortgagee recorded at settlement proceedings that mortgage was redeemable—Whether an acknowledgment. See **MORTGAGE (GENERAL)**, No. 42, 5 P.W. R. 1914 (N.W.F.P.).

(51) S. 19—Practice of Nattukottai Chetties—Their family properties whether can be treated as trade assets—Practice of signing letters with the name of their family diety—Effect—Such signature whether an 'acknowledgment' under S. 19, Limitation Act—Acknowledgment by member of a family firm who is also the manager of the family—Whether binds the firm—Agreement to discharge debt in a particular manner—Other remedies of creditor whether excluded. See **NATTUCOTTAI CHETTIES**, No. 1, 27 M.L.J. 631.

(51-a) S. 19. See Nos. 4, 35, *supra*.

(52) Ss. 19, 20—Acknowledgment or part payment by one partner—Whether binds other partners—Express authority—Necessity of proof of custom, of South India—Trade debt—Debtors signing creditor's book—Judicial notice. **K. R. Y. Firm v. Sathyavada Sitharama Swami**, 25 M.L.J. 501=37 M. 146=21 Ind. Cas. 634. See Final Part, 1913, Col. 834.

(53) S. 19, Arts. 66 and 116—Registered bond—Suit to recover money due on bond—Limitation.

A suit to recover money due on a registered bond, though in form a suit for money due on a bond, is in substance a suit for compensation for breach of a contract, and governed by Art. 116 and not by Art. 66 of the Limitation Act, 1908 (a).

A mortgagor, subsequent to his mortgage, passed two promissory notes to the mortgagee on different occasions in one of which he

Limitation Act (1908)—(Continued).

referred to the mortgage debt thus: "the amount due under the mortgage-debt is set apart" and in another, he said: "Besides this the mortgage-debt is distinct."

Held, that the words in the two promissory notes amounted to acknowledgments within the meaning of S. 19 of the Limitation Act. **Dinkar Hari Kulkarni v. Chhaganlal Narasidass**, 16 Bom. L.R. 20=38 B. 177=23 Ind. Cas. 353.

HEATON and SHAH, JJ.

References:—(a) 12 I.A. 12; 14 B. 377, *Discussed*.

- (54) *S. 19, Art. 148—Limitation—Redemption—Entries in the Settlement Record not signed by mortgagee—No starting point of limitation.*

Held, that an entry in a Settlement Record that a mortgagor is at liberty to redeem the land at any time on payment of the mortgage-money, which is not signed by the mortgagee or any other person duly authorised by him in that behalf, neither amounts to a contract between the mortgagor and the mortgagee, nor constitutes an acknowledgment for extending, under S. 19 of Act IX of 1908, the limitation prescribed by Art. 148 of the Act for a redemption suit. **Wazir Singh v. Jhanda Singh**, 77 P.W.R. 1914=178 P.L.R. 1914=24 Ind. Cas. 898.

KENSINGTON, C.J.

References:—116 P.R. 1891; 53 P.R. 1905=74 P.W.R. 1905 (F.B.), F; 39 P.R. 1910=35 P.W.R. 1910, R.

- (55) *S. 19, Art. 179, Cl. 4—Application to have payment made under a decree certified by the Court—Acknowledgment of decree as outstanding decree—Step-in-aid of execution—Installments, failure in payment of.* **Bacharaj v. Babaji**, 15 Bom. L.R. 990=21 Ind. Cas. 407=38 B. 47. See Final Part, 1913, Col. 835.

- (56) *S. 20—Mortgagee authorised to pay creditor of mortgagor in full—Whether he is an agent authorised to make a pure payment of interest—Optional exercise of authority—Effect.*

A executed a mortgage in favour of B for Rs. 26,000. Part of the consideration was made up of Rs. 10,920 to be paid by the mortgagee to a creditor of the mortgagor on two bonds. The mortgagee did not pay the Rs. 10,920 but nearly two years later paid the interest due on the plaint bond up to that date. The words of the mortgage were "The sum received by us in the matter of our having given you permission to pay off the said bond and obtain the return of the same, is Rs. 10,920."

Held, that, though the mortgagee had authority to pay off the debt in full, he had no authority to make a pure payment of interest as such so as to bring the case within S. 20, Limitation Act (a).

A person may be an authorised agent, even if the exercise of the authority be optional and

Limitation Act (1908)—(Continued).

not obligatory. **Alagappa Chettiar v. Subramania Pandia Thevar**, 26 M.L.J. 509=23 Ind. Cas. 810.

WALLIS and SADASIVA IYER, JJ.

Reference:—(a) 2 Bing. N.C. 241, R.

- (57) *S. 20—Payment of interest—Burden of proof—Limitation.*

Under S. 20 of the Limitation Act, the payment of interest must be proved to have been made either by the debtor himself or by his agent duly authorised in this behalf. **Ramchandra Singh v. Durga Devi**, 23 Ind. Cas. 863.

KNOX, J.

- (58) *S. 20—Payments of principal or interest—Payments when to be in handwriting of person making the payments.*

So far as payment of the principal of a debt is concerned, the writing should be in the hand of the debtor. This rule does not apply to payments of interest. **Muthu Pillay v. Maria Sandanam Pillai**, 16 M.L.T. 505=(1914) M.W.N. 910.

KUMARASWAMI SASTRI, J.

Reference:—35 C. 813; 14 M.L.T. 318, F.

- (59) *S. 20—Debt—Part payment of principal—Debtor knowing how to write—Entry recording such payment—Not written by person making payment but merely signed—Effect—Limitation not saved.* **Lodd Govindoss Kristna Dass v. Rukmani Bhal**, 14 M.L.T. 310=21 Ind. Cas. 302. See Final Part, 1913, Col. 835.

- (60) *S. 20—Unregistered mortgaged bond—Payment of interest before expiry of period of limitation—Whether can be proved—Limitation not saved—Provision as to payment of interest—Not a collateral purpose.* **Balaprassad v. Bhola Nath**, 9 N.L.R. 140=21 Ind. Cas. 281. See Final Part, 1913, Col. 836.

- (60-a) *S. 20. See No. 52, supra and 101, infra.*

- (61) *S. 21 (2)—Promissory note—Acknowledgment by one when binding upon both—Series of endorsements—Interference in revision—Error of law but substantial justice.*

From a number of endorsements on a promissory note by two promisors, a Court can infer that the promisors had each authorised the other to make acknowledgments so as to bind both.

Even if there had been an erroneous decision on a question of law, if substantial justice had been done, the High Court would be slow to interfere in revision. **Annamalai Pattar v. P. Natesa Iyer**, (1914) M.W.N. 792.

HANNAY, J.

- (62) *S. 22—Suit for money—Plaintiff suing in his private capacity—Application to and prayer for decree in the alternative in his favour as managing director of a Company—Applicability of S. 22—No addition of new party—Only alteration of capacity—Effect.*

Limitation Act (1908)—(Continued).

Where the plaintiff in a suit having sued, in his private capacity in the first instance, to recover a sum of money from the defendant, subsequently put in an application asking that a decree in the alternative may be passed in his favour as the Managing Director of a Limited Liability Company and that he may be allowed to amend the plaint accordingly.

Held that the effect of granting the application would not be equivalent to adding new plaintiff so as to admit of the terms of S. 22 of the Limitation Act being applied to the case(a).

The alteration, if allowed, merely had the effect of altering the ground on which the plaintiff already on record could recover the suit amount. **M. A. Rajam Aiyangar v. Muthukrishna Pillay**, 16 M.L.T. 251.

HANNAY, J.

References:—(a) 15 M. 417; 32 C. 582; 25 M.L.J. 452, R.

(63) S. 22—Suit for foreclosure—Subsequent mortgagee added as defendant on his own application and with plaintiff's consent, after expiry of limitation for the suit—Effect—Suit whether barred as against him—Discharge or removal of such party from suit. See **MORTGAGE (FORECLOSURE)**, No. 3, 10 N.L.R. 173.

(64) S. 22, Cls. 1 and 2—Order allowing claim—Purchase of attached properties within one year from order—Purchaser whether a necessary party to suit under O. XXI, r. 63, Civ. Pro. Code—Person added not a necessary party—Applicability of S. 22, Limitation Act. See **CIV. PRO. CODE (1908)**, No. 337, 26 M.L.J. 449.

(64-a) S. 28. See No. 29, *supra*.

(65) S. 28, Art. 44—Suit by a minor after attaining majority for possession of land sold by his guardian during his minority, limitation for.

Where the mother of a certain Hindu minor acting as their guardian sold certain grove lands belonging to the minors during their minority and the minors brought a suit for possession of the grove lands more than three years after attaining majority but within 12 years of the sale, *held*, that, under the provisions of S. 28 and Art. 44, Sch. I of Act IX of 1908, the claim of the plaintiff respondents became extinguished three years after their attaining majority. **Sheonatha Musammat v. Sheoraj Singh**, 17 O.C. 52=23 Ind. Cas. 406.

STUART, J.C.

References:—23 M. 271, *Rel.*; 11 O.C. 346, *Not F.*

(65-a) S. 29. See No. 33, *supra*.

(66) S. 30, Art. 11—Period of limitation altered by implication—S. 30, if applies—Claim petition dismissed for default—Regular suit if must be brought within a year—Civ. Pro. Code (1882), Ss. 278, 281.

Limitation Act (1908)—(Continued).

The operation of S. 30 of the Limitation Act is not limited to cases in which the period of limitation has been expressly altered. It applies also to a case where the period of limitation has been altered as the result of the alteration of the description of the suit.

Art. 11 of the Limitation Act does not apply where a claim preferred under S. 278 of Act XIV of 1882 was "dismissed for absence," the order of dismissal not being an order passed under S. 281 of that Act but under those sections of the Code which enabled a Court to dismiss a miscellaneous case for default. **Umacharan Chatterjee v. Heron Moyee Debi**, 18 C.W.N. 770.

CHAPMAN and NEWBOULD, JJ.

(66-a) S. 31. See No. 5, *supra*.

(67) S. 31 (1)—Question whether a transaction is or is not a mortgage—Test. See **MORTGAGE (GENERAL)**, No. 22, (1914) M.W.N. 501.

(68) Arts. 2, 36—Act injurious to another done under powers conferred by some Act of the Legislature—Act done in improper manner out of malice and carelessness. **Wali-ullah (Maulvi) v. Baj Bahadur**, 16 O.C. 211=21 Ind. Cas. 426. See **Final Part**, 1913, Col. 839.

(69) Arts. 2, 62, 120—Refund of Octroi—Suit for money.

Where a Municipality legally takes octroi duty from a person but wrongfully refuses to refund it on his application, a suit for refund of the money is governed by Art. 120 of the Limitation Act and not by Art. 2 or Art. 62. **The Municipal Board of Ghazipur v. Deokinandan Prasad**, 12 A.L.J. 952=36 A. 555.

CHAMIER and RAFIQ, JJ.

References:—7 A.L.J. 496; 10 C. 860; 19 C. 123, R.

(70) Limitation Act (1908), sch. I, arts. 10 and 120—Pre-emption.—Second purchaser of property sought to be pre-empted, limitation as against—Cause of action and relief against vendee's assignee—Declaratory suit, suit against second purchaser to be regarded as—Suits against first and second purchasers, distinction between—Sale "sought to be impeached," meaning of.

Where the first purchaser sells property to a second purchaser before the filing of a pre-emption suit and the suit against the former is filed within one year of the date of the original sale, but the latter is subsequently impeached as a defendant after the said period, the suit as against the latter is governed not by Art. 10 but by Art. 120, Sch. I of the Limitation Act, that is to say, the limitation as against the second purchaser is six years. For the suit against him is in effect a suit for a declaration that the pre-emptor is not affected by the re-sale and that the second purchaser shall be bound by the decree which would ultimately be passed between the original parties to the suit upon a

Limitation Act (1908)—(Continued).

final adjudication by the Court on the merits of the claim. **Razawand Singh v. Dukchhor**, 24 Ind. Cas. 116.

LINDSAY, J.C.

References:—18 Ind. Cas. 70=31 P.R. 1913=28 P.W.R. 1913=61 P.L.R. 1913, *F.*; 25 P.R. 1908=74 P.L.R. 1903; 106 P.R. 1907=75 P.L.R. 1908, *Diss.*

(71) Art. 11—Hindu Law—Document merely declaring the divided status of family—Whether registrable—Civ. Pro. Code (1908), O. XXI, r. 103—Civ. Pro. Code (1882), S. 335—Art. 11, Limitation Act—Undivided share in joint family purchased in Court auction—Effect of symbolical delivery—Suit for partition and separate possession—Limitation. See REGISTRATION, No. 1, 15 M.L.T. 163.

(71-a) Art. 11. See No. 66, *supra*.

(72) Art. 12—Suit to set aside rent sale—Landlord not a necessary party—Receiver representing landlord added as party after one year—Suit not barred. See ACT VIII OF 1865 (MADRAS RENT RECOVERY), No. 3, (1914) M.W.N. 236.

(73) Arts. 14, 142—*Ultra vires*—Order of Collector as to question of title under S. 37 of Bombay Land Revenue Code—Suit for declaration of ownership after one year from date of order, but within 12 years of dispossession—Limitation. See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), No. 1, 7 S.L.R. 169.

(74) Arts. 29, 62, 120—Attachment of debt—Payment in pursuance of attachment—Effect—Suit by claimant to the attached debt—Limitation.

The attachment of a debt does not constitute a "wrongful seizure of moveable property under legal process" within the meaning of Art. 29, Limitation Act. And the payment of money into Court in consequence of a legal process of attachment is not in all cases enough to constitute a "seizure."

Where the amount of the debt is paid to the decree-holder, a suit by a claimant to the debt attached against the decree-holder is governed by either Art. 62 or 120. **Yellammal v. Ayyappa Naick**, 26 M.L.J. 166=(1914) M.W.N. 348=22 Ind. Cas. 370 (F.B.).

WHITE, C.J., and SANKARAN NAIR and CLDFIELD, JJ.

References:—27 M. 348; 8 B. 17, R.

(74-a) Art. 36. See No. 68, *supra*.

(75) Art. 42—Suit for damages for wrongfully obtaining an injunction—Maintainability—Limitation. See DAMAGES, No. 3, 18 C.W.N. 1189.

(76) *Sch. I, Art. 44—Guardian and ward—Alienation by mother as guardian—Consideration applied for benefit of minor—Suit brought to set aside alienation more than three years after attainment of majority—Limitation.*

Limitation Act (1908)—(Continued).

While the plaintiff was an infant, his mother for alleged legal necessity transferred certain property belonging to the plaintiff to the defendant for valuable consideration. The plaintiff brought a suit to set aside the conveyance and recover possession of the property, but he had attained majority more than three years before the institution of the suit. It was found that there had been no legal necessity for the alienation, but the money had been in fact applied for the plaintiff's benefit:

Held, that the suit was barred by Art. 44 of the Limitation Act, 1908 (z).

Art. 44 of the Limitation Act applies to a case where the alienation has been made by a guardian who has not been appointed as such by the Guardians and Wards Act or by a similar statutory provision. **Manmatha Nath Mandal v. Khirodhar Ghosh**, 24 Ind. Cas. 110.

MOOKERJEE and BEACHROD, JJ.

References:—(a) 9 Ind. Cas. 377=13 C.L.J. 277, *F.*; 14 M. 26; 7 M.L.J. 131, *Diss.*; 5 A. 490=A.W.N. (1883), 64, *Dist.*

(77) Art. 44—Applicability to alienations by unauthorised guardians. See HINDU LAW (GUARDIANSHIP), No. 1, 27 M.L.J. 285.

(77-a) Art. 44. See Nos. 26, 65, *supra* and 140, *infra*.

(78) Arts. 44, 91, 144—Aliyasantana family—Suit to recover possession of family properties alienated by its Ejaman—Limitation. See ALIYASANTANA LAW, No. 1, 27 M.L.J. 60.

(79) Arts. 48, 49—Specific moveable property—Entrustment to a person for inspection for sale—Pledge by latter for his own use—Suit against pawnee by owner—Institution within 3 years from date when owner became aware of pawnee's possession—Suit not barred—Ostensible owner—True owner—Rights inter se—Ss. 108, 178, Contract Act—S. 41, Transfer of Property Act—Scope.

Plaintiff gave K a jewel on 19th May 1907 on K's representation that there was a demand for the jewel, that he would show it and bring it back and that, if the purchaser liked the jewel, he would settle the price in the presence of the plaintiff. K pledged it with S on the 20th June 1907 and obtained a sum of Rs. 175 from S for his own use. K died without redeeming the jewel. S asked plaintiff to sell the jewel when the latter came to know that it was his own jewel. On S's refusal to restore it to him, plaintiff instituted in 1911 the present suit within 3 years from the date of his knowledge that it was in S's possession. S contended that the suit was barred by limitation because it was brought more than 3 years from the date when it was pledged to him.

Held that Art. 48, Limitation Act, was the proper article applicable to the case and that the suit was within time (a).

Ss. 108 and 178 of the Contract Act as well as S. 41 of the Transfer of Property Act and

Limitation Act (1908)—(Continued).

the sections dealing with reputed ownership in the various Insolvency Acts proceed upon the principle that *prima facie* the rights of the legal owner should be protected unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner; mere *bona fides* on the part of the purchaser or pledgee is not enough. He will have to prove that, by some act or omission, the true owner has forfeited his right to recover back possession. It is therefore incumbent upon the party resisting the claim of the true owner to adduce strict proof of the equities which have arisen in his favour, and of the laches on the part of the owner which have led him to advance the money (b).

Held, also, that, in the present case, K was not an agent for sale of the jewel and that S has got no right to be paid back his money before he can be asked to deliver the jewel. **Seshappier v. Subramania Chettiar**, 15 M.L.T. 221=(1914) M.W.N. 319=23 Ind. Cas. 174.

SESHAGIRI LYER, J.

References:—(a) 29 A. 579, F.; 22 M.L.J. 152; 11 Bom. L.R. 926; 12 Bom. L.R. 316, R.; 3 M.L.T. 324, D. (b) 12 B.L.R. 42; 24 B. 458; 27 M. 424, R.

(79-a) Art. 49. See No. 79, *supra*.

(80) Arts. 49, 60, 61, 62, 81, 89, 120 and 145—'Specific moveable property,' meaning of, in Art. 479—Suit by Karnavan to recover tarwad money received by a junior member—Such suit governed by Art. 62—Money had and received to plaintiff's use. **Sankunni Menon v. Govinda Menon**, (1912) M.W.N. 516=11 M.L.T. 325=22 M.L.J. 485=14 Ind. Cas. 254=37 M. 381. See Final Part, 1912, Col. 776.

(81) Arts. 52, 56, 120—Claim for money due for work performed and materials supplied under contracts—Limitation. **Radha Kishen v. Basant Lal**, 103 P.R. 1913=81 P.L.R. 1914=22 Ind. Cas. 576. See Final Part, 1913, Col. 844.

(81-a) Art. 56. See No. 81, *supra*.

(81-b) Art. 60. See No. 80, *supra*.

(82) Arts. 60, 66, 115, 120 and 145—Agreement to pay money after a certain event, breach of—Art. 115 applicable—Suit more than 3 years after event, barred—Deposit, meaning of, in Arts. 60 and 145, considered—Executor appointed under will of Hindu widow—Onus of showing that money belonged to her absolutely, laid on plaintiff—Estoppel.

N, a Hindu widow, obtained a document in 1900 from the father of the defendant, which ran as follows:—"You have given to me a receipt that you have received from me Rs. 10,680-9-9 deposited with me by you till the disposal of your Pungali's suit to come off on 15th August 1900. But I have not paid you the abovesaid amount. I shall, after the disposal of your Pungali's suit, pay you the abovesaid amount with interest, &c. In the meantime I shall pay you for Court and house expenses. After the disposal of the above suit, I shall pay

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you the amount due to you according to account." The Pungali's suit referred to in the above document was filed in 1901, and dismissed by the District Court in 1902; and it was finally dismissed in appeal by the High Court in December 1904. Meanwhile, N died in the beginning of 1904, leaving a will, dated 1903, whereby she appointed the present plaintiff as executor. Now in 1910, the executor sued the defendant to recover the sum of Rs. 10,000 and odd deposited with his father, under the above document.

Held, the suit is governed by Art. 115, Limitation Act, and having been brought more than 3 years after the final dismissal of the Pungali's appeal in December 1904, it was barred by limitation (a).

Art. 145 is clearly inapplicable to a case of this kind, i.e., the lending of money and an agreement to pay on demand or on a specified date. The word 'pawnee' which occurs in conjunction with the word 'depository' seems to be wholly inappropriate to the case of money.

Art. 60 cannot apply, as the amount is not payable on demand but only "after the disposal of the Pungali's suit." Further, 'deposited' in Art. 50 is used in the sense of a deposit account as contradistinguished from a current account (b).

Art. 120 ought not to be applied, unless it is clear that no other specific article is applicable.

Quære:—Whether Art. 66 applies to this case (c).

Held, further, that the onus is on the plaintiff to show that this sum of money was money in which N had an absolute interest, and not money as the defendant contends, in which she had only a life interest.

Held, also, the plea that the plaintiff was not entitled to sue as executor for this amount at it was not deceased's absolute property was open to the defendant and he was not estopped from setting it up. **Balakrishnadu v. Narayanaswami Chetty**, (1914) M.W.N. 264=22 Ind. Cas. 60.

WHITE, C.J., and OLDFIELD, J.

References:—(a) 10 C. 1033 and 15 M. 380, F. (b) 18 M. 390, F. (c) 4 A. 3 (4), R.

(82-a) Art. 61. See No. 80, *supra*.

(83) Arts. 61, 99, 120—Contribution—Money paid—Money realized by sale of plaintiff's property whether money paid—Joint decree against plaintiff and defendant paid by third party—Decree obtained by third party against plaintiff—Realization of decretal amount by sale of plaintiff's property—Suit for contribution by plaintiff—Point of time for commencement of limitation. **Janki Koer v. Domi Lal**, 20 Ind. Cas. 24=18 C.W.N. 480. See Final Part, 1913, Col. 845.

(84) Art. 62—Suit for recovery of over-payments to building contractor—Amounts received in execution of decrees cannot be recovered so long as the decree stands.

Limitation Act (1908)—(Continued).

The plaintiff entrusted the defendants, contractors, with the building of three different masonry works for the plaintiff, and paid them from time to time on account the sum of Rs. 34,433. The total amount of the value of all the three works was Rs. 33,202. Subsequently, the defendants obtained decrees for Rs. 3,500 and Rs. 1,400 for two of the works, and recovered the amounts of the decrees from the plaintiff in execution proceedings.

The plaintiff sued the defendants for recovery of the amount overpaid to them and also for the amount of the decrees wrongfully received by the defendants in execution.

Held, that these sums, upon plaintiff's allegations, must be regarded as moneys payable by defendants to the plaintiff for moneys received by defendants for the plaintiff's use, within the meaning and for the purposes of Art. 62 of the Limitation Act.

Held, also, that, as the amounts of decrees were paid in execution of the decrees obtained by the defendants, plaintiff could not ask for a refund so long as those decrees subsisted. **The Roman Catholic Mission at Rawalpindi v. Suwder Singh**, 88 P.L.R. 1914=67 P.W.R. 1914=22 Ind. Cas. 592.

RATTIGAN and BEADON, JJ.

(85) Art. 62—*Suit to recover money from a person appointed to sell stock-in-trade—Money had and received.*

Disputes having arisen between the heirs of one G, deceased, the defendant was appointed to sell his stock-in-trade and pay up the creditors pending certain arbitration proceedings. The defendant sold certain property and paid up certain debts. The arbitration proceedings fell through. In a suit for recovery of her share brought by the sister of G, **held** that the plaintiff was only entitled to recover under the form of action known as a claim for "money had and received," and the suit having been brought more than three years after the last amount realised by the defendant was barred by limitation. **Masih-Ud-Din v. Imtiaz-Un-Nisa Bibi**, 12 A.L.J. 1256=37 A. 40.

RICHARDS, C.J. and BANERJI, J.

(86) Art. 62—*Illegal levy of assessment by Cantonment Magistrate—Payment under protest—Payment by cheque—Suit for refund—Limitation.* See CANTONMENT TAXING REGULATIONS (POONA), No. 1, 16 Bom. L. R. 121.

(86-a) Art. 62. See Nos. 41, 69, 74, 83, *supra* and No. 107, *infra*.

(87) Arts. 62, 89, 120—*Misappropriation by father—Suit against sons—Limitation.*

Where the plaintiff sues for certain sums misappropriated by the defendant (agent) the suit would be barred if brought more than 3 years after the termination of the agency or after the amount due was ascertained by arbitration.

Limitation Act (1908)—(Continued).

A cause of action against the sons of a deceased agent for sums misappropriated by the agent is not different from that against the father and would be barred against the sons if it would be barred against the father if he had lived. Art. 120 of the Limitation Act does not apply to such a suit, but Arts. 62 and 89 would apply. **A.R.S. Arunachalam Chetty v. Raman Chetty**, 16 M.L.T. 614=(1915) M.W.N. 23.

SANKARAN NAIR and SPENCER, JJ.

(88) Arts. 62, 97—*Mortgage of joint Hindu family property by one of family members—Not void but voidable—Remedy of mortgagee—Suit to recover mortgage-debt from mortgagor personally—Limitation.* See TRANSFER OF PROPERTY ACT, No. 66, 21 Ind. Cas. 581.

(89) Arts. 62, 97, 114, 115, 116—*Lease—Failure of consideration—Suit for refund of consideration—Limitation.* See KHORPOSH GRANT, No. 1, 19 C.W.N. 102.

(90) Arts. 62, 120 and S. 14—*Plaintiff's application for rateable distribution refused—Plaintiff's revision petition dismissed—Suit under S. 73, Civ. Pro. Code, to recover portion of assets—Limitation—Deduction of time spent in prosecuting revision petition.* See CIV. PRO. CODE (1908), No. 111, 16 M.L.T. 509.

(91) Arts. 62, 120, 131—*Limitation—Suit for recovering Jagir income wrongfully realised by defendant from third persons—Patta permanent or limited to the term of settlement—Jagir income of Major Raja Jai Chand of Lambo groon in Maua Khara.*

In 1852 R granted to K a patta to the effect that the value of his Jagir income in Maua Khara would be estimated at Rs. 2,507, that the lessee would collect in kind and after paying Rs. 2,257, in cash to the lessor, the lessee would keep the balance Rs. 250, more or less for himself.

Before the settlement and other Revenue authorities, R unsuccessfully contested that the patta of 1852 was limited to the term of the settlement and that it was revocable at its end. In 1909, at last, R sued K in the Civil Court for recovering from K six years' arrears of Jagir income wrongfully realised and kept by K, briefly on the ground that the patta was revocable by him after the term of the settlement and that it was actually revoked.

The pleas *inter alia*, were that 1. The lease was one in perpetuity 2. the suit was barred by limitation and 3. R, was estopped from cancelling the lease.

Held, that:

The lease of 1852 was limited to the term of the settlement and R was entitled to revoke it at the end of that settlement (a).

That the suit is governed by Art. 62. Act IX of 1908 and R can only recover Jagir moneys which he was entitled to receive in respect of the three years immediately preceding the date of his suit; and that neither Art. 120

Limitation Act (1908) — (Continued).

nor 1914s applicable (b). **Kirpa Ram v. Jal Chand**, 46 P.W.R. 1914=140 P.L.R. 1914=23 Ind. Cas. 445.

JOHNSTONE and SHAH DIN, JJ.

References :—(a) C.A. 169 of 1903, F. (b) 83 P.R. 1906=126 P.W.R. 1906, D.

(92) *Art. 64—Limitation—Money due on balance—'Promise to pay'—Barred debt—Contract Act, S. 25 (3).*

* When it is sought to recover a time-barred debt on the strength of a writing showing merely a balance due, the document relied on must contain a promise to pay within the meaning of S. 25, Contract Act.

Art. 64, Limitation Act, refers to money on account stated between the parties but not on a balance. **Debi Prosad v. Ram Ghulam Sahu**, 19 C.L.J. 263.

COX and CHATTERJEE, JJ.

(92-a) *Art. 66. See Nos. 53, 82, supra.*

(93) *Arts. 66, 115, 120, 133, 145 and S. 17—Applicability of Art. 145 to deposits of money—Limitation applicable in case of loans repayable at a fixed date—Meaning of deposit—S. 4, Probate and Administration Act (V of 1881)—Executor's right to sue when begins—Same word used in a section of the subsequent Act in which it was re-enacted—Construction.*

A testator deposited some money with defendant in 1900 and died in 1904. The Probate and Administration Act applied to the case. The executor sued in 1910 for the amount deposited. *Held*, the suit was barred under Art. 66 or 115, Limitation Act.

The word 'deposit' in Art. 145, Limitation Act (1908), means a deposit of goods to be returned *in specie*. When, as in the Limitation Acts of 1859 and 1871, there is nothing to suggest the use of the word 'deposit' in any other sense, it must be taken to mean the sort of bailment known to lawyers under that name in the Roman Law of Bailments which was accepted by Bracton and afterwards by Lord Holt in *Coggs v. Barnard* (a) as fit to be enforced in England.

There is no ground for holding that, in Acts of 1859 and 1871, the word 'deposit' included so called deposits of money or other things which were not intended to be kept but to be used, and there is nothing in the Acts of 1877 and 1908 to show that any different construction should be put on Arts. 133 and 145 (b).

Unless there is some strong reason to the contrary, a word used in an article must be read in the same sense in the subsequent Act in which it is re-enacted (c).

Art. 145 is not applicable to deposits of money. Even treating the transaction as a loan repayable at a fixed date it is governed probably by Art. 66 and, if not, by Art. 115, Art. 120 is not applicable.

Where a will is not governed by the Hindu Wills Act and S. 187 of the Succession Act

Limitation Act (1908) — (Continued).

does not apply, the estate of the deceased testator vests in the executor, under S. 4 of the Probate and Administration Act, on his death and there is nothing in that Act to prevent the executor instituting the suit at once for debts due to the deceased. No doubt, if he omitted to take out probate, he could not obtain a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree. The executor is capable of instituting the suits, within the meaning of S. 17 of the Limitation Act, from the death of the testator. **V. Balakrishnadu v. Narayanasawmy Chetty**, 37 M. 175=24 Ind. Cas. 852 (*vide* appeal against this judgment reported in (1914) M.W.N. 264=22 Ind. Cas. 60.)

WALLIS, J.

References :—(a) (1703) 1 Sm. L. C. 173, R. (b) 16 C. 25; 18 M. 390 F.; 31 C. 519; 8 C.L.J. 535, Not F.; (1885) L. R. 10 A. C. 364, R.

(93-a) *Art. 74. See No. 4, supra.*

(94) *Art. 75—Instalment bond—Waiver.*

A bond payable by instalments contained the provision that, in default of payments on due dates, the whole amount with interest shall be payable :

Held, that the creditor was not compelled to sue for the whole amount on default of any one instalment only, and was, therefore, competent to sue for any instalment due within the period of three years. **Bohra Moti Ram v. Lal Khan**, 23 Ind. Cas. 830.

KNOX, J.

(95) *Art. 75—Waiver—Default, meaning. T. Sitarama Chetty v. Cotta Krishnasamy Chetty*, (1913) M.W.N. 676=25 M.L.J. 264=21 Ind. Cas. 24. See Final Part, 1913, Col. 847.

(95-a) *Art. 75. See No. 4, supra.*

(96) *Arts. 75, 116—Instalment bond—Default in payment—Option to allow time—Effect—Waiver—Mere failure to sue—Not sufficient proof of waiver.*

Where an instalment bond contained the following clause, *viz.*, 'If I make any default I will be liable to pay the remaining principal amount at once and even then it will be in the power of the mortgagees to let the money remain with me or not.'

Held that the clause amounted to an indivisible contract providing that the whole amount should be due in default of payment of the instalments within the meaning of Art. 75 of the Limitation Act (a).

Mere failure to sue, though some evidence of waiver, is not sufficient proof of waiver so as to affect limitation (b).

Held that Art. 75¹ applied to the case and that the fact that the bond was registered merely increased the period of limitation to 6 years by

Limitation Act (1908)—(Continued).

reason of Art. 116. **Kimatral Kashiram v. Wadero Sher Mahomed Khan**, 8 S.L.R. 69.

HAYWARD, J.C. and BOYD, A.J.C.

References :—(a) 30 A. 123, *Not F.* (b) 31 C. 297; 36 C. 394, *R.*

(96-a) Art. 80. See No. 4, *supra*.

(96 b) Art. 81. See No. 80, *supra*.

(97) *Sch. I, Art. 85—Mutual, open and current account, what constitutes.*

In order that an account should, under Art. 85, Limitation Act, constitute "mutual, open and current account" not only must it be mutual, open and current, but there should also be reciprocal demands between the parties.

Where, therefore, a contract creates a right in the defendant to demand an account of the plaintiff's dealings as the defendant's agent, and a right in the plaintiff to demand from the defendant delivery of goods to a specified amount every month, there is a mutual, open and current account within the meaning of Art. 85, Limitation Act, though there are no reciprocal credits and debits (a).

*Per White, C.J. (Oldfield, J., dissenting).—*Where one party makes an advance to another to enable him to carry on business with him, the fact that the latter executes to him a promissory note for the amount advanced does not make it cease to be an item of debit as against him in the mutual, open and current account. **Sowcar Bapu Saib Yussuf Saib & Co. v. Iscoet Ismail & Co.**, 24 Ind. Cas. 148.

WHITE, C.J. and OLDFIELD, J.

References :—(a) 8 Ind. Cas. 141 = 34 M. 513 = 8 M.L.T. 412 = (1911) M.W.N. 1 = 21 M.L.J. 391, *Distd*; 6 T.R. 189 = 101 E.R. 504, *F.*

(98) Art. 85—*Plaintiff advancing moneys to defendant—Latter consigning goods for sale on commission—Mutual, open and current account.* **S. Namburumal Chetty v. K. Kotayya**, 14 M. L.T. 498 = 21 Ind. Cas. 773. See Final Part, 1913, Col. 848.

(98-a) Art. 89. See Nos. 80, 87, *supra*.

(99) Arts. 89, 90—*Suit by principal against agent for neglect or misconduct—Knowledge of misconduct when to be presumed—Limitation.* See **PRINCIPAL AND AGENT**, No. 8, 7 Bur. L. T. 199.

(99 a) Art. 90. See No. 99, *supra*.

(99-b) Art. 91. See No. 78, *supra* and 140, *infra*.

(100) Arts. 91, 141—*Adoption—Possession of widow—Adverse possession—Belief that the possession was mere life-estate and not absolute—Widow's possession not adverse to adopted son—Alienation by widow—Deed of adoption reserving life-estate to the widow—Registration—Registration Act (1908), S. 17.*

In 1893, B and his wife R adopted G (plaintiff) as a son. The deed of adoption, which was executed about the time and which was not

Limitation Act (1908)—(Continued).

registered, provided that the plaintiff was to become full owner of the estate after the death of both B and R. B died in 1894. Shortly after his death, R drove away the plaintiff from her house. In 1902, she granted two leases to defendants of a portion of the property for a term of twenty-five years. R died in 1907. In 1909, the plaintiff sued to set aside the leases as not binding on him after R's death and to recover possession of the property. The lower Courts decreed the plaintiff's claim on the ground that the leases were not binding on the plaintiff. The defendants appealed contending, *inter alia*, that the plaintiff's claim was barred by the adverse possession of R from 1894 to 1907 :—

Held, (1) that the deed of adoption was compulsorily registrable, for, first, it reserved a life-interest to himself, and after himself to his widow before giving the remainder absolutely to the plaintiff, that is, it created in the widow an interest in immoveable property which she otherwise would not and could not have possessed.

(2) That no bar of limitation defeated the plaintiff's claim, for if the plaintiff honestly believed, though wrongly, that R was entitled to remain in possession for life and if she shared that belief and so remained in possession while he took no steps to disturb her, the intention to hold adversely in order to acquire an absolute estate was wanting. **Pirsaab v. Gurappa**, 16 Bom. L.R. 111 = 38 B. 227 = 24 Ind. Cas. 716.

BEAMAN and MACLEOD, JJ.

(100-a) Art. 97. See Nos. 88, 89, *supra* and 107, *infra*.

(101) Art. 97 and S. 20—*Temporary possession of land given in consideration of loan—No registered document—Suit for redemption by borrower dismissed but decree passed for delivery of possession to borrower—Institution of suit for money by the lender within 3 years of such decree but more than 3 years from date of loan—Claim not barred—Fruits of land taken in lieu of interest—Payment of interest—Saving of limitation—Claim cognisable by Small Cause Court—No second appeal—High Court's power to treat it as Civil Revision petition—Civ. Pro. Code, 1908, S. 102—Lower Burma Courts Act, S. 80.*

A owed B a debt of Rs. 400. In 1906, A put B in possession of a parcel of land under an agreement by which, according to A, B was to take the fruits of the land in lieu of interest on the debt. A filed a suit for redemption in which B pleaded that the transaction was an upright sale. It was decided in that suit that, there being no registered deed in support of the transaction, there had been neither a sale nor a mortgage and a decree was passed giving possession of the land to A. B instituted the present suit for the recovery of the sum of Rs. 400. The Court of First instance decreed B's suit but the lower appellate Court dismissed the

Limitation Act (1908)—(Continued).

suit on the ground that the cause of action was on the original loan made in 1906 and was therefore barred by limitation. B preferred a second appeal to the Chief Court.

Held, that no second appeal lay, because under S. 80 of the Lower Burma Courts Act, and S. 104 of the Civ. Pro. Code, 1908, the present claim was one which was cognisable by a Small Cause Court and that the Chief Court had power to treat the second appeal as a Civil Revision Petition.

Held, also that Art. 97 of the Limitation Act applied and that the suit was not barred by limitation (a).

Even if the cause of action were considered to be the old debt, under S. 20 of the Limitation Act, the fact that B was in possession of the land and under an agreement admitted by A was to take the profits in lieu of interest, such taking of profits would be a payment, by A of interest to B so as to preserve the claim from being barred. *Maung Kyan v. Maung Po*, 7 L.B.R. 138.

ORMOND, J.

Reference:—(1888) P. R. p. 527 and 27 M. 380, R.

(101-a) Art. 99. See No. 83, *supra*.

(102) Art. 106—Hindu Law—Joint family partnership—Death of one of the partners—Effect upon dissolution of partnership—Agreement between survivors to continue the partnership—Liability of surety—Suit for dissolution and accounts—Limitation. See CONTRACT ACT, No. 104, 101 P.R. 1914.

(103) Art. 109—Suit for mesne profits—Limitation when commences. See MESNE PROFITS, No. 2, 10 N.L.R. 76.

(103 a) Art. 110. See No. 108, *infra*.

(104) Art. 113—Agreement to grant permanent lease 'hereafter'—Suit for specific performance—Limitation. See SPECIFIC PERFORMANCE, No. 10, 23 Ind. Cas. 360.

(104-a) Art. 114. See No. 89, *supra*.

(104-b) Art. 115. See Nos. 82, 89, 93, *supra*.

(105) Art. 116—Applicability—Suit by Jenmi against assignee of Kanomdar for arrears of *purapad*—Liability how arises—Limitation.

The question in this case was whether the Jenmi was entitled to recover 6 years arrears of rent from the assignee of the Kanom or only arrears for 3 years. The original Kanom was not for a term of years expressed, but was in writing and registered, and the assignment was also in writing and registered. It was contended that Art. 116 applied because the assignee impliedly contracted with the Kanomdar to pay the rent to the Jenmi and that the Jenmi could sue on the contract which was for his benefit.

Held, that Art. 116 was not applicable as there was no contract between the assignee and the Kanomdar for the benefit of the Jenmi and the obligations of the assignee to the

Limitation Act (1908)—(Continued).

Jenmi are based on a privity of estate created by the assignment. *Nuduvil Edom Kelo Achan v. Varadaraja Iyer*, 26 M.L.J. 288 = 24 Ind. Cas. 481.

MILLER, J.

References:—17 M. 296; 40 M. 410, R.; 21 M. 8, D.

(106) Art. 116—Suit for rent—Registered lease.

A suit for rent under a registered document is governed by Art. 116. *K. Ramanadhan Pat-tar v. Achuta Varier*, (1914) M.W.N. 323 = 23 Ind. Cas. 753.

SESHAGIRI IYER, J.

References:—3 M. 76; 19 M. 52; 24 M.L.J. 54; 7 M.L.T. 419, F.

(106-a) Art. 116. See Nos. 53, 89, 96, *supra*.

(107) Arts. 116, 62, 97—Registered conveyance executed after Transfer of Property Act came into force—Covenant for title—Breach of covenant—Suit for compensation—Limitation—S. 55 (2), Transfer of Property Act.

In all registered conveyances executed after the Transfer of Property Act came into force, a covenant for title is implied by S. 55 (2) of that Act. The registered conveyance should be read as if it expressly embodied that covenant, and a breach of that covenant is the breach of a contract in writing registered within the meaning of Art. 116 of the Limitation Act. Art. 116 (and not Art. 62 or 97) applies to a suit by a vendee against his vendor for compensation for breach of covenant for title and possession. *Arunachala Iyer v. Ramaswami Iyer*, 16 M.L.T. 397 = 27 M.L.J. 517.

SADASIVA IYER and NAPIER, JJ.

References:—1 M.L.J. 163; 1 M.L.J. 471, F.; 35 M. 39, Not F.; 25 M. 567; 21 M. 8; 21 M. 242; 15 M.L.J. 396; (1911) 1 M.W.N. 361; 14 M.L.T. 524 = (1913) M.W.N. 1029; (1904) M.W.N. 376 = 15 M.L.T. 240; 19 C. 123; 11 B. 475, R.

(108) Arts. 116, 110—Registered rent notes—Suit to recover rent—Articles governing the suit. *Lalchand Nanchand Gujar v. Narayag Hari*, 14 Bom. L.R. 836 = 37 B. 656 = 21 Ind. Cas. 315. See Final Part, 1913, Col. 852.

(109) Art. 120—Suit for recovery of share of moveables on death of widow of brother—Contest between two brothers—Plaintiff entitled to half and defendant wrongfully in possession of whole.

A suit between two brothers for recovery by the plaintiff of his share of moveables left by the widow of a third brother, on the allegation that the plaintiff is entitled to a half and that the defendant has wrongfully taken possession of the whole on the widow's death, is governed

Limitation Act (1908)—(Continued).

by Art. 120, Limitation Act. *Joti Parshad v. Sant Lal*, 13 P.L.R. 1914=24 P.W.R. 1914=34 P.R. 1914=21 Ind. Cas. 919.

REID, C.J.

References:—21 C. 157 (P.C.)=21 I.A. 155; 19 A. 169=A.W.N. (1897) 34; 6 Ind. Cas. 50=34 M. 511 (F.B.)=8 M.L.T. 4=(1910) M.W.N. 447=20 M.L.J. 288, *Rel.*

(110) *Art. 120—Revenue Court's refusal to correct village papers—Suit for declaration of right—Cause of action.*

The plaintiffs' predecessors-in-interest in 1875 sold to the defendants a zemindari share with the exception of 16 bighas. In 1888 the vendors were recorded as ex-proprietary tenants of all the zemindari including the 26 bighas which had remained in possession of the plaintiffs. In 1904 the plaintiffs applied to the Revenue Court for correction of the village papers, but the application was refused, and on the defendants applying for assessment of rent the Revenue Court assessed rent on the 26 bighas. The plaintiffs brought this suit for declaration of their right. *Held*, that the order assessing rent gave the plaintiffs a cause of action for instituting the present suit, which having been brought within six years of the order was within time. *Allah Jilal v. Umrao Husain*, 12 A.L.J. 810=36 A. 492=24 Ind. Cas. 535.

CHAMIER and RAFIQ, JJ.

References:—20 A. 35; 31 A. 9; 10 A.L.J. 413; *Mis.* 279 of 1903; S.A. 263 of 1907, *R.*

(111) *Art. 120—Recurring cause of action—Trespass committed upon plaintiff's land—No right of easement acquired.*

The plaintiff was the owner of a well adjoining which was the house of the defendants. Nine years before the institution of the suit the defendants opened a door in their wall and began to commit trespass upon the platform of the plaintiff's well. *Held*, that each act of trespass constituted a fresh cause of action so long as an absolute right of easement was not acquired and the plaintiff's suit was not barred by limitation. *Sheo Prasad Sonar v. Mangar Manihar*, 12 A.L.J. 1150.

SUNJARLAL, J.

(112) *Art. 120—Declaratory suit—Plaintiff's title slandered six years before suit—Title again slandered within six years of suit—Suit not barred.* *Rahmatullah v. Shamsuddin*, 11 A.L.J. 977=21 Ind. Cas. 609. See *Final Part*, 1913, Col. 853.

(113) *Art. 120—Applicability.* See CIV.PRO. CODE (1908), No. 458, 93 P.L.R., 1914.

(114) *Art. 120—Redemption suit—Interest—Limitation to six years not warranted by law—See MORTGAGE (REDEMPTION)*, No. 8, 73 P.L.R. 1914.

(114-a) *Art. 120.* See Nos. 4, 29, 69, 70, 74, 80, 81, 82, 88, 87, 90, 91, 93, *supra* and 141, *infra*.

Limitation Act (1908)—(Continued).

(115) *Arts. 120, 125, 126—Mortgage by father and father's brother's widow—Suit by son for declaration that the mortgage shall not affect his reversionary rights—Limitation.*

On 4-4-1898, a mortgage deed was executed whereby the house in suit was mortgaged by defendants 1 and 2 (father and uncle's widow) to defendants 3 and 4 for Rs. 1,400. Plaintiff, who was the son of the first defendant, sued on 25-2-1910 for a declaration that this mortgage, being without consideration and necessity, should not affect his reversionary rights.

Held that Art. 125, Limitation Act, covers only suits for land and comes in only when the suit is by the first reversioner; and it did not apply in the present case as the suit was not for land and the plaintiff was not the first reversioner.

Held also Art. 126, which applied only to suits to 'set aside' a father's alienation, did not apply to mere declaratory suits (a).

To ask for a thing to be 'set aside' implies a prayer for immediate relief, and not for a mere declaration that, on the happening of a future contingency, of which the plaintiff may not be alive to take advantage, certain results will follow.

Held, therefore, that Art. 120 applied and the present suit was barred. *Devraj v. Shiv Ram*, 70 P.R. 1914=260 P.L.R. 1914=165 P.W.R. 1914.

JOHNSTONE and CHEVIS, JJ.

Reference:—(a) 13 C. 308, *D.*

(116) *Art. 121—Applicability—Sale of Putni taluk—Suit by purchaser for possession—Limitation.* See ACT VIII OF 1885 (BENGAL TENANCY), No. 86, 19 C.W.N. 18.

(117) *Art. 123—Suit by residuary legatee to recover his legacy—Limitation.* See LEGACY, No. 1, 41 C. 271.

(118) *Arts. 123, 142, 144—Limitation—Suit barred both under Arts. 123 and 144—Burden of proof under Arts. 142 and 144—Adverse possession.* *Maung Tun U v. Mg. Myat Tha Zan*, 6 Bur. L.T. 198=21 Ind. Cas. 335. See *Final Part*, 1913, Col. 855.

(119) *Arts. 123, 144—Suit for possession by one heir against another heir—Limitation Act, Art. 123—Estate, vesting of, when a Mahomedan dies intestate—Property held under a lien for dower, and property over which the lien is exercised, distinction between.*

Held, that a suit by one of the heirs against another heir to recover possession is governed by Art. 144, Limitation Act; Art. 123 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute. But where a Mahomedan dies intestate the estate vests in the heirs and no one is charged by law with the distribution of the property (a).

Limitation Act, (1908)—(Continued).

Held further, that a transfer by a widow of her rights under the lien to hold for dower and a transfer by her of the property over which the lien is exercised are separate and distinct matters (b). *Aziz-ul Haq v. Musammat Maryam Bibi*, 17 O.C. 157 = 24 Ind. Cas. 45.

LINDSAY, J.C.

References :—(a) 34 M. 511; 19 A. 169, R. (b) 32 A. 551, R.

(120) Art. 124—Succession of Hindu widow to Shebaitship—Alienation by widow of surplus offerings—Suit to declare alienation invalid—Maintainability—Limitation. See *SHEBAIT*, No. 2, 16 M.L.T. 210.

(120-a) Art. 125—See No. 115, *supra*.

(120-b) Art. 126—See No. 115, *supra*.

(121) Art. 129—Maintenance—Demand and refusal—Burden of proof—Limitation. See *HINDU LAW (IMPARTIBLE ESTATES)*, No. 1, 26 M.L.J. 205.

(122) Art. 131—Suit to recover *dusturat*—Periodically recurring right—Limitation. See *DUSTURAT*, No. 1, 21 Ind. Cas. 179.

(122-a) Art. 131—See No. 91, *supra*.

(123) Art. 133—Suit for sale against mortgagor and person in adverse possession—Maintainability of.

A suit for sale upon a mortgage brought against the mortgagor and a person claiming a right adverse to him is a suit under Art. 132 of the Limitation Act of 1908. A suit for sale can always be brought against all persons in possession whose possession is subsequent to the date of the mortgage, provided this suit is brought within twelve years of the time when the money becomes due. *Raj Nath v. Narain Das*, 12 A.L.J. 982 = 36 A. 567 = 24 Ind. Cas. 997 (F.B.).

RICHARDS, C.J., TUDBALL and CHAMIER, JJ.

References :—5 A. 1, D.; 34 A. 640; 33 C. 1015, R.

(124) Art. 133—Suit for account against *Gomastha*—Hypothecation of property for due performance of duties—Suit to recover amount found due from hypothecated property—Limitation. See *CIV. PRO. CODE* (1882), No. 3, 24 Ind. Cas. 18.

(125) Art. 132—Mortgage by one co-heir of undivided ancestral property—Suit by another for his share of mortgage money. See *MORTGAGE (GENERAL)*, No. 1, U.B.R. (1913), 3rd Gr., 178.

(125-a) Art. 133—See No. 93, *supra*.

(126) Art. 134—Mortgage by conditional sale—Transfer by mortgagee after foreclosure—Rights of transferee—Suit by subsequent mortgagee for sale—Applicability of Art. 134. See *MORTGAGE (FORECLOSURE)*, No. 2, 12 A. L.J. 457.

Limitation Act (1908)—(Continued).

(126-a) Art. 134—See Nos. 24, 29, *supra*.

* (126-b) Art. 135—See No. 35, *supra*.

(127) Arts. 136, 142, 144—Meaning of 'vendor' in Art. 136—Vendor out of possession at date of sale—Suit by purchaser—Limitation. See *SALE*, No. 12, 24 Ind. Cas. 216.*

(128) Arts. 137, 138—*Sale certificate, amendment of—Limitation—Execution sale—Burden of proof*.

A Court has an inherent jurisdiction to amend a sale certificate which incorrectly describes the property actually sold (a).

A suit for recovery of possession by the plaintiff as representative in interest of the purchaser at a sale in execution of rent decree, is to be brought, if the judgment-debtor was out of possession at the date of sale, within twelve years, under Art. 137, Limitation Act, from the date when the judgment-debtor is first entitled to possession, but if the judgment-debtor was in possession at the date of the sale, then, under Art. 138, within twelve years from the date when the sale becomes absolute. It is incumbent on the plaintiff to prove whether or not the judgment-debtor was in possession at the date of the sale. The onus is not discharged merely by proof that he was in possession at sometime antecedent to twelve years before the suit (b).

The delivery of symbolical possession to the auction-purchaser, though effective against the judgment-debtor, is not operative as against a stranger to the suit (c). *Nasiruddin v. Sayudur Rahman*, 19 C.L.J. 209 = 23 Ind. Cas. 811.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 26 C. 529; 23 A. 476; 20 M. 487; 16 M. 207; 27 B. 334, R. (b) 16 C. 473, R. (c) 16 C. 530, R.

(128-a) Art. 138—See No. 128, *supra*.

(129) Arts. 140, 141—*Adverse possession—Trespassers, when, can tack on periods of enjoyments*.

Art. 141, Limitation Act, is intended to apply only to the case of a reversioner entitled to succeed on the death of a female heir, i.e., a female who has succeeded as heir and not taken possession of the property in any other capacity, e.g., as trespasser, legatee, or by way of favour (a).

Art. 140, Limitation Act, applies to a case where an heir first succeeds as such, and not to cases where, having succeeded, he creates life-interest in favour of some other person inasmuch as by giving the widows a life-estate the owners who create that life-estate do not become reversioners or remainder men and their estate does not fall into possession on the death of the widows (b).

One trespasser cannot tack on his possession to that of another trespasser, where the former holds in a capacity different from or antagonistic to that of the latter, but where the interests of both are identical and similar, there is a

Limitation Act (1908)—(Continued).

continuity of adverse possession (c). **Raja Sir Baldeo Singh v. Bhal Mohun Singh**, 119 P.L.R. 1914=72 P.W.R. 1914=24 Ind. Cas. 355.

JOHNSTONE and CHEVIS, JJ.

References:—(a) 102 P.R. 1907=78 P.W.R. 1907, D. (b) 19 P.R. 1895; 155 P.R. 1883, D. (c) 189 P.R. 1889, F.

(130) Art. 141—*Ancestral land—Gift to daughter's son—Reversioner's suit to recover possession from latter—Institution within six weeks from death of donor's widow—No bar—Punjab Limitation Act, 1900—Applicability, of—Gift by Gil Jat of Dasuya Tahsil, Hoshiarpur District in favour of daughter's son—Validity by custom—No proof—Claim based on father of donor being donor's Khanadamad—Not pressed in former suit—Res judicata—Acquiescence—No proof.*

A made a gift of ancestral land to B, his daughter's son, on 18th February 1887. A died on 8th March 1894 and his widow M died on 7th November 1908. Plaintiffs, who are the reversioners of A, instituted the present suit on the 19th December 1908 for possession of the land gifted by A.

Held that Art. 151 of the Limitation Act applies and not the Punjab Limitation Act, 1900, and that the suit, having been instituted within 6 weeks from the date of the widow's death, was within time (a).

Held that the plea that B's father was A's Khanadamad not having been pressed in a former suit brought by the reversioners against B and the widow for a declaration of the invalidity of the gift of another portion of the land, it must now be treated as having been adjudicated against the appellant (i.e., B).

Held also that a custom authorising A to make a valid gift of ancestral land in favour of his daughter's son in the presence of his collaterals was not proved (b).

Held also that the suit was not barred by acquiescence (c). **Bhagat Singh v. Sher Singh**, 29 P.R. 1914=156 P.L.R. 1914=24 Ind. Cas. 212.

REID, C.J., and BEADON, J.

References:—(a) 90 P.R. 1904 (F.B.); 145 P.R. 1907; 33 P.R. 1911 (F.B.), F.; 62 P.R. 1910, R. (b) 116 P.R. 1894; 15 P.R. 1886 and 107 P.R. 1887 (F.B.), R. (c) 85 P.R. 1889; 85 P.R. 1900 and 61 P.R. 1909, R.

(131) Art. 141—*Daughters inheriting father's estate jointly—Adverse possession for more than 12 years during both daughters' lifetime—Death of one—Surviving daughter's right to recover moiety share belonging to deceased if arises from her death. See HINDU LAW (INHERITANCE), No. 1, 18 C.W.N. 904.*

(131-a) Art. 141—See Nos. 100, 129, *supra*.

(132) Art. 142—*Suit for possession of the land free of the house and trees—Claim for removal of trees.*

Limitation Act (1908)—(Continued).

Held, that a suit for possession of land free of the house and trees wrongfully built and planted by the defendants, as distinguished from a claim merely for the removal of trees, is governed by Art. 142 of the Indian Limitation Act. **Jagmohan Singh v. Tula Ram Das**, 17 O.O. 252.

PANDIT KANHAIYA LAL, A.J.C.

(133) Art. 142—*Applicability. See POSSESSION, No. 6, 7 Bur. L.T. 255.*

(133-a) Art. 142—See Nos. 73, 113, 127, *supra*.

(134) Arts. 142, 144—*Limitation—Waste land—Abadi in a village—Possession and dispossession within 12 years—Onus of proving—Jurisdiction of Civil or Revenue Court.*

Held, that possession goes with the title, and therefore waste land allowed to remain so by the proprietor cannot be declared to be a discontinuance of possession; and the onus is, in such a case, shifted on to the defendant to prove when his possession became adverse (a).

Held, also, that a suit for possession of abadi land is cognizable by a Civil Court. **Narain Devi v. Billa**, 106 P.W.R. 1914=204 P.L.R. 1914.

SCOTT SMITH, J.

References:—(a) 49 P.R. 1884; 105 P.R. 1901, F.

(135) Arts. 142, 144—*Property under lease—Mortgage by trustee for his own purposes—Decree upon mortgage—Auction sale and delivery to purchaser—Suit by succeeding trustee to recover property—Absence of evidence as to collection of rent by purchaser (defendant)—Burden of proof—Evidence of dedication—Meaning of 'Rusum,' 'Tanakha,' 'Jari,' etc.*

The suit in this case was instituted in 1908 by the Rajah of Karvetnagar to recover possession, on behalf of a temple in Karvetnagar, of a village which, according to the plaint, was given to the temple in 1808 by a sanad of that year. The sanad was not produced in Court. In 1881, a lease of the village for 10 years was given by the then Rajah to 2 persons, at an annual rental which was to be credited in payment of sums due to the lessees on mortgages executed by the Rajah. The Rajah was the hereditary Dharmakarth of the temple in question, but the money borrowed on the mortgages was not for the purposes of the temple, but for his own private use. In 1885, the village in question was mortgaged by a simple mortgage to the father of the defendants and in 1887 he sued on the mortgage and obtained an *ex parte* decree on 1-4-1887. The property was brought to sale in execution of the decree in August 1889 and purchased by the mortgagees. The sale was confirmed in April 1890 and possession was delivered by proclamation to the mortgagee purchaser on 7-5-1890. The purchaser and after him his sons remained in

Limitation Act (1908) — (Continued).

possession of the village until this suit was filed by the succeeding trustee on 30th June 1903. *Held*, that, under the circumstances of this case, the evidence was not sufficient to make out a dedication of the village in question to the temple and the suit by the trustee to recover the village was barred under Art. 142, Limitation Act, as more than 12 years had elapsed from the date of delivery to the purchaser (defendant).

Held also that the fact (if it be a fact) that the lessees did not pay their rent until after the end of June 1891 will not make the purchaser's possession any the less adverse to the Rajah, and the plaintiff had not discharged the burden which was on him of showing that the defendant did not collect rent and was not in possession.

The meaning of the words 'Rusum' 'Jari' 'Tanakha' considered. *Sowcar Sahanada Govinda Doss v. Rajah Venkata Perumal Rajah*, 27 M.L.J. 195.

MILLER and TYABJI, JJ.

References :—2 C. 341, R.

(136) Arts. 142, 144—Plaintiff getting only symbolical possession and not actual possession—Suit for possession—Limitation. See HINDU LAW (WIDOW), No. 10, 18 C.W.N. 940.

(137) Art. 144—Adverse possession of equity of redemption—Limitation. See ADVERSE POSSESSION, No. 10, 17 O.C. 294.

(138) Art. 144—Suit for recovery of possession of endowed property by heirs of donor—Limitation. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 24 Ind. Cas. 72.

(139) Art. 144—Claim by reversioners of sonless proprietor for possession of land on the ground that he had no right to create occupancy rights—Adverse possession—Limitation. See JURISDICTION OF CIVIL OR REVENUE COURTS, No. 5, 112 P.W.R. 1914.

(139-a) Art. 144. See Nos. 24, 78, 118, 119, 127, 134, 135, 136, *supra*.

(140) Arts. 144, 91, 44—Minor's property—Alienation by guardian *de facto* but not *de jure*—Effect—Minor's right to recover possession—Limitation—Void contract whether can be ratified.

An alienation of the property of a minor by a person who is that minor's guardian *de facto* but not *de jure* is not merely voidable but absolutely void, and the minor need not sue to have it set aside before he can obtain possession of the property (a). Art. 144, Limitation Act, applies to the suit, but not Art. 44 or 91.

There cannot be any ratification of a contract which is void *ab initio*. *Husen v. Rajaram*, 10 N.L.R. 138.

HALLIFAX, A.J.C.

References :—(a) 16 C.W.N. 338, 18 A. 373; 29 C. 473, F.; 1 C.P.L.R. 76; 1 N.L.R. 129, D.; 5 A. 490; 8 A.W.N. 152, R.

Limitation Act (1908) — (Continued).

(141) Arts. 144, 120—Hindu Law—Property alienated by adoptive mother before adoption—Suit by adopted son for recovery—Limitation—Position of reversioner and adopted son compared.

Where immoveable property is alienated by the adoptive mother before adoption, the adopted son can, under Art. 144, Limitation Act, sue for recovery of the same within 12 years from the date of the adoption.

In the case of a reversioner, the cause of action to sue accrues, on general principles, on the death of the widow. The same rule, *a fortiori*, governs the right of an adopted son.

Until the plaintiff's right to immediate possession accrues, his right to possession is not barred. In the case of a reversioner, the cause of action will accrue on the death of the widow; in the case of an adopted son, on his adoption. And as the residuary Art. 120 applies to moveables, the residuary Art. 144 applies to a suit by the adopted son for the recovery of immoveable property. *Kancharla Venkataratnam v. Koganti Venkataramiah*, 16 M.L.T. 435 = 27 M.L.J. 569.

WALLIS, OFFG., C.J., and SESHAGIRI IYER, J.

References :—26 M. 143; 19 B. 809; 2 Bom. L.R. 411; 9 C.W.N. 795, F.; 15 Beng L.R. 10; 9 C. 93; 5 M.H.C. 428; 13 M. 518; 13 B. 276; 23 B. 725, R.

(141-a) Art. 145. See Nos. 80, 82, 93, *supra*.

(141-b) Art. 148. See Nos. 24, 54, *supra*.

(142) Art. 149—Proof of possession for 12 years—Public pathway—Onus on Government to prove possession within 60 years. See ADVERSE POSSESSION, No. 9, 27 M.L.J. 299.

(143) Art. 163—Dismissal of suit on plaintiff's default—Application for restoration put in within one month—No affidavit or copy of decree and judgment filed as ordered—Petition dismissed—Second application after two months of order dismissing suit barred. See CIV. PRO. CODE (1908), No. 282, 22 Ind. Cas. 689.

(144) Art. 164—Applicability—Orders in execution—*Ex parte* orders. See CIV. PRO. CODE (1908), No. 66, 26 M.L.J. 189.

(145) Art. 164—Applicability—Citing person in probate proceeding whether makes him defendant. See PROBATE, No. 1, 24 Ind. Cas. 27.

(146) Arts. 164, 181—Setting aside *ex parte* decree—By executor not on record. *Venkatasubblar v. Krishnaamurthi*, 14 M.L.T. 396 = (1913) M.W.N. 899 = 21 Ind. Cas. 568. See Final Part, 1913, Col. 861.

(147) Arts. 165, 166—Execution of a decree—Application to set aside sale of plots not specified in the mortgage deed—Limitation.

Where in execution of a decree for sale in respect of certain plots of land which had been mortgaged, a number of plots were sold by

Limitation Act (1908)—(Continued).

auction which were not the plots specified in the mortgage deed, and the sale was confirmed and possession delivered to the purchaser, and subsequently an application was made by the judgment-debtor asking the Court to set aside the sale and to restore him to possession of the plots not covered by the mortgage deed and the decrees for sale, *held*, that the application made by the judgment-debtor was one of the nature described in Art. 165, Limitation Act.

Held further, that Art. 165 must be taken to cover any application which the judgment-debtor may be entitled to make. **Raja Ram v. Raji Iraj Kuer**, 17 O.C. 94=24 Ind. Cas. 137.

LINDSAY, J.C.

(148) Art. 166—Applicability—Sale contrary to terms of decree—Application to set aside—Limitation. See CIV. PRO. CODE (1908), No. 217, 27 M.L.J. 605.

(149) Art. 163—Mortgage-decree—Sale in execution—Nullity—Application to set aside sale—Limitation. See EXECUTION OF DECREE, No. 5, 26 M.L.J. 267.

(149-a) Art. 166. See Nos. 42, 43, 147, *supra*.

(150) Art. 167—Decree-holder purchaser failing to complain of obstruction within 30 days—Fresh application for possession whether barred. See CIV. PRO. CODE (1908), No. 364, 24 Ind. Cas. 512.

(150-a) Art. 171. See No. 21, *supra*.

(151) Art. 174. See CIV. PRO. CODE (1908), No. 82, U.B.R. (1913), 4th Qc., p. 191.

(151 a) Art. 179, Cl. 4—See No. 55, *supra*.

(152) Art. 180—Confirmation of sale—Appeal by judgment-debtor—Compromise in appeal—Promise to pay decretal amount in instalments or in default, sale to be confirmed—Default by judgment-debtor—Confirmation of sale when to be considered to take place—Application for delivery of possession—Limitation. See EXECUTION OF DECREE, No. 7, 22 Ind. Cas. 497.

(153) Sch. I, Art. 181—Bengal Tenancy Act S. 73, sub-S. (3)—Rent sale set aside—Order setting aside sale itself set aside—Confirmation of sale on later date—Application to set aside sale by decree-holder on ground of benami purchase by judgment-debtor, whether in time if made three years after restoration of sale to validity.

A sale in execution of a rent-decree was set aside on September 17th, 1907. The order setting aside the sale was itself set aside and the sale restored to validity on July 23rd, 1909, and confirmed on August 28th, 1909. Within three years of the confirmation but after three years from July 23, 1908, the decree-holder made an application under S. 173, sub-S (3) of the Bengal Tenancy Act to set aside the sale on the ground that the purchaser was a *benami-dar* of the judgment-debtor:

Held, that the application was barred under Art. 181 of the Limitation Act of 1908, because

Limitation Act (1908)—(Continued).

it could have been made when the sale was restored to validity. **Maharaj Kumar Gopal Saran Narayan Singh v. Sheikh Muhammad Siddiq**, 24 Ind. Cas. 366.

STEPHEN and MULLICK, JJ.

(153-a) Art. 181. See Nos. 43, 146, *supra*.

(154) Arts. 181, 182—Civ. Pro. Code, 1908, O. XXXIV—Mortgage decree—Instalments—Failure in payment—Decree absolute for sale—Application—Limitation. **Datto Atmaram Hasabnis v. Shankar Dattatraya**, 15 Bom. L.R. 841=21 Ind. Cas. 318=39 B. 32. See Final Part, 1913, Col. 861.

(155) Arts. 181, 182—Mortgagor and mortgagee—Application to make a personal decree—Limitation. **Rama Venkatasubba Iyer v. Shanmugam Pillai**, (1913) M.W.N. 867=21 Ind. Cas. 530. See Final Part, 1913, Col. 861.

(156) Arts. 181, 182, 183—Payment of amount due under decree nisi—Right of mortgagor—Continuing right—Limitation. See MORTGAGE (GENERAL), No. 44, 17 O.C. 347.

(157) Art. 181—Application for substituted service—Step in aid of execution.

A decree was passed against one Amir Ahmad and sought to be executed against his widow who was a *pardanashin* lady. On 16th March 1909, an application was made for execution. Notices were issued to her several times but always came back unserved. On the 29th August 1909 an application was made for substituted service and service was effected. On 12th July 1912 the present application was made for execution. *Held*, that the application of 29th August 1909 for effecting substituted service was a step in aid of execution and the decree was not barred by limitation. **Amia Bibi v. Banarai Prasad**, 12 A.L.J. 785=36 A. 439=24 Ind. Cas. 200.

RAFIQ and PIGGOTT, JJ.

Reference: —29 A. 301, F.

(158) Art. 182—Execution of decree—Application for execution against a person whose whereabouts are not known—Application for execution of joint decree made against any of the judgment-debtors—Whether in accordance with law.

An application for execution of a decree made against a person whose whereabouts are not known is an application in accordance with law, and gives a fresh start of limitation for a subsequent application for execution.

An application for execution of a decree, passed jointly against more persons than one, is an application in accordance with law even if it is made against one judgment-debtor only. **Mahmad Husain v. Enayat Husain**, 12 A.L.J. 830=36 A. 482=24 Ind. Cas. 473.

TUDBALL and PIGGOTT, JJ.

(159) Art. 182—Limitation Act, 1877, Art. 179—Step-in-aid of execution—Decree—Execution—Judgment-debtor declared insolvent—Appeal by decree-holder against

Limitation Act, (1908)—(Continued).

adjudication order—Appeal successful—Appeal amounts to step-in aid of execution—Civ. Pro. Code, 1882. Ss. 351, 357.

On the 8th August 1905, the decree-holder applied to execute his decree of the year 1903, by sale of the mortgaged property. Thereafter in January 1906, the judgment-debtor applied to be declared an insolvent; and the Court declared him an insolvent in September of the same year. In the meanwhile, in June 1906, the mortgaged property was sold in execution of the decree. In December following, the Court dismissed the *darkhast* first, because it had been satisfied; and, secondly, because the judgment-debtor was an adjudicated insolvent. The decree-holder appealed to the District Court against the adjudication order; and that Court held in December 1910 that the judgment-debtor was not insolvent. The decree-holder then filed a second *darkhast* on the 18th October 1911 to execute his decree. The lower appellate Court dismissed the *darkhast* as barred by limitation. On second appeal:—

Held, under the unusual circumstances of this case, that the second *darkhast* was within time, for the appeal by the decree-holder against the insolvency order was an application to take a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act, 1908. *Laxmiram Lalubhai Joshi v. Bhala-shankar Veniram Mehta*, 16 Bom. L.R. 612 = 39 B. 20.

BEAMAN and HEATON, JJ.

(160) Art. 182—Application by decree-holder for continuance of sale to secure more bidders—Whether a step-in-aid of execution—Construction of Art. 182. See EXECUTION OF DECREE, No. 9, 16 M.L.T. 103.

(160-a) Art. 182. See NOS. 154, 155, 156, *supra*.

(161) *Sch. I, Art. 182, cl. (2)—Limitation—Execution, application for—Suit against several defendants decreed against some and dismissed with costs against others—Appeal by former set—Application for execution against plaintiff by latter set made three years after original decree but within three years of disposal of appeal—Whether application barred—“Where there has been an appeal,” meaning of.*

The words “where there has been an appeal” in Art. 182, cl. 2, of the Limitation Act, mean, where there has been an appeal against the decree or order for the execution of which an application is made.

When an appeal does not imperil the whole decree, the appeal by one defendant will not prevent limitation of an application for execution running against others (a).

Therefore, in dealing with the question of limitation of an application for execution when there has been an appeal, the Court should see whether the original decree was really one decree or an incorporation of several decrees,

Limitation Act (1908)—(Continued).

and whether the appeal against it impeilled the whole decree or not (b).

The plaintiff sued a number of defendants on a mortgage and obtained a decree, except against defendants Nos. 24 to 26 against whom the suit was dismissed and the plaintiff was directed to pay their costs. The other defendants appealed. The defendants Nos. 24 to 26 now applied to execute their decree for costs after three years from the date of the original decree but within three years from the date of the decision of the appeal:

Held, that the order dismissing the plaintiff's suit with costs as against defendants Nos. 24 to 26 and the order decreeing it with costs as against the other defendants are not one and the same decree though embodied in one formal order; that there has been no appeal against the decree for costs against the plaintiff, and the fact that there has been an appeal by the her defendants against an entirely distinct decree does not affect the question of limitation of application for execution of the decree against the plaintiff, when no order that could have been passed in the other defendants' appeal could possibly have effected the decree which the defendants Nos. 24 to 26 now sought to execute; and that the present application was, therefore, barred. *Mrs. Christiana Benshawn v. Benarasi Prosad Chowdhury*, 22 Ind. Cas. 685 = 19 C.W.N. 287.

COXE and CHATTERJEE, JJ.

References:—(a) 2 C.L.R. 471, *F.* (b) 13 A. 1 = 10 A.W.N. 207, *Rel.*; 16 C. 598; 19 C. 750; 25 C. 594 = 2 C.W.N. 556, R.

(162) Art. 182, cl. 5—*Oral application for adjournment—Production of encumbrance certificate—Step-in-aid of execution—Bar of limitation—Saving of.*

An oral application for an adjournment of the hearing of a previous execution application, in order to enable the decree-holder to produce an encumbrance certificate in respect of the attached property, is a step-in-aid of execution which would save limitation. *Abdul Kadir Rowther v. Krishna Malamal Nair Karnavan and the Manager of the tarwad*, 26 M.L.J. 433 = 15 M.L.T. 305 = (1914) M.W. N. 563 = 23 Ind. Cas. 533.

SADASIVA AIYAR and SPENCER, JJ.

References:—14 C.W.N. 486, *F.*; 3 A. 139; 15 B. 405 (407), *F.*; 27 C. 265; 37 B. 317; 36 B. 638; 29 A. 301 (302); 5 M. 141, R.

(163) Art. 182 (5), (6)—*Decree attached in execution—Application for execution of attached decree—Step-in-aid of execution—Decree passed when Act of 1877 in force—Application governed by the New Act—Issue of notice to judgment-debtor.*

A decree was passed in favour of the respondents on 19th March, 1907. On 8th April, 1909, the decree-holder applied for execution by attachment of the property of his judgment-debtor which in this case was a decree. The Court ordered notice to issue and a notice was

Limitation Act (1908)—(Concluded).

issued on 27th April, 1909. It was returned unserved and another notice was issued on 18th May, 1909.

On September 14th, 1909, the decree-holder moved the proper Court to execute the decree in favour of his judgment-debtor. The next application for execution was made on 15th April, 1912.

Held, that the period of limitation should be calculated according to the Act of 1908.

Held, also that the period of limitation was to be reckoned from the date of actual issue of notice within the meaning of S. 182 (6) of the Limitation Act of 1908.

Held, also, that, even if the Act of 1877 be applied, the order of the Court dated 18th May ordering fresh notice to issue would save the application of 15th April, 1912, from being barred by limitation.

Held, further, that an application by the decree-holder moving the Court to execute the attached decree in favour of his judgment-debtor is a step-in-aid of execution. *Maharaja of Jaipur v. Lalji Sahai*, 12 A.L.J. 1006.

PIGGOTT, J.

(184) Art. 182 (5) and (6)—Accompanying serving peon to identify judgment-debtor.—Whether a step-in-aid of execution. See EXECUTION OF DECREE, No. 8, 20 C.L.J. 15.

(184-a) Art. 183. See No. 156, *supra*.

Lis Pendens.

(1) *Lis pendens*, application of, to collusive and fraudulent proceeding—Auction-purchaser—Collusive proceeding—*Lis pendens*, extension of, to third persons—Correctness of the order for execution of decree or of judgment, inquiry into—Decree, subsequent variation in—Jurisdiction—Civ. Pro. Code, S. 144. *Nuzbat-ud-daula Abbas Husain Khan v. Dilband Begam*, 16 O.C. 225=21 Ind. Cas. 570. See Final Part, 1913, Col. 866.

(2) Applicability of doctrine of. See CIV. PRO. CODE (1882), No. 22, 19 C.W.N. 152.

(3) Order allowing claim—Purchaser of attached properties after order on claim petition but within one year—Whether an alienee *pendente lite*—Rights of alienee, See CIV. PRO. CODE (1908), No. 337, 26 M.L.J. 449.

(4) Devolution of interest *pendente lite*—Maintainability of suit—Suit if can be continued by original plaintiff—Cause of action—Effect of decree in such suit. See CIV. PRO. CODE (1908), No. 379, 20 C.L.J. 107.

(5) Applicability of doctrine of *lis pendens* to moveables. See CIV. PRO. CODE (1908), No. 25, 16 M.L.T. 158.

(6) Effect of dealing with property after filing of pre-emption suit. See PRE-EMPTION, No. 18, 17 O.C. 150.

Local Boards Act (Madras).

See MADRAS ACT V OF 1884.

Local Inspection.

Practice—Procedure—Parties agreeing to abide by the result of the local inspection—Enquiry by a particular officer presiding—Inspection note left by that officer—His successor to try the case himself.

Where the parties to a case agreed not to give oral evidence but to abide by the result of the inspection of the locality or any local enquiry by the officer who was then presiding over the Court, and that officer recorded a note of his inspection but was transferred before delivering judgment, *held*, that his successor was not competent to decide the case on the basis of that inspection note but was bound to try the case himself. *Kishan Narayan v. Ram Baksh*, 12 A.L.J. 48=22 Ind. Cas. 51.

BANERJI, J.

Lower Burma Courts Act.

See BURMA ACT VI OF 1900.

Lower Burma Town and Village Lands Act.

See BURMA ACT IV OF 1898.

Lunacy Act.

See ACT XXXV OF 1858.

Lunatic.

(1) *Lunatic*, suit against—Ex parte decree against unrepresented lunatic—Ignorance of Court as to fact of lunacy—Jurisdiction of Court—Fraudulent purchase by de facto manager of lunatic—Rights of purchasers from such fraudulent purchaser.

One N was a lunatic not adjudged as such. During his lunacy a suit for rent was brought by the landlord for two plots of land belonging to the lunatic, and two rent decrees were obtained *ex parte* against the lunatic who was not at all represented in the suit. The fact of the lunacy was not brought to the notice of the Court. At the auction sales in execution of the decrees, the properties were purchased by a person who was the lunatic's *de facto* manager who again sold them to other persons who purchased with full knowledge of the lunacy:

Held, that, as the lunatic or his estate was not represented in the rent-suit, the sales under the decrees of the Court therein obtained were nullities and the purchaser acquired no title by his purchase. The purchaser, being besides a fraudulent purchaser who had acted deliberately in breach of his trust as *de facto* manager of the lunatic, could not in any case be allowed to take advantage of the Court-sales, even if they had been made with jurisdiction.

As he had no title whatever, the purchasers from him also acquired no title. *Hakimulla v. Nabin Chandra Barua*, 18 C.W.N. 1329=20 C.L.J. 291=24 Ind. Cas. 177.

HOLMWOOD and CHAPMAN, JJ.

References:—33 C. 1094, *Rel.*; 33 C. 296 (345), *doubted*.

(2) Person of weak memory or weak mental strength whether of unsound mind—Person adjudged lunatic—Burden of proof as to

Lunatic—(Concluded).

recovery from unsoundness of mind—References in documents to provisions in repealed Acts—Construction.

A man of weak memory or of only ordinary mental capacity or even mere weak mental strength cannot be called an idiot or a man of unsound mind (a).

The burden of proof lies heavily on the person who alleges that a person, who had been adjudged a lunatic, has recovered from his unsoundness of mind.

It is a well understood legal rule that all references in documents to provisions in repealed Acts, provided those provisions have been re-enacted in the repealing Act, might be construed as references to the corresponding re-enacted provisions. **Pachi v. Charni**, 16 M.L.T. 529.

SADASIVA IYER and SPENCER, JJ.

References:—(a) A.W.N. (1905) 9; A.W.N. (1905) 43=2 A.L.J. 154; 4 C.L.J. 115, R.

(3) Lunatic—Guardian *ad litem* not appointed—Effect. See CIV. PRO. CODE (1908), No. 46, 22 Ind. Cas. 673.

(4) Suit relating to lunatic's property how to be brought—Scope of enquiry under Act XXXV of 1885 (Lunacy). See CIV. PRO. CODE (1908), No. 434, 19 C.W.N. 45.

Mahant.

(1) *Dharmasala—Its Mahant—Leaving no legal representative—Founder's right to oust a trespasser—When Mahant's possession becomes adverse to its founder.*

Held, that, in the absence of a duly appointed Mahant of a Dharmasala, its founder is entitled to oust a trespasser.

Held, also, that a mere long possession by a Mahant of a Dharmasala does never become adverse to its founder, unless he does some overt act repudiating the latter's title for over 12 years. **Prem Singh v. Mohand Singh**, 151 P.W.R. 1914=281 P.L.R. 1914.

CHEVIS, J.

(2) Mahant of *math* or *sangat*—Right to acquire property. See RELIGIOUS ENDOWMENTS, No. 4, 17 O.C. 336.

(3) Mohant purporting by a document to appoint his successor and to make over to him the Asthal properties, etc.—Document whether a will—Probate. See WILL, No. 8, 20 C.L.J. 307.

Mahomedan Law.

1.—GENERAL.

2.—ALIENATION.

3.—DIVORCE.

4.—DOWER.

5.—GIFT.

6.—GUARDIANSHIP.

7.—INHERITANCE.

8.—JOINT FAMILY.

Mahomedan Law—(Continued).

9.—MARRIAGE.

10.—PRE-EMPTION.

11.—RESTITUTION OF CONJUGAL RIGHTS.

12.—WAKE.

—1.—General.

Moplahs of North Malabar—Whether governed by Marumakkathayam Law or Mahomedan Law—Custom—Proof—Validity of custom—Courts whether can take judicial notice of custom—Value of previous decision on the enforceability of custom—S. 16, Madras Civil Courts Act—Scope. See MOPLAHS, No. 1, 16 M.L.T. 17.

—2.—Alienation.

Minor—De facto guardian—Power to sell minor's property—Limits of marriage expenses of minor's sister—Discharge of family debts—Not justifying causes—Property ordered to be partitioned—Sale—Lower Court's power to direct. Hyderman Kuttli v. Syed Ali, 12 M. L.T. 147=23 M.L.J. 244=(1912) M.W.N. 889=15 Ind. Cas. 576=37 M. 514. See Final Part, 1912, Col. 791.

—3.—Divorce.

(1) *Kabinnamah—Condition that wife will continue to live in her father's house, whether legal—Marriage—Divorce.*

A condition in a Kabinnamah that the husband is to live with the wife in her father's house and that, if he breaks this condition, she is to have a right to divorce him, is illegal, as it implies that the wife will continue to live in her father's house. The wife is not, therefore, entitled to use it for supporting her claim to divorce and, consequently, to the deferred dower. **Imam Ali Patwari v. Arfatunnessa**, 21 Ind. Cas. 87=18 C.W.N. 693.

STEPHEN and MULLICK, JJ.

Reference:—6 Bom. L.R. 728, F.

(2) *Hanafia law—Divorce—Prescribed formality—Intention of dissolving marriage—Burden of proof—Evidence.*

No special form or formula is prescribed for a divorce under the Hanafia Law. The law requires the words of divorce pronounced by a husband to show a clear intention on his part to dissolve the marriage contract.

Where witnesses depose that in their presence the husband divorced the wife, it is for the party alleging the invalidity of the divorce to prove by cross-examination that the words used were insufficient or incomplete to support a valid divorce. **Wahid Khan v. Zainab**, 12 A. L.J. 707=56 A. 458.

RAFIQ and PIGGOTT, JJ.

(3) *Marriage—Divorce—Post nuptial agreement—Provision for payment of dower by instalments—Failure—Stipulation for conditional divorce—Illegality—Non-payment—No defence to suit for restitution of conjugal rights.*

Mahomedan Law—(Continued).**—3.—Divorce—(Concluded).**

Where, under a post-nuptial agreement, a Mahomedan husband promised to pay to his father-in-law the amount of dower and maintenance remaining due by monthly instalments, and declared that in default the wife should be considered divorced, *held* that the stipulation for conditional divorce is illegal according to Mahomedan Law.

Held also that the plea of non-payment of dower is no answer to a suit for restitution of conjugal rights, as the marriage was admittedly consummated and the parties are Mahomedans. * **Mahomed v. Fatma**, 7 S.L.R. 138 = 24 Ind. Cas. 881.

HAYWARD, A.J.C.

Reference :—8 A. 149, R.

(4) Iddat—Difference between a widow and a woman divorced—Want of consent of a divorced woman whether invalidates the marriage. See MAHOMEDAN LAW (MARRIAGE), No. 1, 50 P.W.R. 1914.

—4.—Dower.

(1) *Possession in lieu of dower—Right descendible—Possession without force or fraud.*

A Mahomedan lady who had entered into possession of her father's property set up a right to remain in possession in lieu of her mother's dower debt. The mother had never entered into possession. *Held* that, the mother never having got into possession, no such right could descend to her heirs. **Tahirunnissa Bibi v. Nawab Hasan**, 12 A.L.J. 906 = 36 A. 558 = 24 Ind. Cas. 988.

RICHARDS, C.J., and BANERJI, J.

References :—32 A. 551, D.; 14 M.I.A. 377, R.

(2) *Dower debt—Possession in lieu of—Transfer—How effective.*

A Muhammadan widow, who was in possession of her husband's property in lieu of dower, made a gift of the property 'left by her husband' in favour of her son. On a suit being brought by the heirs for possession of their shares after her death, *held* that the gift was a gift of the property and not a gift of the dower debt. The right of a Muhammadan widow to remain in possession of her husband's property is a transferable right but it can only be transferred along with the dower debt. **Mohammad Hussain v. Bashiran**, 12 A.L.J. 1141.

PIGGOTT, J.

References :—7 A.L.J. 567 ; 6 A.L.J. 50 ; 1 Agra 150, R.

(3) *Verbal contract for large dower when can be admitted—Power of Court to decree customary amount when dower was fixed—Rules of Hidaya at variance with the Statute law—Not to be followed.*

A verbal contract for a dower of a large sum can be admitted only if proved, by most clear and satisfactory evidence (a).

Mahomedan Law—(Continued).**—4.—Dower—(Concluded).**

The Mahomedan Law lays down the rule that, if no dower is specified at the time of the marriage, the wife is entitled to a proper dower, i.e., to an amount to be fixed by the Court after taking evidence as to what has usually been settled on other female members of the wife's father's family. But when it is admitted that the dower was stipulated for, but the amount alleged by the plaintiff has not been proved, then it is clearly not a case in which no dower was specified.

Where both the parties are agreed that the case is one of fixed dower, but each party states its own figure, the dispute is confined to the amount said to have been fixed, and the Court cannot go into the question as to what would be a proper dower nor pass a decree for customary dower. In the event of the plaintiff not proving the amount asserted by her, the Court must, according to the rules of procedure, pass a decree for the sum admitted by the defendant.

The rules of procedure and evidence laid down by the Hidaya to be followed in deciding disputes as to dower between the husband and the wife, being at variance with the statute law on the subject, cannot be followed by Courts in British India. **Fazl Khan v. Mussammat Karm Begam**, 105 P.R. 1914.

CHEVIS and CHADI LAL, JJ.

Reference :—(a) 4 W.R. 110, F.

(4) *Shia school—Dower, claim for, whether consummation necessary—Consummation, proof of—Amount of dower where consummation did not take place—Marriage contracted by sick man (mariz), when void—Liabilities of deceased, effect of, on claim for dower.* **Bismillah Begam v. Shahr Bano Begam alias Agha Begam**, 16 O.C. 325 = 22 Ind. Cas. 529. See Final Part, 1913, Col. 870.

(5) Property held under a lien for dower and property over which the lien is exercised—Distinction. See LIMITATION ACT (1908), No. 119, 17 O.C. 157.

(6) Kabinnamah—Condition that wife will continue to live in her father's house, whether legal—Right to dower on breach of condition. See MAHOMEDAN LAW (DIVORCE), No. 1, 21 Ind. Cas. 87.

—5.—Gift.

(1) *Gift by a Sunni during marz-ul-maut—Validity—Death-illness, what constitutes—Apprehension of death in the mind of the deceased—Death caused by the disease from which he was suffering at the date of gift.*

A deed of gift in favour of one of his heirs was executed by a Sunni Mahomedan who had Bright's disease, from which he never rallied, whose condition was growing worse from day to day, and who, at the date upon which the deed of gift was executed, was, and knew himself to be, in a serious condition.

Held, that, when at the date upon which the deed of gift was executed, the deceased donor

Mahomedan Law—(Continued)**—5.—Gift—(Continued).**

was suffering from the very disease which was the immediate cause of his death and which was of such a nature and character on that day as to induce him that death might result, or at least it was sufficient to engender in him an apprehension of death, and when, upon the day on which the deed was executed, the illness of the deceased was sufficient to restrain him from the pursuit of ordinary avocations and from saying his prayers save in a recumbent position, the deceased was suffering from *marz-ul-maut* within the meaning of the Mahomedan Law and the gift was consequently void. *Sheikh Mohammad v. Khadeja Bibi*, 12 A.L.J. 132=22 Ind. Cas. 807.

RICHARDS, C.J., and BANERJI, J.

Reference :—31 C. 319, R.

- (2) *Gift—Residence of donor in house gifted away—Validity of gift—Contingent gifts—Conditional gifts—Distinction between—Validity of latter.*

In certain circumstances, the residence of the donor in the house which is the subject of gift would not be a ground for invalidating the gift (a).

Under the Mahomedan Law, it is necessary to distinguish between contingent gifts and gifts with a condition attached. Though the former are generally invalid, the latter can be enforced as absolute gifts, although the condition may be bad (b). *Alla Pichai Tharaganar alias Kadir Mira Sahib Tharaganar v. Mohamed Mohideen Tharaganar*, 15 M.L.T. 216=23 Ind. Cas. 520.

SADASIVA IYER and SPENCER, JJ.

References :—(a) 30 M. 305, F.; 19 M. 343, Not F. (b) 13 B. 254, R.

- (3) *Gift, validity of—Seizin in case of property not admitting of physical possession—Gift, when it is complete—Gift by a Mahomedan of two distinct properties of only one of which possession is delivered—Oudh Laws Act, S. 3—Possession obtained subsequent to the gift, effect of.*

A gift is not valid without seizin. But where a property given does not admit of physical possession and the donor gives such possession actual or constructive as he is capable of giving, provided he himself is not out of possession, the gift would be valid. A gift is not however complete until possession is taken of the thing given.

Held further, that if a gift is made by a Mahomedan of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered.

Held, also, that, under the Mahomedan Law which has been made applicable under S. 3 of the Oudh Laws Act, to questions relating to gifts between Mahomedans, a gift of a house

Mahomedan Law—(Continued)**—5.—Gift—(Continued).**

conveys no title unless it is accompanied by delivery of possession or followed by the taking possession with the permission, express or implied of the donor. *Munifa Bibi v. Fateh Ali*, 17 O.C. 60=23 Ind. Cas. 458.

PANDIT KANHAIYA LAL, J.C.

- (4) *Shia School—Gift with possession—Marz-ul-maut—Disease of more than one year's duration—Condition.*

Under the Shia Law a gift made in *Marz-ul-maut* holds good to the extent of only one-third of the donor's estate, in spite of delivery of possession prior to his death.

If the donor dies of a disease of more than one year's duration the disease is not considered death-illness. But there is this condition attached to it that, if the illness increases to such an extent as to give an apprehension of death in the mind of the donor, it becomes a death-illness. The nature of the gift does not change even if the donor had intended prior to death-illness to transfer the property to the donee. *Khurshed Husain v. Faiyaz Husain*, 12 A.L.J. 417=36 A. 289=23 Ind. Cas. 253.

TUDBALL and RAFIQ JJ.

- (b) *Gift in favour of minor son—Essentials—Transfer of possession of the subject of gift—Mode of transfer—Test of transfer—Presumption in favour of transfer to son—Applicability and scope of—Gift of the corpus—Reservation of enjoyment of produce during donor's life—Effect.*

Where a Mahomedan father made a gift of a house to his minor son under a deed of gift which contained the following recital, viz.:—
"As I have become an old man and as I intend that there should not be any disputes among my heirs after my lifetime, I have this day given to you as a present, the aforesaid house and ground according to the condition mentioned below, out of my affection towards you. The condition was as follows :—Till my death I myself will collect and take the rent of the aforesaid house and ground for my livelihood. After my lifetime you should use and enjoy the aforesaid house and ground together with their entire income . . . with power to sell, mortgage . . . from generation to generation."

Held, that the validity of the gift depended upon the questions whether there was a transfer of possession in favour of the donee and if there was a transfer how it was effected (a).

A gift, though it is one in favour of a minor son, cannot be completed by the mere declaration of the father.

Mere registration of the property in the name of the donee does not amount to a transfer of possession (b). But if the donor does everything that is in his power to do for transferring possession, that would be sufficient (c).

Where gifts under the Muhammadan Law are the subject-matter of a suit, it is necessary

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

to consider their validity from both of the following aspects, *viz.*, (1) whether or not the transactions purported to be made are such that, under the Muhammadan Law, the parties have power to effectuate them by any act on their part, and (2) if the transactions are permissible, then whether the requirements of the law have been fulfilled so as to effectuate them.

Where there is a real transfer of property by a donor in his lifetime and where the transfer is given effect to by possession being given of the 'dominion' over the corpus of the property, in such a case the transfer of possession is not to be deemed the less complete or effectual because it is shown that the donor has stipulated with the donee that the recurring produce of the subject of the gift will be made over to the donor during the donor's lifetime by the donee.

In deciding the question as to what is the exact kind of possession that must be required to complete and effectuate the gift, two considerations must, among others, be borne in mind, *viz.*, (1) the nature of the subject of the gift or, when the subjects of the gift consists of rights in or over some object, then that object or thing as well as of the rights themselves; and (2) whether the donee is in need of anything being done by the Court in order that he may derive that benefit which he alleges it to be the purpose of the gift that he should derive.

The test for determining whether the principle underlying the rules about possession is satisfied is whether, at the time when the gift is alleged to have been completed, the donee was placed in such a position that, without any further act on the part of the donor or those representing him or of the Court, the donee can have the benefit of that which he claims.

The presumption that the possession of the father after declaration of gift must be presumed to be possession on behalf of his minor as guardian of his property cannot be extended to cases where the property is of such a nature that the mere physical control over it is not the only indication of ownership. **Rahiman Bi v. Mahomed Fatima Bibi**, 15 M.L.T. 345=23 Ind. Cas. 651.

WHITE, C.J., and TYABJI, J.

References:—(a) 11 M.I.A. 517; 30 M. 519; 15 C. 684; 9 B. 146; 16 M. 43 (48), R. (b) 30 M. 519, R. (c) 15 C. 684, R.

(6) Gift—Revocation—Partition of the subject-matter of the gift—Substantial alteration.

Under the Muhammadan Law a donor has a right to revoke a gift except in cases, amongst others, where the subject-matter of the gift has altered in substance in the hands of the donee. The mere partition of the subject-matter of the gift, which at one time formed part of a bigger mahal, into smaller mahals, does not alter the nature of the property and does not amount to a substantial alteration of the property in the possession of the donee which could bar the

Mahomedan Law—(Continued).**—8.—Gift—(Continued).**

donor's right to revoke it. **Maqbul Husain v. Ghafurunnissa**, 12 A.L.J. 452=36 A. 333=24 Ind. Cas. 34.

RICHARDS, C.J., and BANERJI, J.

(7) Mahomedan Law—Gift—Settlement—Creation of life-estate—Burma Laws Act 1898, S. 13 (2)—Transfer of Property Act, Ss. 2, 20, 21, 123 and 129.

The Mahomedan Law is to be applied in all suits instituted in the Chief Court of Lower Burma relating to gifts among Mahomedans.

The creation of a life-estate is inconsistent with Mahomedan Law and where a life-estate is attempted to be created, the donee takes an absolute title. **P. M. P. A. N. Annamalai Chetty v. Shaikh Mahomed Ismail**, 7 Bur. L. T. 75=23 Ind. Cas. 903=7 L.R.R. 123.

HARTNOLL, OFFG. C.J. and YOUNG, J.

References:—12 I.A. 91; 7 Bom. L.R. 306, F.; 17 I.A. 201, D.; 31 C. 319; 10 C. 1112; 9 C. 136; 17 W.R. 525; 8 C. 13; 17 B. 1, R.

(8) Pardanashin lady—Independent advice—Gosha not observed—Mercenaries of Southern India—Gift—Mushaa—Transfer of Property Act, S. 123—Registration.

The doctrine of "independent advice" should be applied only where the *pardah* system is rigorous and even voluntary deliberate acts of a *pardanashin* woman should not be lightly set aside (a).

Under Muhammadan Law a gift by a wife to her husband does not require strict proof of its being of a voluntary nature.

A gift of an undivided share in property capable of division and in possession of the donor is valid if such possession is transferred to the donee, although a mere registered gift deed without transfer of such possession is not valid. (b). **Abdul Rahiman Nachiyal v. Muhammad Nurdin Maracayer**, 23 Ind. Cas. 547.

MILLER and SADASIVA AIYAR, JJ.

References:—(a) 7 Ind. Cas. 167=12 C.L.J. 357; 16 Ind. Cas. 110=39 C. 933=16 C.W.N. 649, R. (b) 14 Ind. Cas. 993=35 M. 120; 30 M. 519=17 M.L.J. 562; 30 M. 305=2 M.L.T. 180; 24 M. 513=11 M.L.J. 227; 6 Bom. L.R. 1043; 11 C.W.N. 973=4 A.L.J. 572=17 M.L.J. 408=6 C.L.J. 695=34 I.A. 167 (F.C.)=9 Bom. L.R. 872=35 C. 1; 26 B. 577=4 Bom. L.R. 180; 8 Ind. Cas. 38=15 C.W.N. 328; 9 Ind. Cas. 635=38 C. 518=15 C.W.N. 541=13 C.L.J. 492; 11 Ind. Cas. 979=8 A.L.J. 824; 15 Ind. Cas. 698=17 C.L.J. 173, R.

(9) Gift—Delivery to donee—Donor's order to third party having possession of the property to hand it to donee—Gift invalid and revocable if no such order.

For a gift to be valid, the donor must do everything to put the donee into possession and to divest himself of his rights of ownership. If property is in the hands of a third person, the

Mahomedan Law—(Continued).**—5. Gift—(Concluded).**

donor must give notice to that person to hand over the property to the donee. If the gift was not intended to take effect in *presenti*, it would be void. Registration cannot make an invalid gift valid. An invalid gift is revocable. **Ahmed Gulam Mahomed Sadiq v. Mahomed Cassim Makda**, 7 Bur. L.T. 142=24 Ind. Cas. 704.

ORMOND and PARLETT, JJ.

• (10) *Gift—Hiba-bil-iwaz—Hiba-ba-shart-ul-iwaz—Delivery of possession necessary.*

Gifts under Muhammadan Law, whether of the nature of *hiba-bil-iwaz* or *hiba-ba-shart-ul-iwaz*, are not valid without delivery of possession (a).

A *hiba-bil-iwaz* is a gift which has been completed and for which an *iwaz* or return has been accepted. It consists of two gifts (i) the original gift and (ii) the reciprocal gift, and both are subject to the law of gift pure and simple, and it postulates the completion of both these gifts.

A *hiba-ba-shart-ul-iwaz* is a gift, the legal incident of which is that the two parties agree to make an exchange of the properties forming the subject of the two gifts, and after mutual possession has been taken neither party can revoke the transfer. **Rasool Bee v. Madari Mahaldar Gulam Kasim Shaib**, 23 Ind. Cas. 802.

SANKARAN NAIR and TYABJI, JJ.

Reference:—(a) 2 C. 184=26 W.R. 36=3 I.A. 291, D.

(11) Muhammadan purchasing property in name of wife and daughter—Presumption—Gift of undivided share—Validity. See BENAMI TRANSACTIONS, No. 6, 24 Ind. Cas. 10.

—6.—Guardianship.

(1) *Minor—Guardian—Lease by de facto guardian who could not be de jure guardian, whether valid—Benefit of minor.*

A lease granted by a *de facto* guardian of a Muhammadan minor is valid if it is for the benefit of the minor, although the *de facto* guardian is a person who could not be guardian *de jure*. **Maklesur Rahman v. Pillaram**, 21 Ind. Cas. 128.

STEPHEN and MULLICK, JJ.

References:—34 C. 36=4 C.L.J. 485=11 C. W.N. 71; 34 C. 65=11 C.W.N. 160=4 C.L.J. 578, F.; 13 Ind. Cas. 976=15 C.L.J. 270=16 C.W.N. 838=11 M.L.T. 145=(1912) M.W.N. 183=9 A.L.J. 215=14 Bom. L.R. 192=15 O. C. 49=34 A. 213=23 M.L.J. 6=39 I.A. 49, R.

(2) *Guardians and Wards Act (VIII of 1890), Ss. 9, 39—Guardianship, application for—Minor girl's sister's husband—Residence within the jurisdiction of the Court.*

The husband of a minor girl's sister is not, under the Mahomedan Law, entitled to be appointed a guardian of the person or property of the minor girl.

Mahomedan Law—(Continued).**—6.—Guardianship—(Concluded).**

The Guardians and Wards Act contemplates that an applicant for guardianship should reside within the jurisdiction of the Court to which he makes the application. **Asghar Ali v. Amina Begam**, 12 A.L.J. 392=36 A. 280=24 Ind. Cas. 59.

RAFIQ and PIGGOTT, JJ.

(3) *Guardians and Wards Act (VIII of 1890)—Mahomedan infant—Mahomedan Law—Maternal uncle if a proper guardian—Sister's husband if qualified—Prohibited degrees of relationship—Adverse interest.*

Under the Mahomedan Law no male has a right to the custody of a female child, unless he is a Mahram, that is, one who stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her.

A maternal uncle may be appointed as a guardian to a Mahomedan minor girl.

When the girl was married to a person below her station in life, the Court ordered a governess to be appointed to stay with her until puberty, the husband not to have access to her meanwhile, so that the girl might have liberty to repudiate the marriage, if she liked, just on the attainment of puberty. *In the matter of Musammatt Hurunnessa Bibee*, 18 C.W.N. 853.

CHAUDHURI, J.

(4) *Shia school—Guardianship of a minor girl—Father and maternal grandmother.*

The maternal grandmother of a Shia Mahomedan child is not entitled to its guardianship in the lifetime of the father. The right to the guardianship of such a child after the death of its mother passes to the father and after him to the maternal grandmother and other ascendants. **Sadat Hussain v. Salimunnissa**, 12 A. L.J. 772=36 A. 466=24 Ind. Cas. 632.

RAFIQ and PIGGOTT, JJ.

(5) Mahomedan ward of Court—Who can act as guardian for marriage—Guardian if bound to provide for suitable marriage—Mahomedan Law as to guardianship if abrogated by Act VIII of 1890—Procedure to be followed in case of marriage—Court's power to restrain unsuitable marriage—Appeal—Revision. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 22, 20 C.L.J. 91.

—7.—Inheritance.

(1) Suit for possession by one heir against another heir—Limitation—Mahomedan dying intestate—Vesting of estate—Duty to distribute estate. See LIMITATION ACT (1908), No. 119, 17 O.C. 157.

(2) Issues of muta and nikah marriages—Legitimacy—Succession. See MAHOMEDAN LAW (MARRIAGE), No. 2, 27 M.L.J. 89.

—8.—Joint Family.

Joint family, Muhammadan—No presumption of joint funds—Second appeal—

Mahomedan Law—(Continued).**—8.—Joint Family—(Concluded).**

Concurrent findings of fact—Power of High Court to interfere—Findings not based on evidence.

In a Muhammadan joint family, there is no presumption as to the jointness of funds, and in this connection Hindu and Muhammadan joint families are quite different.

The rule that the High Court will not interfere to upset concurrent findings of fact is inapplicable to a case where the findings are not based on evidence, but on a wrong presumption. *Imam Din v. Dulo*, 239 P.L.R. 1914 = 144 P.W.R. 1914.

JOHNSTONE and SCOTT-SMITH, JJ.

—9.—Marriage.

- (1) *Restitution of conjugal rights—Nikah—Iddat—Difference between a widow and a woman divorced—Want of consent of a divorced woman whether invalidates the marriage—Question of fact cannot be raised or argued in second appeal.*

Held, that Iddat must be kept if the first marriage is terminated by death of husband, but for a woman whose marriage has never been consummated, Iddat is not necessary.

Held, also, that, where the woman is a virgin, or represents herself as virgin, the consent of father, uncle or brother is sufficient to validate the marriage, and her silence is tantamount to consent. But, in case of her not being virgin, her consent must be expressed in person. A divorced woman whose marriage has not been consummated is a virgin for the purposes of such consent.

Held, further, that no question of fact can be either urged or argued in second appeal. *Jainan v. Rulia*, 50 P.W.R. 1914 = 145 P.L.R. 1914.

CHEVIS, J.

Reference :—43 P.R. 1882 (Cr.), R.

- (2) *Shia Law—Muta Marriage—Nikah—Presumption—Legitimacy—Succession.*

A *muta* marriage is, according to the law which prevails among Shias, a temporary marriage, its duration being fixed by agreement between the parties. It does not confer on the wife any right or claim to her husband's property, but children conceived while it exists are legitimate and capable of inheriting from their father. The term of a *muta* marriage may be extended from time to time by agreement and if it is once proved that co-habitation originated in such marriage, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of co-habitation.

A *nikah* marriage is a religious ceremony, and confers on the woman the full status of wife, and children born after it are legitimate.

A Mahomedan of the Shia School contracted *muta* marriage with a woman and had two

Mahomedan Law—(Continued).**—9.—Marriage—(Concluded).**

daughters from her; then he performed *nikah* with her and had a third daughter from her:

Held, that the three daughters were co-heirs and entitled to share the inheritance equally. *Shoharat Singh v. Mussammat Jafri Bibi*, 27 M.L.J. 89 = 24 Ind. Cas. 499 = 16 M.L.T. 517 = 17 Bom. L.R. 13 = 21 C.L.J. 4 = 19 C.W.N. 225 = 13 A.L.J. 113 (P.C.).

LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

- (3) *Hindu married woman of Palli Caste—Conversion to Mahomedanism—Second marriage with Mahomedan during the subsistence of first marriage—Legality—Applicability of Hindu or Mahomedan Law—Recognition of paternity and acknowledgment—Effect—Conflict between persons of different religions—Law applicable—Doctrine of Factum Valet—Applicability—Legitimacy of offspring. See CONVERTS, No. 1, 15 M.L.T. 107.*

- (4) *Girl married to a person below her station in life—Right to repudiate marriage on attaining puberty—Appointment of governess to stay with her until puberty. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 19 C.W.N. 853.*

- (5) *Restitution of conjugal rights—Right to restitution when arises. See RESTITUTION OF CONJUGAL RIGHTS, No. 1, 19 C.L.J. 216.*

—10.—Pre-emption.

- (1) *Pre-emption—Sale by kobala—Right if arises before or after registration—Mahomedan Law of sale or statute law superseding it applicable—Pre-emptor if loses right by rejecting previous offer—Waiver.*

Where a *kobala* was executed by a Mahomedan in favour of a stranger, but possession was not delivered:

Held, that a co-sharer of the vendor, who did not perform the necessary *talabs* until he became aware of its registration, was entitled to maintain a suit for pre-emption, although he had previously come to know of the execution of the *kobala*.

Per *Carnduff, J.*—As under Mahomedan Law, the right of pre-emption does not arise until after the cessation of the vendor's title, the point of time at which the right is to be taken to arise at the present day should be determined by the statutory law of sale which has superseded the Mahomedan Law.

Per *Richardson, J.*—When possession is not given and the price is not paid till registration, the right of pre-emption arises upon registration and not before.

The mere fact that, previous to the sale, the pre-emptor had refused to buy the property cannot, in the absence of proof of the terms and circumstances of the offer made to him, bar his right to pre-empt when the property is later on sold to a stranger.

Mahomedan Law—(Continued).**—10.—Pre-emption—(Concluded).**

Carnduff, J.—This would be so because the right of pre-emption under the Mahomedan Law does not arise out of an obligation on the part of an intending vendor to sell preferentially to the obligor if he offers as good conditions as any intending vendee, but because the obligation is attached to a particular status which binds the purchaser from the person obliged to hand over the subject-matter to the other party to the obligation on receiving the price paid by him for it (a).

Per Richardson, J.—In the absence of anything showing that the pre-emptor had an opportunity to purchase the property at the price offered by the stranger or that he had sanctioned the sale to the vendee at that price, the mere fact that subsequently he himself was negotiating to purchase at a higher price did not constitute waiver (b). *Budhal Sardar v. Sonaulah Mirdha*, 18 C.W.N. 890 = 19 C.L.J. 601 = 41 C. 943 = 23 Ind. Cas. 385 = 41 C. 943.

CARNDUFF and RICHARDSON, JJ.

References:—(a) 24 W. R. 198; 8 W. R. 255, *Not F.*; 2 W. R. 215; 8 W. R. 255; 10 W. R. 246; 6 B.L.R. 42 (N) = 11 W. R. 71, *R.* (b) 35 C. 572, *R.*

(2) Pre-emption—Mahomedan Law—Sale by Shia—Suit by Sunni—Shia law applicable.

There is no warrant for saying that the Shia law of pre-emption is a dead letter (a). In case of a sale of property by a Shia to a Hindu, a Sunni brought this suit to pre-empt, basing his title on prevailing custom and Mahomedan law. It was held that a custom of pre-emption did not exist. *Held* that the Shia law of pre-emption was applicable and the Sunni had no right to pre-empt. *Pir Khan v. Fayaz Hussain*, 12 A.L.J. 813 = 36 A. 488.

RICHARDS, C.J., and TUDBALL, J.

References:—(a) 12 A. 229; 22 A. 102, *R.*

(3) Pre-emption—Applicability to Hindus—Gujarat—Customary law—Applicability to Hindus in districts other than Surat and Broach—Custom must be proved in every case. *Dahyabhai Motiram Bhat v. Chunilal Kishoredas Pandya*, 15 Bom. L.R. 1136 = 38 B. 183 = 22 Ind. Cas. 289. See *Final Part*, 1913, Col. 875.

(4) Pre-emption suit—Alternative claim—Custom and Mahomedan Law—Falling back on latter. See *PRE-EMPTION*, No. 12, 12 A.L.J. 681.

(5) Pre-emption—Suit based on Mahomedan Law—Custom found to be in existence—Effect—Whether amendment of plaint necessary. See *PRE-EMPTION*, No. 22, A.L.J. 966.

—11.—Restitution of Conjugal Rights.

Conditional decree for restitution—Validity, See *RESTITUTION OF CONJUGAL RIGHTS*, No. 4, 12 A.L.J. 1065.

Mahomedan Law—(Concluded)**—12.—Wakf.**

(1) Shia school—Wakf made during maraz ul-maut—Valid to the extent of one-third.

Under the Shia Law, a wakf made in death-illness (maraz-ul-maut) is valid only to the extent of one-third, unless assented to by the heirs, even if possession has been delivered under the wakf. *Ali Hussain v. Fazal' Hussain Khan*, 23 Ind. Cas. 291 = 12 A.L.J. 868 = 36 A. 431.

RICHARDS, C.J., and BANERJI, J.

References:—12 Ind. Cas. 730 = 8 A.L.J. 1154; 25 A. 236 (255) = 7 C.W.N. 465 = 5 Bom. L.R. 410 = 30 I. A. 94 (P.C.); 14 A. 429 = A.W.N. (1892) 187; 12 A. 229 = A.W.N. (1890) 93, *R.*

(2) Wakf, dedication for expenses of mosque and maintenance of family members, how far valid—Wakf Validating Act (VI of 1913), if would operate retrospectively.

Where a person belonging to Hanafi school of Mahomedan law made a wakf whereby he provided for the payment of expenses of and in connection with, a mosque and for regular monthly maintenance of the members of his family:

Held, that the dedication in connection with the mosque was valid, but not so the provision for the payment of maintenance to members of the family.

That the Wakf Validating Act (VI of 1913) has no retrospective effect. *Rahimunissa Bibi v. Shaikh Manik Jan*, 19 C.W.N. 76.

CHAUDHURI, J.

(3) Wakf, dedication of rents and profits of immoveable property for annual performance of Mohurram, if valid.

A Mahomedan of the Sunni sect conveyed immoveable property to his grand-daughter under a deed of wakf, the purpose of the dedication being stated to be "service of Imam Hossain and Hassan and for religious purposes," and gave directions in the deed to apply the rents and profits "to the due and proper observance of the annual Mahomedan festival of the Mohurram."

Held, that such dedication was valid and operated as a wakf and the property was inalienable by sale or mortgage. *Ram Churn Law v. Shahibzada Fatima Begum*, 19 C.W.N. 33.

IMAM, J.

Reference:—15 B.L.R. 167, *D.*

(4) Wakf—Mutawalli—Right of succession to office—Hereditary principle. *Phatmabi v. Abdulla Musa Sahib*, 14 M.L.T. 568 = 21 Ind. Cas. 964 = (1914) M.W.N. 75 = 26 M.L.J. 115. See *Final Part*, 1913, Col. 878.

Maintenance.

(1) Suit to recover value of paddy payable under agreement to maintain—Jurisdiction. See *ACT IX OF 1887 (PROVL. S.C. COURTS)*, No. 17, 22 Ind. Cas. 39.

Maintenance—(Concluded).

(2) Award fixing rate of—Decree in terms of award—Declaratory decree—Not executable. See EXECUTION OF DECREE, No. 10, 7 S.L. R. 192.

(3) Grant for—Powers of grantee—Whether alienation by, grantee may be prevented under Hindu law. See GRANT, No. 1, 15 M. L.T. 361.

(4) Maintenance grant—No express provision authorizing grantee to open mines—Grantee if can grant mining lease. See GRANT, No. 6, 20 C.L.J. 527.

(5) Karar between Karnavan and five members of Tavazhi—Members born subsequent to karar entitled to maintenance. See MALABAR LAW, No. 2, 31 Ind. Cas. 755.

Majority Act.

See ACT IX OF 1875.

Makbuza Tenure.

Makbuza tenure in Delhi District, nature of—Public purpose, use of land for an octroi post.

The *makbuza* tenure by which the State or a public body, such as the District Board, may, with the consent of the owner, take possession of land free of cost for public purposes, though not definitely recognized by the Civil Courts exists as a custom beyond doubt in the Delhi district, one of its cardinal principles being that the State or public body must return the land, if it is no longer utilized for a public purpose.

The use of the land held by a Municipality on a *makbuza* tenure for building an octroi post is clearly a public purpose. **Sangham Lal v. The Municipal Committee of Delhi**, 101 P.L.R. 1914=51 P.R. 1914=22 Ind. Cas. 824.

RATTIGAN and BEADON, JJ.

Malabar.

Beds of rivers, streams, tanks, etc., in Malabar ownership. See EASEMENTS, No. 3, 15 M.L.T. 247.

Malabar Compensation for Tenants' Improvements Act.

See MAD. ACT I OF 1900.

Malabar Law.

(1) *Nambudri—Law governing illam—Hindu and Malabar Laws—Son's non-liability to pay ancestral debts.*

The rule of Hindu Law imposing a liability on the son to pay his father's debts, which are neither illegal nor immoral, is not applicable to Nambudries (a).

The principle deducible from the authorities is that an *Illam*, though governed by the ordinary Hindu Law, is also governed by the rules governing a *Marumakkathayam* Nair

Malabar Law—(Continued).

Tarwad. Kunba Kotti Ammah v. Mallaprath, (1914) M.W.N. 149=15 M.L.T. 201=22 Ind. Cas. 546.

MILLER and SADASIVA IYER, JJ.

References:—(a) 10 M. 9; 15 M. 333, F.

(2) *Malabar Law and usage—Members of Tavazhi—Karar between Karnavan and five members of Tavazhi—Members born subsequent to karar entitled to claim maintenance.*

Where a *karar* between a *karnavan* of a *Malabar tarwad* and the head of a *Tavazhi* provides for the maintenance of the then existing members of the *Tavazhi* only, members born in the *Tavazhi* subsequent to such *karar* are not prevented from claiming similar maintenance, and the *karar* does not operate as a bar to their claim.

In a suit for the maintenance of the minor members of the *Tavazhi*, it is not necessary to make a prayer to set aside the *karar*. The minors, not being parties to it, are not bound to set it aside. **Pattu Neithiar Amma v. Thazhatha Meladath Dharmam Achan**, 21 Ind. Cas. 755.

SANKARAN NAIR and OLDFIELD, JJ.

(3) *Uralans—Alienation and delegation of trusteeship invalid—Custom—Appointment of agent by two out of three without giving notice to the third Uralan invalid.*

The ordinary rule is that duties of the office of an Uralan cannot be alienated or delegated. If there is a custom to so alienate or delegate, which is not wholly unreasonable or opposed to public policy, it should be strictly proved.

The appointment of an agent by two out of three Uralans without giving due notice to the third Uralan is invalid (a). **Mannian Nambudripad v. Agniharman Nambudripad**, (1914) M.W.N. 251=15 M.L.T. 276=23 Ind. Cas. 141.

SADASIVA IYER and SPENCER, JJ.

Reference:—(a) 34 M. 406, F.

(4) *Melcharth granted by Karnavan when cannot be upheld.*

A *melcharth* granted by a *Karnavan* before the expiry of the terms mentioned in previous *Kanom* deeds cannot be upheld, unless there was adequate necessity or unless the grant of it was beneficial to the *Tarwad*. **Raman Nambiar v. Raman Nambiar**, 27 M.L.J. 175.

SADASIVA IYER and TAYABJI, JJ.

References:—15 M.L.T. 600; S.A. No. 877 of 1911, R.

(5) *Melcharath granted before expiry of the lease—No family necessity—Whether binding on succeeding karnavan.*

In this case a *melcharath* was given before the expiry of the prior lease and it was found that there was no family necessity to justify the *melcharath*. *Held* that it was not binding on the successor of the *karnavan* who executed

Malabar Law—(Concluded).

it, whether the latter did or did not survive the expiry of the prior kanom. **Moldin Kutti v. Kunhi Koyan**, 27 M.L.J. 691.

AYLING and HANNAY, JJ.

(6) *Junior member of tarwad acquiring property in his name—Presumption as to ownership of such property.* **Govinda Panikker v. Nani**, 86 M. 204 = 21 Ind. Cas. 211. See Final Part, 1913, Col. 882.

(7) *Marumakkathayam—Moplah Tarwad governed by—Karnavan—Lease already in force—Power to grant—Melcharath before expiry of prior lease—Necessity or benefit—Absence of—No power to the down successor's discretion.* **Karayan Kandy Puthuparazi Cherla Chirikandan v. Ayliath Kushikath Krishnan Namblar**, 12 M.L.T. 600 = 16 Ind. Cas. 391 = 27 M.L.J. 690. See Final Part, 1912, Col. 811.

(8) *Suit by Jenmi against assignee of Kanomdar for arrears of purapad—Liability how arises—Limitation.* See LIMITATION ACT (1908), No. 105, 26 M.L.J. 283.

(9) *Karar by karnavan—Karar acknowledging right of another in uraima right—Fraud—Suit to set aside karar by members of tarwad—Minority of some members—Power of karnavan to represent tarwad—Power to give discharge.* See LIMITATION ACT (1908), No. 25, 16 M.L.T. 241.

(10) *Moplahs of North Malabar—Whether governed by Marumakkathayam Law or Mahomedan Law—Custom—Proof—Validity of custom—Courts whether can take judicial notice of custom—Value of previous decisions on the enforceability of custom—S. 16, Madras Civil Courts Act—Scope.* See MOPLAHS, No. 1, 16 M.L.T. 17.

(11) *Tarwad transactions—Joint execution of document by Karnavan and senior anandravans—Assent of family when presumed.* See MORTGAGE (REDEMPTION), No. 7, (1914) M.W.N. 281.

(12) *Chetties residing in Malabar—Applicability of.* See PLEADINGS, No. 3, (1914) M.W.N. 883.

(13) *Pro-note—Execution by karnavan—Signed not as Karnavan—Liability of tarwad property.* See PROMISSORY NOTE, No. 10, (1914) M.W.N. 782.

Malice.

Meaning of 'malice.' See SLANDER, No. 1, 7 L.B.R. 86.

Malicious Prosecution.

(1) *Malicious prosecution, suit for—Prosecution—Application to take proceedings under S. 107 of the Code of Criminal Procedure—Lawful action, if to be taken by Court—Maliciously and without reasonable and probable cause setting the Court in motion—Prosecution, when commences—Notice, issue of, if necessary.*

Malicious Prosecution—(Concluded).

An application by X to a Magistrate to take proceedings against Y under S. 107 of the Crim. Pro. Code, is a prosecution, entitling Y to claim damages in an action for malicious prosecution if the application was made maliciously and without reasonable and probable cause (a).

¶ If a person, maliciously and without reasonable and probable cause, sets the machinery of the criminal law in motion, he is responsible for the consequences, and cannot escape liability on the ground that the action taken by the Court was such as he did not intend or was erroneous in law (b).

The point of commencement of a prosecution is independent of the result of the prosecution. The prosecution—that act of the prosecutor which renders him liable to be cast in damages, if malicious and not based on reasonable and probable cause—commences when the prosecutor has taken the initial step, namely, has made his complaint to the Magistrate (c).

A prosecution exists where a criminal charge is made before a judicial officer or tribunal, and any person who makes or is actually instrumental in the making or prosecuting of such a charge, is deemed to prosecute it, and is called the prosecutor. **Blahun Prasad Narayan Singh v. Phulman Singh**, 20 C.L.J. 518.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 17 C. L. J. 105, F.; 18 M. L.J. 370, Diss. (b) (1883) 30 Kansas 534 = 2 Pacific Rep. 635; (1887) 37 Minn. 386 = 34 N. W. 746; (1882) 5 B. & Ald. 634; 37 M. 181, Diss. (c) 37 C. 358; 38 C. 880, D.; 37 M. 181, Diss.

(2) *Complaint by defendant accusing plaintiff of defamation—Issue of notice to plaintiff and inquiry by Magistrate under S. 202, Crim. Pro. Code—Dismissal of complaint—Whether affords cause of action for suit for malicious prosecution—Ss. 200, 202, 204, Crim. Pro. Code—Scope—Object of Chap. XVI, Crim. Pro. Code—Prosecution when commences.* **N. K. Sheik Meran Saib v. C. Ratnavelu Mudaly**, 25 M. L.J. 1 = 21 Ind. Cas. 703 = 37 M. 181. See Final Part, 1913, Col. 886.

Malikana.

(1) *Malikana—Non-enjoyment for 12 years—Right to sue, if barred—Malikana, whether interest in or charge upon immoveable property or rent—Limitation Act (XIV of 1859), S. 12—Limitation Act (IX of 1871) Sch. II, Art. 132.*

Under Art. 132, Sch. II, of the Limitation Act (IX of 1871), *malikana* was deemed to be money charged upon immoveable property, and a similar provision is contained in the later Limitation Acts. But under Act XIV of 1859, *malikana* was considered as an interest in immoveable property and not rent, and was governed in the matter of limitation by S. 12 of the Act (a).

Consequently, if there had been no enjoyment of *malikana* for a period of 12 years, the

Malikana—(Concluded).

right to sue for money recoverable on account of it was barred (b).

Therefore, where the plaintiff's right to a *malikana* was established in 1855, but since that date and before Act IX of 1871 came into force, they were for a period of more than 13 years not in enjoyment of it, held, their right was barred, *Moheer Prosad Singh v. Dalj Nath*, 21 Ind. Cas. 779.

CHATTERJEA and WALMSLEY, JJ.

References :—(a) 12 W.R. 498 ; 19 W.R. 94, Rel. (b) 9 W.R. 102, R.

Mandamus.

(1) *Specific Relief Act, S. 45 — Mandamus, writ of—Discretionary power, how exercised—Personal right of and threatened injury to persons seeking relief—Person holding office on conditional appointment, if entitled to relief—When validity of appointment in question, if application entertainable before validity declared by suit—Honorary office—Proceedings not meant for opinion of Court in doubtful matters—Universities Act (VIII of 1904 and II of 1857), University Regulations, cl. 12 — Government of India Act, 2 and 3 Geo. V., c. 6 and Notifications—Parties—Provision for post-graduate studies, if compulsory or enabling—Internal arrangement of University—Part-performance, if discretionary duty becomes obligatory, by—Estoppel—Notice implied as to powers of statutory bodies.*

S. 45 of the Specific Relief Act provides an exceptional remedy; being discretionary, it must be exercised with caution and the duty sought to be enforced must be clear and obligatory. The first condition is that the applicant must show clearly the existence of his personal right and that an injury is threatened to such right.

In the absence of any letter of appointment or of any unconditional resolution of appointment, it could not be held that the applicant has been appointed, and having regard to the resolution of the Senate, it could not be said that they ever intended to appoint him without the sanction of the Governor-General.

That the fact of the appellant having lectured during a part of the term did not establish a continuing right to lecture.

When the duty is conditional on the approval of another person or body being obtained, there is no right to a Writ of Mandamus until such approval has been given (a).

The principle underlying the jurisdiction in these cases is that the proceedings can confer no title not already existing though they may affect the consummation of the relator's title, if he had one; but it gives him none (b).

The existence of a legal right is the foundation of every Writ of Mandamus (c).

In all cases where the validity of an appointment is the main point in dispute, the writ is not granted until the controversy has been

Mandamus—(Continued).

tried at law and an adjudication had in favour of the relator (d).

The writ does not lie to try the title. The Court has always refused to allow an application for Mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful point of law.

Whether the sanction required under S. 12, Ch. XI, of the University Regulations for the appointment of a University lecturer is *ultra vires* or not having regard to 2 and 3 Geo. V., c. 6 and the notifications of the Government of India thereunder and whether the words "Governor of the Presidency of Fort William in Bengal in Council," should be substituted for "the Governor-General in Council," cannot be tried in these proceedings. The Government concerned are not parties to proceedings and cannot be made parties under the express provisions of S. 45 of the Specific Relief Act.

It is a clear principle of law that no order affecting the status or rights of any parties concerned in the matter ought to be determined in proceedings of this nature or of any proceedings whatever unless they are parties thereto.

Any such question arising between the University and the Governor-General in Council may perhaps be decided in a properly constituted suit but not in a summary proceeding of this nature.

The personal right referred to in S. 45 of the Specific Relief Act is not a right *in rem*, such as every human being in civilized society possesses independently of any act of his own (e).

He alone is a competent relator who has some interest other than that of the community at large in the question to be tried (f).

An honorary lectureship may not be an office of any pecuniary value, but it is undoubtedly an office of consequence; but the fact that no arrangements are being made by the University for the delivery of such lectures can hardly be said to be an injury to the personal right of the lecturer.

The provision in the University Regulations that the Syndicate shall appoint a place for lectures in consultation with the lecturer, imposes no obligation on the Syndicate to appoint any definite time. Having regard to that fact, the Court cannot give a complete or effectual remedy such as is contemplated in the section. These are, besides, matters of internal arrangement with which Courts are unwilling to interfere, unless under express obligation.

Although S. 1 of Ch. XI of the University Regulations imposes on the University an obligation to provide for post-graduate teaching by appointing lecturers, it cannot be construed that the duty is not only imperative but also immediate. The provision is only an enabling one.

Although it may be true in some cases that work, which before it is begun is only permissive, becomes obligatory by part performance

Mandamus—(Concluded).

after it has been begun, yet it is not true as an abstract proposition of law in every case, and it does not follow that the appointment of a University lecturer which is discretionary becomes obligatory by reason of its part performance (g).

Whether the University having availed itself of the services of the applicant is estopped from denying his title as lecturer is a question which can only be determined in a properly constituted suit.

Although the doctrines of estoppel and part performance apply to corporations yet no sort of part performance or ratification can bind a corporation to a transaction which the Legislature has forbidden it to undertake as here under S. 12 in Ch. XI of the University Regulations.

The University could not be held bound by representations made by any individual officer without the authority or sanction of the University.

All persons dealing with a statutory body like the University, or its agents, are deemed to have notice of the limits publicly set to their authority, and it is well accepted law that such a corporation is not bound by anything done by such agents, in its name, when the transaction is on the face of it in excess of the powers defined by Statute.

The applicant must be deemed to have known the conditions imposed upon the Senate by the University Regulations and to have accepted the office with knowledge of such limitations, and he is not entitled to rely upon any estoppel on the part of the University in these proceedings such as would validate his appointment.

Even if the sanction of the Governor-General in Council to his appointment be held not necessary, it does not under the circumstances of this case better the position of the applicant (h).

Whether or not under the Statutes the Government of India is vested with any power to impose conditions or limitations on the statutory powers of the Senate is a difficult and doubtful point, which cannot be decided as a side issue in proceedings of this summary character. *In the matter of A. Rasul*, 18 C.W.N. 490=41 C. 518=24 Ind. Cas. 404.

CHAUDHURI, J.

References :—(a) (1862) 31 L.J.Q.B. 50 (53), *F. (b)* (1801) 2 East, 75 (83), *R. (c)* (1852) 18 Q.B. 692 (695), *R. (d)* Spelling on Injunction, 2nd Ed., p. 1365, *R. (e)* 3 Bom. L.R. 663, *Diss.*, (f) (1760) 3 T.R. 574, note. (b), *R. (g)* (1853) 1 El. & B. 860, *Expl. (h)* (1877) 9 Ch. A. 783, *Expl.*

(2) Omission of qualified candidate's name from election roll—Right to—Interference of High Court. See ACT VI OF 1914 (BENGAL MEDICAL), No. 1, 19 C.W.N. 129.

(3) Application for Mandamus—What it must contain—Mandamus when may be granted. See SPECIFIC RELIEF ACT, No. 34, 26 M.L.J. 310.

Maps.

Thak map—Evidentiary value. See SALE, No. 7, 22 Ind. Cas. 645.

Market.

Market—Right of weighing—Old market closed and a new one opened—Permission to weigh—License.

An old market having been closed by the Government, a new one was opened at a more convenient place, and certain weighmen, who had exercised their right of weighing in the old market, continued with the permission of the authorities to follow their calling on specific portions of the new market.

Held, that even assuming that the weighmen had a right in respect of the old market based upon the doctrine of a lost grant, the permission granted to them with respect to the new one was a bare license. Because it did not create a perpetual right in the licensees and their descendants. *Secretary of State for India v. Kanhai Lal*, 12 A.L.J. 447=23 Ind. Cas. 922.

RICHARDAS, C.J., and BANERJI, J.

Market Value.

Determination of—Value of previous sales. See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

Marriage.

(1) Breach of betrothal contract—Amount of damages. See CONTRACT ACT, No. 70, 86 P.L.R. 1914.

(2) Breach of contract of—Whether suit for damages lies—Measure of damages. See DAMAGES, No. 1, 7 Bur. L.T. 14.

'Married Woman'.

Meaning of the words in the Civ. Pro. Code of 1882. See HINDU LAW (WILL), No. 5, 17 C.C. 318.

Married Women's Property Act.

See ACT III OF 1874.

Master and Servant.

(1) *Condition of service to work on holidays—Failure to work on holiday—Summary dismissal and forfeiture of wages—Legality—Applicability of Negotiable Instruments Act.*

Plaintiff was employed in the defendant's printing press on a pay of Rs. 19 a month. By the printed rules for employees in the press they were required to work on holidays, including Sundays, in case of necessity, with an allowance of overtime pay if required to do this extra work, and liability to summary dismissal and forfeiture of 15 days' wages on refusal.

The plaintiff failed to work on Sunday, 19th May, when ordered to do so and was in consequence dismissed on Monday, the 20th. He claimed wages for 19 days, plus some overtime allowance plus damages (pay for 15 days more) on dismissal, in all Rs. 22-4-9.

The Small Cause Court allowed Rs. 19-2-6, including pay for the whole month and such overtime allowance as was found due, finding

Master and Servant—(Concluded).

that "Sunday" is a holiday under Negotiable Instruments Act, and under general law of the land servants cannot be forced to work on that day."

Held that the Negotiable Instruments Act had nothing to do with the matter and a vague reference to the general law of the land was equally irrelevant.

Sundays are customary holidays, but it is open to any employer to stipulate to the contrary, and if his servants, having accepted service on these conditions, refuse to abide by their terms, they must take the consequences.

Held, therefore, that the defendant did not act illegally in dismissing the plaintiff on 20th May, but the penalty of forfeiture to pay for 15 days cannot be reasonably exacted; and the Civil Courts have ample discretion to determine in any particular case whether such penalty may be justified or not. **Amar Singh v. Karam Singh**, 50 P.R. 1914 = 251 P.L.R. 1914 = 163 P.W.R. 1914.

KENSINGTON, C.J.

(2) Misconduct of servant—Dismissal.

Misconduct inconsistent with the due and faithful discharge by a servant of the duties for which he was engaged is a good cause for his dismissal. **Po Kin v. Maung Kala**, 7 L.B.R. 264 = 25 Ind. Cas. 815.

TWOMEY, J.

(3) Servant of plaintiff conveying an order for work to be done to plaintiff under instructions from defendant—Defendant's liability to pay for work done. See ACT IX OF 1887 (PROV. S. O. COURTS), No. 7, 12 A.L.J. 271.

Mate's Receipt.

Nature of document. See SHIPPING COMPANY, No. 1, (1914) M.W.N. 163.

Medical Act (Bengal).

See BEN. ACT VI OF 1914.

Medical Evidence.

Value of, to prove age. See LIMITATION, No. 3, 78 P.W.R. 1914.

Medical Fees.

Reasonable fees claimable in the absence of any agreement. See CONTRACT ACT, No. 4, U.B.R. (1914), 2nd Qr., p. 19.

Merchandise Marks Act.

See ACT IV OF 1889.

Merger.

(1) Doctrine of merger—Applicability. See LANDLORD AND TENANT, No. 18, 23 Ind. Cas. 393.

(2) Putni and mokurari—Mokurari created before Transfer of Property Act—Both interests kept alive and separate—Acquisition of both interests piecemeal at different times—Merger. See TRANSFER OF PROPERTY ACT, No. 6, 22 Ind. Cas. 366.

Merger—(Concluded).

(3) Applicability of doctrine of merger to property in mofussil prior to Transfer of Property Act. See TRANSFER OF PROPERTY ACT, No. 98, 23 Ind. Cas. 612.

Mesne Profits.

(1) *Mesne profits—Co-sharers—Recovery of possession—Ouster.*

Mesne profits may be awarded to a co-sharer suing another co-sharer for recovery of possession of his (plaintiff's) share in a certain joint property, if there has been an ouster. The mere excess of enjoyment does not in itself amount to an ouster. In the absence of ouster, mesne profits cannot be given. **Gora Chahd Chatterjee v. Keshab Chunder Khawas**, 23 Ind. Cas. 122.

JENKINS, C.J., and CHATTERJEE, J.

(2) *Art. 109, Limitation Act (1908)—Suit for mesne profits—Limitation when commences.*

On 4-4-1909 plaintiffs recovered possession of agricultural land which till that date was wrongfully held by the defendant. On 29-4-1912 they instituted a suit for mesne profits obtained by the defendant from the land in the course of the agricultural year which ended on 31-5-1909. The crops of that year were actually cut on 24-3-1909. *Held* that under the present law, it is the actual receipt of the profits that gives the starting point for limitation, and the cutting of the crops in March 1909 by the defendant was clearly a receiving of a portion of the profits, and the suit was barred under Art. 109, Limitation Act (1908) as brought more than 3 years after the date of the actual receipt of the profits. **Ganpatrao v. Jangla**, 10 N.L.R. 76 = 24 Ind. Cas. 866.

HALIFAX, A.J.C.

References:—24 C. 413; 32 C. 118, F.; 10 W.R. 486; 22 W.R. 126, D.

(3) *Civ. Pro. Code (1882), S. 211—Decree awarding mesne profits—Period not prescribed—Decree to be construed as awarding mesne profits for three years—Application for mesne profits beyond three years, treated as suit—Order—Decree appealable—Civ. Pro. Code (1908), S. 47.*

In awarding mesne profits a decree did not prescribe any period for the calculation of mesne profits as directed by S. 211 of Civ. Pro. Code, 1882. The decree-holder applied in the execution for mesne profits beyond the period of three years. The executing Court, while declining to give any relief upon the application as regards the period in excess of three years, converted the application into a suit on the ground that a suit for part of the period in question would be barred and passed an order for the payment of mesne profits for that period.

Held, (1) that in the absence of a period for the calculation of mesne profits being prescribed the decree must be construed as awarding mesne profits for three years from the date of the decree, because the grant of any further sum would be beyond the jurisdiction of the Court;

Mesne Profits—(Continued).

(2) *that*, after the Court had held that the decree did not include mesne profits beyond three years, there was no further question relating to the execution of the decree which could be determined under S. 47, Civ. Pro. Code of 1908, but as a Court treated the execution application as a suit and passed an order under S. 47, its order was a decree and, therefore, appealable.

S. 47, Civ. Pro. Code, is intended to obviate the injustice caused to parties by mistake in initiation of proceedings and enables a Court to treat an application as a suit or a suit as an application, but it does not enable one proceeding to be treated as both suit and proceedings. *Sri Raja Row Venkata Kumara Mahipati Surya Rao Bahadur Garu v. Sri Rajah Rao Subbayamma Rao Bahadur Garu*, 24 Ind. Cas. 484.

BAKEWELL and SPENCER, JJ.

- (4) *Court fee—Claim for mesne profits—Jurisdiction—Mesne profits—If Munsif can entertain claim for mesne profits beyond pecuniary jurisdiction—Plaint—Presentation of plaint in Court of competent jurisdiction, if to be deemed new suit—Claim for mesne profits already accrued due—Plaintiff to value amount claimed approximately—Civ. Pro. Code (1908), O. VII, r. 2, para (2).*

Court-fees cannot be levied in respect of a claim for mesne profits *pendente lite* (a).

A Munsif has no jurisdiction to entertain a claim for mesne profits in excess of the limits of his pecuniary jurisdiction.

The institution of a proceeding in a Court which has no jurisdiction to entertain it, is not a valid institution of a proceeding which may thereafter be continued on transfer in a Court of competent jurisdiction. Therefore, the presentation of a plaint in a Court of competent jurisdiction must be deemed to be the institution of a new suit.

Where a proceeding is instituted before a Court for the recovery of mesne profits the entire amount of which has accrued due, and the plaintiff is in a position to value the amount claimed by him, at least approximately, he is bound to state approximately the amount sued for under O. VII, r. 2, para (2) of the Civ. Pro. Code. *Bhupendra Kumar Chakravarti v. Purna Chandra Bose*, 24 Ind. Cas 232.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) 15 B. 416; 21 M. 371; 1 Ind. Cas. 670 = 13 C.W.N. 815, *Rel.*

(5) *Judgment-creditor purchasing property at auction-sale—Sale subsequently set aside—Judgment-debtor in the next sale proclamation claiming a set off from the judgment-creditor for the mesne profits of the property—Question to be dealt with in execution proceedings and not by a separate suit. See CIV. PRO CODE (1908), No. 87, 7 Bur. L.T. 64.*

Mesne Profits—(Concluded).

(6) *Execution sale set aside on account of fraud between auction-purchaser and decree-holder—Application to executing Court by judgment-debtor for mesne profits if maintainable. See CIV. PRO. CODE (1908), No 4, 22 Ind. Cas. 889.*

(7) *Alienation of undivided share in joint family property—Alienee's right to mesne profits. See HINDU LAW (ALIENATION), No. 10, 16 M.L.T. 181.*

(8) *Suit for mesne profits against father and son—Decree against father alone—Executable against son's share also. See HINDU LAW (DEBTS), No. 2, (1914) M.W.N. 616.*

(9) *S. 9, Specific Relief Act—Suit for possession together with prayer for mesne profits—Powers of Court. See SPECIFIC RELIEF ACT, No. 3, 16 M.L.T. 190.*

Military Officers.

Claim against—Reference to arbitrator—Award—Decree in terms of award—Interference by High Court. See HIGH COURT RULES, (BOMBAY), No. 2, 16 Bom. L.R. 517.

Minerals.

(1) *Moghli Brahmatrar grant—Right to mines and minerals. See GRANT, No. 5, 20 C.L.J. 304.*

(2) *Right to minerals in Shrotriam villages. See SHROTRIAM GRANT, No. 1, 15 M.L.T. 277.*

Mining Lease.

- (1) *Mining lease—Injunction, suit for—1-roof necessary—Intention, evidence of—Lessor and lessee—Contract, breach of—Right to take away entire coal—Owner of lower mine, right of, to pen back water—Barrier between mines, breaking down—Damages—Lessee, if to leave a barrier, to prevent communication with adjoining mines—Instroke—Outstroke—Lessor, when can deprive lessee of his right of instroke—Lessee's right of instroke, when cannot be exercised—Surface owner—Support, right to, when protected by injunction—Injunction, when granted in case of subsidence.*

A man who seeks the aid of the Court by an injunction must show that the act complained of, is in fact a violation of his right or is at least an act which, if carried into effect, will necessarily result in a violation of the right. The mere prospect or apprehension of injury of the mere belief, that the act complained of may or will be done is not sufficient (a).

The plaintiff must show the existence of an intention on the part of the defendant to do the act complained of; but direct evidence of such intention may be unnecessary, if a man insists on his right to do or begins to do or threatens to do or gives notice of his intention to do an act which must, if completed, give a ground of action.

Where the defendant claims a right to take away the entire coal, a Court is competent to

Mining Lease—(Continued).

grant an injunction, if it is established that what the defendant asserts he has a right to do would constitute a breach of contract between the lessor and the lessee.

An owner of a lower mine must, if he wishes to guard against the natural flow of water from the mines of his neighbour, have a barrier in the upper part of his mine to pen back the water; and a lessee may be liable for damages done by breaking down such barrier between the mines (b).

It is not obligatory upon the lessee to leave a barrier of coal merely to prevent communication with adjoining mines.

The right of instroke is the right of conveying minerals leased to the surface, through a pit or shaft in an adjoining mine; it is the converse right to that of outstroke, which is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the mine leased. A lessee *prima facie* is entitled to work by instroke but not by outstroke (c).

If a lessor desires to deprive the lessee of his right of instroke working, he must do so by clear and unambiguous provision, making it obligatory on the lessee to sink pits or shafts, and the obligation to sink a pit, when not expressly laid on the lessee, is not one readily inferred (d).

If a lessee has a right to work by instroke, he cannot exercise that right fraudulently to the detriment of his lessor, and if it be established that he has fraudulently passed off coal raised from the demised mine by instroke as coal of his own colliery, the Court will grant an injunction to restrain him from a repetition of the fraudulent act.

Prima facie, the owner of the surface has a right of support, and a lessee is not entitled to work a mine so as to cause a subsidence. The right to support will be protected by an injunction, if the Court is satisfied that injury is imminent and certain to result from the defendant's acts. The Court will also interfere by injunction when the defendant claims the right to do acts which must inevitably cause a subsidence (e).

Obiter.—In a lease of all the coals in certain lands, without any stipulation as to barrier, the lessee is relieved by implication from an obligation to leave a barrier as protection against the invasion of water. *Rafijos Agarwala v. Braja Mohan Singh*, 20 C.L.J. 538.

MUKERJEE and BEACHCROFT, JJ.

References.—(a) (1834) 3 My. and Ke. 169 (174) = 41 R.R. 40; (1893) 2 Ch. 87 (91); (1904) 1 I.R. 171; (1904) 1 Ch. 673 (677), R. (b) (1853) 13 C.B. 188; (1943) 7 Beav. 127; (1863) 15 O.B. N.S. 376; (1870) 1 I.R. 11 Eq. 188 (192), R. (c) (1862) 10 W.R. (Eng.) 315; (1869) L.R. 5 Ch. App. 103; (1871) L.R. 6 Ch. App. 742; (1871) L.R. 2 Sc. & D. 166; (1876) 1 App. Cas. 701; (1869) 10 Mac. 901 = 6 S.L.R. 217, R. (d) (1853) 7 Exch. 170 = 8 Exch. 574; (1869) L.R. 9 Eq. 538, R. (e) (1875) 3 K. & J. 695 = 112 R.R. 349; (1886) 11 App. Cas. 145; (1865) 34 L. J. Ch. 406 (412), R.

Mining Lease—(Concluded).

(2) Maintenance grant—No express provision authorizing grantees to open mines—Grantees if can grant mining lease—Mine when open—Intention—Damages for wrongful abstraction. See GRANT, No. 6, 20 C.L.J. 527.

Minor.

(1) *Minor—Suit by next friend—Abatement—Suit by minor later—Not barred.*

There is no provision of law which enables a Court on the death of the next friend to dismiss the suit. It was the duty of the Court to see that a new next friend was appointed or to allow the suit to be pending till the minor attained majority.

There can be no estoppel where a man misconceived the effect of an order which was of no legal force.

Where a suit was instituted by the next friend of a minor and on the next friend's death the suit abated and the minor on attaining majority sought to set the abatement aside but was not successful and instituted a second suit, *held*, the second suit will lie. *Veekateswara Iyer v. Cherussari Madathil Ramunni Nair*, (1914) M.W.N. 740 = 27 M.L.J. 405.

SESHAGIRI IYER, J.

(2) *Decree passed against a person as a minor—Seeking to impeach decree on the ground that he was then a major—Burden of proof.*

Where a decree is passed against a person as a minor, but he seeks to impeach the decree alleging that he was then major, it is for him to show that, though the former Court was satisfied that he was a minor, he was really not so. *Gokal Singh v. Kanhayalal*, 10 N.L.R. 137.

MITTRA, OFFG. A.J.C.

References.—23 W.R. 395, D.; 24 W.R. 262, R.

(3) Civil Judge in Eerar invested with unlimited original jurisdiction under the Hyderabad Assigned Districts Courts Law—Not competent to hear applications under Guardians and Wards Act—Appointment of guardian by such a Civil Judge *ultra vires*—Minority of ward not extended to 21 years—Meaning of, Court of Justice, in the Majority Act. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 2, 10 N.L.R. 161.

(4) Agreement to refer to arbitration—Parties minors—Whether leave of Court necessary. See CIV. PRO. CODE (1908), No. 393, 12 A.L.J. 57.

(5) Gross negligence of next friend—Ground for setting aside dismissal for default. See CIV. PRO. CODE (1908), No. 286, 27 M.L.J. 167.

(6) Company—Liquidation—Minor shareholder—Receipt of dividends even after attaining majority—Liability as contributory. See COMPANY, No. 5, 16 Bom. L.R. 730.

Minor—(Concluded).

(7) Minor party—Next friend—Guardian *ad litem*—Negligence—Fraud or collusion—Compromise decree when can be set aside. See COMPROMISE, No. 3, 22 Ind. Cas. 923.

(8) Compromise—Complete surrender of minor's rights whether for his benefit. See COMPROMISE, No. 7, 212 P.L.R. 1914.

(9) Minor when cannot repudiate compromise made by his guardian or next friend. See COMPROMISE, No. 9, 139 P.W.R. 1914.

(10) Contract by minor void—Fraud—Misrepresentation as to age—Transfer by minor's creditor—Estoppel. See CONTRACT ACT, No. 5, 26 M.L.J. 612.

(11) Minor widow—Reversioner taking power of attorney from her with knowledge of her minority—Inducing stranger to make advance to her—Suit by stranger to recover money—Reversioner estopped from pleading widow's minority. See HINDU LAW (WIDOW), No. 6, 15 M.L.T. 323.

(12) Receiver appointed to manage infants' estate—Rights and liabilities of minor. See RECEIVER, No. 5, 20 C.L.J. 113.

Mirasi Tenure.

(1) *Mirasi tenure in Chingleput District—Conversion of Mokhasa into, Shrotriem—Rights of tenants—Act I of 1908 (Madras Estates Land), Ss. 3 (2), 55—Jurisdiction of Civil or Revenue Courts—Meaning and incidents of 'Kudivaram', 'Ulkudi Payakari', 'Shrotriem tenure', 'Mokhasa', 'Thunduvaram', 'Mirasi'—'Ekabhogam', etc.*

The tenants of the village of shrotriem Thalambur in Chingleput District sued their landlords to enforce the tender of pattas on the ground that the tenants have permanent occupancy rights in the land. The Shrotriemdars contended that they were Ekabhogam Mirasidars, that they were owners of both melvaram and kudivaram, and that the Revenue Courts could not entertain the suit.

Held, that the Ekabhogam Mirasidars of the plaint village had not lost their original kudivaram rights in the village cultivable lands at the time of the grant of the shrotriem inam to them in 1802, and that the village could not be deemed to be an estate within the meaning of S. 3 (2) of the Estates Land Act. *Held* also that the suits for enforcing the tender of pattas was not maintainable.

The origin and incidents of Mirasi tenure in Chingleput District discussed.

Per *Sadasiva Iyer, J.*—The Ulkudi Payakari tenant seems to have obtained a sort of permanent right of occupancy by continual residence in the village and cultivation of the same lands for three generations. But it is doubtful whether he could be held to have acquired in former times what is now known as the kudivaram rights in the lands in his occupation.

Mirasi Tenure—(Concluded).

A person cannot be held to own the kudivaram right in its true and complete sense, unless he has also got the power of alienation of his right of occupancy and unless he does not acknowledge himself to be merely the tenant of a person really owing the Kudivaram right.

As regards a Mirasidar to whom an inam was granted long ago, it cannot be said that there is a presumption against his having also owned the Kudivaram right at the time of such an ancient grant, having regard to the history of mirasi tenure in the Chingleput District.

Per *Spencer, J.*—The grant of the shrotriem being a grant by a Government of a portion of their melvaram rights to persons already in occupation of the lands, a presumption arises that the persons in occupation were, previously to the grant, owners of Kudivaram right.

The word 'Kudivaram' may be used in two senses (1) the right of occupancy, (2) the share of the produce which the cultivator, whoever he may be, actually gets. In S. 3 (2) (d) of the Estates Land Act, it is used in the former sense.

The meaning of 'Shrotriem tenure' 'Mirasi', 'Thunduvaram', 'Ekabhogam', etc., discussed. *Chinnan v. Kondam Naidu*, 26 M.L.J. 169 = 23 Ind. Cas. 113.

SADASIVA AIYAR and SPENCER, JJ.

References:—(1910) M.W.N. 669; 24 M.L.J. 571; 24 M.L.J. 845; 5 M. 345; 7 M.L.J. 1; 24 M.L.J. 86; 29 M. 52; 26 M.L.J. 99; 30 M. 502, R.

(2) *Mirasi right—Title to house-site—Patta issued by Government—Referred to Full Bench.*

The question whether, in a Mirasi village, the Mirasdar entitled to recover possession of a house-site held under a patta from Government referred to Full Bench. *In re S. A. 210 of 1911*, (1914) M.W.N. 537.

SANKARAN NAIR and SADASIVA IYER, JJ.

Misjoinder.

(1) Of cause of action—Suit for declaration of title to immoveable properties situated in different districts—Suit brought in one district—Jurisdiction. See CIV. PRO. CODE (1908), No. 50, 21 Ind. Cas. 439.

(2) Decision as to Whether a preliminary decree. See CIV. PRO. CODE (1908), No. 137, 16 Bom. L.R. 954.

Misrepresentation.

(1) Silence on the part of vendor when amounts to—Rescission of contract. See CONTRACT, No. 8, 24 Ind. Cas. 193.

(2) Sale—Misrepresentation—Identifying witness—Liability of broker and identifier for false representation. See FRAUD, No. 4, 22 Ind. Cas. 818.

Mistake.

Fictitious entry of property—Plea of mistake—Mutual mistake—*Onus*—Evidence of mistake—Admissibility. See REGISTRATION, No. 2, 18 O.W.N. 817.

Mogholl Brahmattar Grant.

Right to minerals under the. See GRANT, No. 5, 20 C.L.J. 304.

Money.

(1) Agreement to pay money after a certain event—Breach of agreement—Suit for money—Limitation. See LIMITATION ACT (1908), No. 82, (1914) M.W.N. 264.

(2) Temporary possession of land given in consideration of loan—No registered document—Suit for redemption by borrower dismissed but possession ordered to be delivered to borrower—Suit by lender for money—Limitation. See LIMITATION ACT (1908), No. 101, 7 L.B.R. 138.

Money-lender.

Who is a.—When exempt from profession tax. See MADRAS ACT IV OF 1884 (DISTRICT MUNICIPALITIES), No. 2, 16 M.L.T. 98.

Moplahs.

Moplahs of North Malabar — Whether governed by Marumakkathayam Law or Mahomedan Law—Custom—Proof—Validity of custom—Courts whether can take judicial notice of custom—Value of previous decisions on the enforceability of custom—S. 16, Madras Civil Courts Act—Scope.

The Madras Civil Courts Act expressly mentions customs and usages as capable of being enforced by Civil Courts; and in this respect it differs from such Acts as the Bengal and Assam Civil Courts Act (XII of 1887), S. 37 of which does not refer to customs and usages.

No customary rule of conduct will be enforced unless it satisfies those general requirements of the law which are well known, and which alone can give to it a claim to judicial recognition. Hence previous adjudications on the question whether a particular rule of conduct satisfies those requirements would afford guidance in subsequent cases; and such previous decisions may be binding on the Court considering the same question subsequently; that question being whether the alleged rule of conduct can be enforced at all, or whether, *e.g.*, it is uncertain or opposed to public policy, or unreasonable. This question is one of law and may be considered irrespective of the question whether the custom actually exists, as in *Moult v. Halliday* (a). But a further question has always to be considered (unless the parties admit that it must be answered in the affirmative) whether the rule of conduct (assuming that it has all the elements entitling it to be so recognised) applies to any particular person. The latter question is a question of fact; and the latter question is resolvable into:—have the particular parties as a matter of fact adopted this rule of conduct.

Moplahs—(Concluded).

When the fact of the existence of a custom amongst a particular class of people has been repeatedly proved in the Courts, the Courts have the power to take judicial notice of it (b).

Where the question is whether the particular parties are governed by the Marumakkathayam Law or Muhammadan Law, the real issue to be decided is one of fact, namely, whether the particular parties have adopted the one system of law or the other and whether they have been governing their conduct in accordance with the one system or the other. For that purpose various considerations may have to be weighed on one side or the other (c).

A custom, to hold good in law, requires, besides the negative conditions, *viz.*, that the custom is not unreasonable and applies to matters which the written law has left undetermined, the following positive condition, namely, that the majority at least of any given class of persons look upon the rule as binding, and it must be established by a series of well known, concordant, and on the whole, continuous instances. How many examples are necessary to prove a custom cannot be laid down beforehand; neither is the number to be left to the arbitrary discretion of the Judge, but the point in each case is whether the common consent of the class in question is clearly demonstrated by the number of instances proved. These considerations are not exclusive of each other. Due attention must be given to each of them and to any other that may be relevant under the Evidence Act to the question of fact involved. *Kunhambi v. Kalanthar*, 16 M.L.T. 17=27 M. L.J. 156=24 Ind. Cas. 528.

TYABJI and SPENCER, JJ.

References:—(a) (1898) 1 Q.B. 125, R. (b) 22 M. 494; 27 M. 77; (1911) 2 K.B. 445, R. (c) 28 M. 1 (9); Perry O.C. 118, R.

Mortgage.

- 1.—GENERAL.
- 2.—BY CONDITIONAL SALE.
- 3.—CONTRIBUTION.
- 4.—EQUITABLE.
- 5.—FORECLOSURE.
- 6.—REDEMPTION.
- 7.—SUBROGATION.
- 8.—USUFRUCTUARY.

—1.—General.

(1) *One co-heir mortgaging undivided ancestral property—Right of another co-heir to claim a share in mortgage-money—Absence of such right—Limitation—Art. 132, Limitation Act—Applicability.*

Where a co-sharer mortgages undivided ancestral property, a suit by another co-sharer does not lie, in the absence of an agreement between the parties, to compel the former to give the latter a share of the mortgage-money.

Mortgage—(Continued).**—1.—General—(Continued).**

Even assuming that such a suit does lie, Art. 132 of the Limitation Act will not apply (a). *Nga Ya Baw v. Nga Bya*, U.B.R. (1913) 3rd Qr., 178—22 Ind. Cas. 959.

MCCOLL, J.C.

References :—(a) 7 B. 191 ; 8 B. 426 ; 12 I.A. 12, R.

- (2) *Mortgagee in possession—Trespasser—Dispossession of mortgagee—Whether adverse possession against mortgagor—Declaratory suit—Limitation—Equity of redemption whether may be lost by adverse possession.*

Where a stranger dispossesses a mortgagee in possession, whether adverse possession will run against the mortgagor or not depends upon the fact whether there was dispossession of the mortgagor also. Mere dispossession of the mortgagee will not amount to such adverse possession ; there must be at least notice to the mortgagor that possession is held against him also.

Prima facie the possession of the trespasser is not full proprietary possession, but was possession of a limited nature which would have the effect ordinarily of extinguishing the limited interest of the mortgagee and vesting that in the trespasser ; but there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor, as, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor.

An equity of redemption may be lost by adverse possession ; but for that purpose it is not sufficient for a trespasser, who has ousted a mortgagee, to prove that possession is held on an exclusive title, without also showing that it was acquired and retained with an assertion of an adverse title to the knowledge of the mortgagor.

When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will, and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person, there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who purchases the mortgage as a mortgage ; or he may be an adverse claimant to the mortgage right ; where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person.

In this case the plaintiff mortgaged his house with possession for a term which would expire in 1917. The mortgage was dispossessed by the defendants in 1898. In 1908 they made certain additions to the building, and when the plaintiff remonstrated with them, they denied the

Mortgage—(Continued).**—1.—General—(Continued).**

plaintiff's title to the equity of redemption. The plaintiff brought this suit for a declaration of his title within six years from 1909. The defendants' plea was that limitation for the suit must be calculated from 1898, when they took possession of the property from the mortgagee.

Held that the possession of the trespassers was not adverse from 1898 to 1908, but it became adverse in 1908 when plaintiff's title was repudiated. *Perla Aiyambalam v. Shunmugasundaram*, 15 M.L.T. 112—26 M.L.J. 140—(1914) M.W.N. 417—22 Ind. Cas. 615 (F.B.).

WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ.

References :—2 M. 226 ; 7 M. 26 ; 12 B.H.C. 180 ; 10 M. 189 ; 21 M. 153 ; 14 M. 176 ; 18 B. 51 ; 27 B. 43 ; 10 B. 49 ; 30 A. 119, R.

- (3) *Practice—Mortgage suit—Subsequent mortgagee not impleaded—Suit by subsequent mortgagee.*

Suit upon a mortgage of 1881. There was a prior mortgage, on the same property, of 1879. In the suit on the latter mortgage the subsequent mortgagee was not impleaded. It was decreed and the property was sold in 1896. In the suit upon the subsequent mortgage the question to be considered was as to the form of the decree to be passed. *Held*, that the principle to be followed in such cases was to place the puisne incumbrancer, whom the prior incumbrancer neglected to make a party, in as nearly as possible the position he would have been in if he had been a party to the suit of the prior incumbrancer. *Held* further that the proper order to be passed was to have an account taken of the amount due on the prior mortgage up to the date of obtaining possession, and, failing it, up to the date of sale to the transferee and declare the puisne mortgagee entitled to redeem upon payment of the amount so ascertained, and not to call upon the prior incumbrancer for an account of the profits he has received subsequent to the sale. *Raghunath Kunwar v. Shankar Singh*, 12 A.L.J. 41—36 A. 123—22 Ind. Cas. 387.

RICHARDS, C.J. and BANERJI, J.

References :—19 A. 527 ; 33 A. 370 ; 34 A. 323, R.

- (4) *Mortgage—Puisne mortgagee not made party to previous suit on prior and subsequent mortgages—Right to sue on mortgage—Pleadings—Second appeal, point taken for the first time in, maintainability of—Findings of fact when to be questioned in second appeal—Consideration, question as to payment of—Retrial—Admission by mortgagor at registration when admissible in evidence against auction-purchaser of mortgaged property.*

Mortgage—(Continued).**—1.—General—(Continued).**

A puisne mortgagee, not made a party to the suit based upon prior and subsequent mortgages, has a right of suit based on his own mortgage deed.

A point not taken in the first appellate Court nor in the memorandum of appeal to the second appellate Court, cannot be raised before the latter Court.

The finding of a first appellate Court on the point of the execution of a deed and the payment of the consideration is conclusive unless it can be shown to have been based upon some error in law.

The recital in a mortgage-deed and the admission made by the mortgagor at registration as regards the payment of the consideration are admissible as evidence against a subsequent auction-purchaser of the mortgaged property, when he purchased it under a decree brought on his own mortgages. **Sayed Zahid Ali v. Budh Sen**, 21 Ind. Cas. 554.

PIGGOTT, A.J.C.

References :—6 C. 268=7 C.L.R. 6 ; 17 A. 428=15 A.W.N. 93 ; 25 A. 159=22 A.W.N. 218, Cons.

(5) *Mortgaged property purchased by prior mortgagee in execution of his mortgage-deed—Right of such mortgagee to interest on his money after obtaining possession as purchaser.*

Where a prior mortgagee has purchased the mortgaged property in execution of a decree obtained on his mortgage and obtained possession of the property, he is not entitled to interest on his money since the date of his possession. **Jugal Kishore v. Bahal Rai**, 21 Ind. Cas. 593.

TUDBALL and RAFIQUE, JJ.

Reference :—26 A. 185=23 A.W.N. 219, R.

(6) *Adverse possession—Simple mortgage—Mortgagee entitled to possession on default—Failure to take such possession.*

Where the provision in a simple mortgage-deed gives the mortgagee the right to claim possession of the mortgaged property if the mortgage amount is not paid on a particular date, but he fails to take such possession, the possession of the mortgagor does not become adverse as against the mortgagee, so as to entitle him to claim title by adverse possession after the lapse of twelve years. **Khande Kondayya v. Kandukar Subbayya Chetty**, 21 Ind. Cas. 773.

SANKARAN NAIR and BAKERWELL, JJ.

(7) *Mortgage suit—Misjoinder of parties and causes of action—Mortgage money, payment of, by mortgagor to prior mortgagee—Suit by subsequent mortgagees to enforce payment—Party, transfer of.*

The defendants second party and third party had five-sixths and one-sixth share respectively,

Mortgage—(Continued).**—1.—General—(Continued).**

in a mortgage security executed by the defendants first party, and the plaintiffs alleged that they purchased the one-sixth share which belonged to the third party defendants. They (the plaintiffs) stated that they were informed that the defendants second party had received from the mortgagors a sum of money sufficient to satisfy their dues and consequently brought a suit to enforce the security only in respect of the money due in their share. The plaintiffs further stated that, if any sum was due to the second party defendants, they were prepared to increase the amount of the claim and pay Court-fees accordingly.

Held, that the suit might be deemed to be a suit for recovery of whatever was due on the mortgage security.

That it was open to the second party defendants, if anything was due to them, to have themselves transferred from the category of the defendants to that of the plaintiffs (a).

When the defendants second party did not choose to be transferred to the category of the plaintiffs, but on the contrary, questioned the title of the plaintiffs, the suit would not be defeated when all the mortgagees were parties and the plaintiff sought to recover what was due on the security (b). **Ram Chandra Marwari v. Dhadhai Singh**, 19 C.L.J. 327.

MOOKERJEE and BEACHCROFT, JJ.

References :—(a) (1879) 11 Ch. D. 121, R. (b) 26 C. 409, R.

(8) *Limitation of a suit for sale on a mortgage not affected by a subsequent transaction between the mortgagee and a third person who paid off the mortgage debt—Right of priority, limitation for enforcement of—Purchaser of property subject to a mortgage right of raising a plea of limitation when mortgagee neglects to recover money within limitation.*

Where a puisne mortgagee, who had paid the amount due on a decree for sale obtained by a prior mortgagee, brought a suit for sale on the basis of his mortgage, and claimed priority as against intermediate mortgagees in respect of the amount spent by him in redeeming the prior mortgage, *held*, that the suit in so far as it sought to enforce the priority must be governed by the same rule of limitation as would have applied to a suit by the prior mortgagee. The period of limitation in respect of a suit for sale on a mortgage could not be extended by a subsequent transaction between the mortgagee and a third person who paid off the mortgage-debt (a).

Held further, that if a person has purchased property subject to a mortgage but the mortgagee allows his right to recover the money to be lost by lapse of time, the purchaser is not barred from taking advantage of the negligence

Mortgage—(Continued).**—1.—General—(Continued).**

of the mortgagee and raising a plea of limitation. **Deputy Commissioner, Lucknow v. Pandit Sukdhanian**, 17 O.C. 38 = 23 Ind. Cas. 448.

LINDSAY, J.C.

Reference:—(a) 39 C. 527, F.

- (9) *Mortgage decree—Right of decree-holder to proceed personally and against other properties without proceeding against mortgaged properties—Mortgaged properties not belonging to judgment-debtor—Effect—Mortgage decree construed to give personal remedy—Application for personal decree under O. XXXIV, r. 6, Civ. Pro. Code, does not lie—Amendment of prayer—Court's power to allow—Civ. Pro. Code, S. 153.*

A decree-holder is bound to bring the mortgaged properties to sale before he could proceed against the other properties of the judgment-debtor (a).

But if the mortgaged properties directed to be sold under the decree do not belong to the mortgagor, the mortgagee need not bring them to sale (b).

Where a mortgage decree directed that 'the defendants do pay to the plaintiff' a certain sum of money, and then proceeded to state that 'this Court doth further order and decree . . . that in default of payment before the date specified, the hypothecated property shall be sold, etc.'

Held, that the decree gave personal relief against the defendants under which execution at the option of the decree-holder can be had against the persons and the other properties of the judgment-debtors without reference to the decree for sale of the mortgaged properties (c).

If there is thus a personal decree, no application for another personal decree under O. XXXIV, r. 6, Civ. Pro. Code, can be granted (d).

Under the circumstances of the present case, the decree-holder was allowed to amend the prayer of his petition by adding an alternative prayer, 'that, if the Court thinks that the decree as it stands awards relief personally against the defendant, the Court will be pleased to order the arrest of the defendant and attach the following properties. . . .'

S. 153, Civ. Pro. Code (1908), gives ample power to the Court to allow such an amendment. **Periyasami Kone v. Y. P. R. M. Muthia Chettiar**, 15 M.L.T. 232 = 23 Ind. Cas. 515.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 3 M.L.T. 335, R. (b) 10 M.L.T. 525 = 22 M.L.J. 125, R. (c) 21 M.L.J. 1036, R. (d) 16 C.L.J. 318; 7 C.W.N. 744; 32 C. 867 (877), R.

- (10) *Mortgage "decree"—No decree absolute passed under Civ. Pro. Code, O. XXXIV,*

Mortgage—(Continued).**—1.—General—(Continued):**

- r. 5—*Execution ordered after notice to judgment-debtor—Latter's failure to take objection as to absence of decree absolute—Effect—Not open to raise the plea at later stage.*

Where, in a mortgage suit, no decree absolute under O. XXXIV, r. 5, had been passed, but on the decree-holder's application for execution of the decree notice was issued to the judgment-debtors and an order was passed directing the sale of the property, and the judgment-debtors took no objection on the ground that the decree passed was only a preliminary decree and was not executable:

Held that, under the circumstances of this case, it was not open to the judgment-debtors to plead that there was no decree under which the mortgaged property could be sold. **Epoor Ramasami Reddi v. Kandadal Rangamannar Iyengar**, 26 M.L.J. 255 = 15 M.L.T. 246 = (1914) M.W.N. 622 = 23 Ind. Cas. 390.

SANKARAN NAIR and AYLING, JJ.

- (11) *Construction of document—Essentials of simple mortgage and charge—Right of holder of charge—Ss. 68, 100, Transfer of Property Act.*

In a document which itself stated that a mortgage was being executed, three lands were mentioned as security for the amount borrowed, and plaintiff was put in possession of one of the three properties and he was given a charge over the other two properties. There was also a clause in the deed that 'whenever we pay the same to you, you shall receive it and give back the deed.' Plaintiff sued for the amount due under the document.

Held per Sadasiva Aiyar, J.:—

The document is a usufructuary mortgage so far as the property in possession of the plaintiff is concerned; and there being no covenant to pay in the document, it created only a charge on the other two properties, and plaintiff was not entitled on the date of the suit to sue for recovery of the mortgage money from the mortgagors personally or by the sale of the property charged.

Per Seshagiri Aiyar, J. (contra):—

The clause in the deed implies an understanding on the part of the mortgagors to pay the amount, and the non-fixing of a period for payment does not make it the less a covenant to pay. **Rangappa v. Thimmayappa**, 22 M.L.J. 514 = 24 Ind. Cas. 372.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

References:—15 M. 304; 21 M.L.J. 562, R.

- (12) *Priority—Mortgage made by mortgagor—Money left with mortgagee to redeem prior usufructuary mortgage—Whether prior mortgage kept alive—Intention—Presumption.*

When a mortgagor in making a subsequent mortgage of the property, over which there was

Mortgage—(Continued).**—f.—General—(Continued).**

a prior mortgage, left with the subsequent mortgagee, out of the consideration of his mortgage, a portion of the money for the payment of the prior mortgage, and it was redeemed by the subsequent mortgagee, *held* that the question, whether the prior mortgage was kept alive for the benefit of the subsequent transferee of the property who discharged it, was a question of intention, and in the absence of clear and express evidence the presumption would be that the intention was to keep up the prior mortgage for the benefit of the transferee. **Har Narain v. Har Prasad**, 12 A.L.J. 470 = 23 Ind. Cas. 827.

RICHARDS, C.J., and BANERJI, J.

- (18) *Mortgage by one of joint property of himself and his mistress—Absence of mistress's consent—Effect of an acquiescence after the transaction.*

The first and second appellants lived together, though not legally married and the first appellant mortgaged their joint property without the consent of the second. On an objection being raised to a mortgage decree affecting second appellant's interests in the land.

Held that the tie of marriage did not exist between them and that they could separate at will and there was no binding contract between them.

Held, further, that no acquiescence after the deed was executed by the first appellant would create an estoppel or would change the past in any way. **Rathna Pillay v. N. P. Firm by its agent Sivaraman Chetty**, 7 Bur. L.T. 88 = 24 Ind. Cas. 60.

HARTNOLL, OFFG. C.J. and TWOMEY, J.

- (14) *Reduction in reduced claim when not allowed—Power of Court—Mortgages.*

Held, that, where, after making all possible reductions claimed by defendant, the real amount due to plaintiff largely exceeds the sum for which he sues, and even the net amount due excluding the interest payable thereon exceeds the reduced claim, no further deduction can be legally made therefrom. **The Administrator-General of Bengal v. Lala Das**, 68 P.W.R. 1914 = 166 P.L.R. 1914 = 24 Ind. Cas. 669.

SHAH DIN and CHEVIS, JJ.

- (15) *Court-fees Act—Ad valorem fee—Properties other than mortgaged, liability of, for the decretal amount—Mortgage-money, remission of.*

In a suit for sale based on a mortgage the plaintiff was given a decree for his mortgage-money to be realized by sale of some of the properties but his claim to make certain other properties liable was dismissed. The plaintiff on appeal raised no question about the amount of the mortgage-money but sought only to make the properties exempted by the lower Court liable for the amount of his decree and paid a Court-fee of Rs. 10 only on the ground that the relief sought in the appeal was merely of a declaratory nature.

Mortgage—(Continued).**—1.—General—(Continued).**

Held, that in such a case an *ad valorem* fee was payable on the value of the property, because the question in dispute was the liability of the land to be proceeded against for the debt. **Sukhnandan (Pandit) v. Lachman Prasad**, 17 O.C. 90 = 24 Ind. Cas. 286.

LINDSAY, J.C.

- (16) *Fraud—Collusion—Mere suspicion—Distinct allegation and proof—Interest, payment of, by mortgagor after parting with equity of redemption—Effect upon purchaser—Limitation Act (1877), S. 20.*

Mere suggestions of fraud and collusion ought not to be tolerated, and allegations of the same cannot be rested on mere suspicion, but must be distinctly stated and established.

Payment of interest by a mortgagor, after he has parted with the equity of redemption, has the effect of extending the period of limitation against the purchaser of the equity of redemption, behind whose back the payment is made. **Hem Chandra Chaudhuri v. Purna Chandra Chaudhuri**, 22 Ind. Cas. 510.

CARNDUFF and RICHARDSON, JJ.

References:—11 H.L.C. 115 (131) = 4 N. R. 250 = 10 Jur. (N.S.) 855 = 11 L.T. 68 = 13 W. R. 20 = 11 Erg. Rep. 1274; 32 C. 1077 = 9 C.W. N. 868; 33 C. 1278 = 11 C.W.N. 107, *Rel.*

- (17) *Hindu Law—Mortgage, suit on—Managing members of joint Hindu family made defendants—Co-parceners not made parties, if bound by decree—Suit by latter for redemption, if lies—Transfer of Property Act, S. 85.*

There are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound.

Where the members of a joint Hindu family other than the managers sued for redemption of mortgages, which the mortgagees had already foreclosed by suits in which the managing members of the family had been made parties and the other members were not made parties, the mortgagee not having had notice of their interests, and there was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself:

Held, that no question under S. 85 of the Transfer of Property Act arose in the case, as the mortgagee was not aware of the plaintiff's interest, and the suit for redemption was properly dismissed. **Sheo Shankar Ram v. Mussammat Jaddu Kunwar**, 18 C.W.N. 968 = 16 M.L.T. 175 = (1914) M.W.N. 593 = 20 C.L.J. 282 = 36 A. 383 = 24 Ind. Cas. 504 = 12 A.L.J. 473 = 16 Bom. L.R. 810 (P.C.).

LORD MOULTON, LORD PARKER, SIR JOHN EDGE, and MR. AMEER ALI.

Reference:—38 A. 71, *Affirmed*.

Mortgage—(Continued).**—1. General—(Continued).**

- (18) *Two mortgages on the same property, in favour of the same person—Suit on the second mortgage alone, if can be maintained—Lien upon the property, whether subsists—Mortgaged property, sale of—Private sale, in presence of mortgagee—Mortgagee, whether bound to disclose existence of the first mortgage—Misrepresentation.*

Where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the latter mortgage only by sale of the property subject to the prior mortgage, that is to say, the decree obtained by the mortgagee in the first suit precludes him from any further lien upon the property brought to sale (a).

A, a holder of two mortgages over the same property, obtained a decree on his second mortgage, and in execution of that decree purchased the property himself and obtained possession thereof. The mortgagor thereupon made an arrangement with P to sell to him a portion of the mortgaged property, and A was present at the negotiation for sale, and received a portion of the purchase money in satisfaction of his decree, and the sale was set aside. Upon a suit having been brought by A on his first mortgage for enforcement of the mortgage security :

Held, that A was guilty of misrepresentation, inasmuch as he was bound as a party to the sale transaction to disclose to P the fact that he had a prior mortgage upon the property, and as such he could not attach the property in the hands of P. *Atab Pramanik v. Arif Tarafdar*, 19 C.L.J. 590=23 Ind. Cas. 426.

HOLMWOOD and CHAPMAN, JJ.

References:—(a) 30 B. 156; 25 B. 161, F.; 20 A. 322, R.

- (19) *Mortgage—Encroachment by mortgagee on other land of mortgagor—Effect of his being recorded in the Settlement paper as mortgagee of the encroached land—Adverse possession.*

Held, that, where a mortgagee encroaches upon his mortgagor's land not mortgaged to him, the former holds it adversely against the latter from the date of encroachment, although in the settlement papers the encroached area is also shown as mortgaged. *Mala Singh v. Budh Singh*, 100 P.W.R. 1914=200 P.L.R. 1914.

BEADON, J.

- (20) *Mortgage decree—Civ. Pro. Code, O. XXXIV, r. 4—Executable as decree for money against other properties.*

Where a decree directed the defendants to pay money to the plaintiffs within a certain time and sale of mortgaged property in default, the decree is not only an ordinary mortgage decree under O. XXXIV, r. 4, Civ. Pro. Code, but is also a decree for money which may be executed against the other properties of the

Mortgage—(Continued).**—1.—General—(Continued).**

defendants. Any further order or decree is unnecessary. *Cheruvath Kumbarani Yala v. Theyyatath Karan*, (1914) M.W.N. 497.

SANKARAN NAIR and AYLING, JJ.

- (21) *Mortgagor and mortgagee—Determination of all rights arising from that relationship—Suit for wrongful delivery of mortgage decree not sustainable.*

All the claims between the mortgagor and the mortgagee should be settled in the suit for redemption itself either before or after decree in that suit, i.e., all such claims as relate to the possession of the property, the amounts to be paid, the accounts to be taken, the enjoyment of the property, &c., connected with the reciprocal rights and obligations flowing from the mutual relationship of mortgagor and mortgagee and decree-holder and judgment-debtor. A suit for the value of the profits alleged to have been wrongly put into defendant's possession in execution of the prior mortgage-decree is unsustainable. *Narasinga Patro v. Bhagavan Sabuto*, (1914) M.W.N. 499=24 Ind. Cas. 688.

SADASIVA AIYAR, J.

- (22) *Mortgage—Execution before Transfer of Property Act—Test to find out—Limitation Act, S. 31.*

The question whether an instrument is or is not a mortgage within the meaning of S. 31 (1) of the Limitation Act, 1908, does not depend on the date of the execution. To effect a mortgage it is not necessary to have an express transfer of interest or an express agreement whereby a creditor acquires power to sell the property in default of payment. *Yenkatarama Iyer v. Suppa Nadan*, (1914) M.W.N. 501=24 Ind. Cas. 24.

MILLER and SADASIVA AIYAR, JJ.

- (23) *Burden of proof—Admission as to payment of consideration in a mortgage-deed—Evidence against mortgagor and persons claiming under him.*

Where a mortgage-deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is a strong *prima facie* evidence that the consideration had been actually received and is evidence not only against the mortgagors but also against persons claiming under them. The mere fact that the Court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment would not absolve the defendant from producing evidence that, notwithstanding the acknowledgment in the body of the deed, there was no consideration in fact. *Babbu v. Sita Ram*, 12 A.L.J. 806=36 A. 478.

RICHARDS, C.J., and TUDBALL, J.

- (24) *Usufructuary mortgage—Decree for sale obtained before Transfer of Property Act passed—Sale in execution—Legality of.*

Mortgage—(Continued).**—1.—General—(Continued).**

Where money is secured on property whether by usufructuary mortgage or any other kind of mortgage, the mortgagee is entitled to sell the property to realise his money subject only to the limitation imposed by the Transfer of Property Act. Where, therefore, a usufructuary mortgage was made before the passing of the Transfer of Property Act and the mortgagee succeeded in getting a decree for sale which became final, held that the property could be legally sold in execution of the decree. **Behari Lal v. Deokinandan**, 12 A.L.J. 897 = 24 Ind. Cas. 367.

RICHARDS, C.J., and TUDBALL, J.

- (25) *Non-payment of full consideration for the mortgage—Mortgagor stating that he has received consideration prior to mortgage—Effect.*

There is a distinction between cases where the mortgagor states that he has actually been paid or received consideration at a time prior to the mortgage, whereas, in point of fact, payment of the full sum or receipt of full consideration has not been made or taken place, and cases where the mortgagee at the time of mortgage undertakes to pay, or to do something for the mortgagor after the date of execution of the mortgage and fails to carry out his undertaking.

The Full Bench ruling in 59 P.R. 1907 applies to the latter and not to the former class of cases. **Muni Lal v. Chatter Singh**, 67 P.R. 1914 = 232 P.L.R. 1914.

RATTIGAN and BEADON, JJ.

References :—59 P.R. 1907 (F.B.), *Expl.*; 192 P.L.R. 1912, R.

- (26) *Mortgage decree—Direction in decree that no application shall be entertained against property other than the mortgaged property, whether legal—Civ. Pro. Code (1908), O. XXXIV, r. 6.*

A Court cannot direct in a mortgage-decree that no application against property other than the mortgaged property shall be entertained. The question whether it is open to the decree-holder to proceed against property other than the mortgaged property is one which should be left to be determined when an application, if any, under O. XXXIV, r. 6, is made. **Pitambar Baur v. Chandl Charun Halder Banja**, 23 Ind. Cas. 389.

TEUNON, J.

- (27) *Mortgage—Alienation by mortgagor—Condition empowering mortgagor to sell and pay three-fourth of sale money to mortgagee—Registration when sufficient notice—Mortgagee not bound to sue at once—Prayer for alternate relief.*

Held, that—

1. A condition to the following effect in a mortgage-deed does not alter its nature and cannot destroy the mortgagee's lien on the

Mortgage—(Continued).**—1.—General—(Continued).**

mortgaged property; therefore, if the mortgagor does not pay three-fourth of the sale money, the mortgagee is entitled to follow the mortgaged property and is not bound to proceed first against the mortgagor's other property.

"If I (mortgagor) desire to sell a part of the immoveable property mortgaged, then 12 annas per rupee shall be paid to the mortgagee out of the sale money for the property thus sold and such payment shall be credited towards the principal mortgage money and interest" (a).

2. Registration of the mortgage-deed itself is sufficient notice to the persons dealing subsequently with the mortgaged property, particularly where the debtor is a notorious man and his dealings with the mortgagee are very well known in that locality. The contention that the deed was registered in Lahore while the property in dispute is in Sialkote has no force, inasmuch as when a deed affecting properties in more than one District is registered in one of them a copy is sent for record to each District in which any part of the property is situate (b).

3. The fact of the mortgagee not suing for several years does not bar him from asserting his right, for it was the duty of the vendee to see the mortgagee paid his dues.

4. From the prayer of a party for an alternate relief, it cannot be concluded that the right to the original relief has been waived. **The Alliance Bank of Simla, Ltd., of Lahore v. Bhal Kahan Singh**, 216 P.L.R. 1914 = 111 P.W.R. 1914.

JOHNSTONE and RATTIGAN, JJ.

References :—(a) 23 P.R. 1891, R; 30 M. 6, *Disappr.* (b) 25 B. 538, R.; 15 M. 268, *Diss.*

- (28) *Mortgage—Kanom—Malabar usage—Right to bring to sale—Where mortgage deed silent about right of sale.*

Wallis, J.—Looked at as a mortgage, kanom is an anomalous mortgage within the meaning of S. 98 of the Transfer of Property Act. It is not an usufructuary mortgage under S. 58 of the Transfer of Property Act. S. 67 of the Act gives a right to bring to sale only in the absence of a contract to the contrary. A kanom is a usufructuary mortgage apart from the reservation of the purapad, and it is well understood in Malabar that it does not confer a right to bring to sale.

Sadasiva Iyer, J.—Whether a kanom is an anomalous mortgage or a usufructuary mortgage?

Where the mortgagee takes possession of the mortgaged property and there is no covenant or undertaking in the deed by the mortgagor to pay the mortgage amount, there is a contract in the nature of an implied one that the mortgagee should not have a power of bringing the properties to sale. **Kader Kutti v. Imbichi**, (1914) M.W.N. 618 = 24 Ind. Cas. 127.

WALLIS and SADASIVA IYER, JJ.

Mortgage—(Continued).

—1.—General—(Continued).

(29) *Parties—Mortgage suit—Person claiming adversely to mortgagor—Decree against mortgagor—Whether binding.*

A person who sets up a title paramount to the mortgagor is not a necessary party to the suit based on the mortgage. Where a person sets up a paramount title but fails to establish it, he cannot maintain a suit merely for a declaration that the decree upon the mortgage is not binding upon him.

The plaintiff claimed a declaration that she, as the heir of her father, was entitled to the property left by him and that the mortgage of that property made by her mother in favour of the defendants and the decree passed upon that mortgage were not binding upon her. The mortgagees, when they instituted a suit upon their mortgage, had made her a party, but upon her setting up a paramount right to that of her mother her name had been expunged. The Court found that her mother was in adverse possession of the property which had become her *stridhan* and that the plaintiff was her heir. *Held* that, upon the finding that the plaintiff had no paramount title, she could not maintain the suit.

She could however sue to redeem the mortgage made by her mother. *Sukh Kunwar Chandar v. Bhagwani*, 12 A.L.J. 1088.

SUNDAR LAL, J.

(30) *Transfer of Property Act, Ss. 67, 99—Trusts Act, S. 90—Mortgagor and mortgagee—Mortgagee in possession of three mortgages on same property—Suit upon last mortgage—Mortgagor's minor sons also impleaded—Decree for sale—Decree amended to bring in guardian of minors—Execution—Sale with prior mortgages as encumbrances—Equity of redemption, whether still in mortgagor—Mortgagee, whether trustee.*

A had three mortgages against the same property of B. He sued on the last mortgage making C and D, the minor sons of B, also parties to the suit under the guardianship of B. B refused on the day of hearing to be their guardian, but a decree was passed in favour of A. Later on the maternal uncle of the minors was made their guardian and the decree was amended accordingly. Through some mistake the first decree was proceeded with in execution and the property was proclaimed for sale, with A's two prior mortgages as encumbrances on the property, and purchased by A himself. On a suit by the minors against A:

Held, (1) that the mortgagee was not bound to bring in all his mortgages in the suit and his failure or omission to do so could not be said to be such an illegality as to amount to an advantage gained by him within the meaning of S. 90 of the Trusts Act, so as to compel him to hold the equity of redemption in trust for the mortgagor's sons (a).

(2) that, as the guardian of the minors was aware of the execution proceeding inasmuch

Mortgage—(Continued).

—1.—General—(Continued).

as he applied to set aside the sale, the minors were not prejudiced and the sale was not vitiated by fraud and the entire interest of the minors passed by the sale. *C. Ganapathi Mudaliar v. N. Krishnamachariar*, 27 M.L.J. 213=24 Ind. Cas. 187.

MILLER and TYABJI, JJ.

References:—(a) 2 M.L.J. 188; 91 M. 590; 18 M.L.J. 564; 24 M. 96; 12 M.L.J. 383, F.

(31) *Suit by first mortgagee without making second mortgagee party—Purchase by first mortgagee—Purchase by second mortgagee in suit on his mortgage previous to purchase by first mortgagee—Whether first mortgagee entitled to possession subject to second mortgagee's right to redeem.*

A first mortgagee, who has bought the mortgaged property in a suit upon his own mortgage, to which suit the second mortgagee was not a party, is entitled to possession as against the second mortgagee, though the latter had previously obtained possession by a sale under his own mortgage, as he is merely entitled to redeem the prior mortgage. *Chattur Dhari Chowdhury v. Gaya Proshad Singh*, 23 Ind. Cas. 791.

COXE and IMAM, JJ.

References:—32 C. 891=9 C.W.N. 728=1 C.L.J. 371; 5 C.L.J. 315=11 C.W.N. 403, F., 9 Ind. Cas. 513=(1911) 1 M.W.N. 165=21 M.L.J. 213=9 M.L.T. 431, Not F.

(32) *Mortgage—Consideration—Mortgage without consideration is inoperative.*

A mortgage without consideration is a nullity and, therefore, inoperative. It creates no charge on the property and cannot be enforced against a subsequent purchaser. *Ramayami Chettiar v. Sundara Reddiar*, 23 Ind. Cas. 805.

TYABJI and SPENCER, JJ.

Reference:—21 M. 56, D.

(33) *Mortgage decree—Execution—Satisfaction of part of decree.*

B obtained a decree on the foot of a mortgage against T and L. In execution of another decree T's share in the property was put up for sale; B applied that half of the money due under his decree was a charge on T's property which was being put up for sale. B himself purchased T's property:

Held, that, under the circumstances, B's decree must be deemed to have been satisfied to the extent of one half. *Balwant Singh v. Chet Singh*, 23 Ind. Cas. 848.

RAFIQUE and PEGGOT, JJ.

(34) *Evidence—Mortgage—Proof of copy from registration—Fixed rate holding—Subtenancy in sir holding—Acquisition of fixed rate holding—Land mortgaged by sub-tenant of sir—Mortgagee continuing in possession, effect of.*

Mortgage—(Continued).**—1.—General—(Continued).**

The mere production of a copy of mortgage-deed is not sufficient to prove the mortgage.

A sub-tenancy of *sir* land in 1864 could not develop into a fixed-rate tenancy.

Obiter.—If the fact were established that a sub-tenant of *sir* land mortgaged his plot with possession to a mortgagee and the *sir* rights vanished and the mortgagee continued to hold as tenant and occupancy rights were acquired, then the acquisition would enure for the benefit of the mortgagor, and on redemption the latter would be entitled to possession. **Mata Pershad Misser v. Gajadhar Lohar**, 23 Ind. Cas. 864.

TUDBALL, J.

(35) *Mortgage of undivided share, partition after execution of, mortgagee's rights in case of—Mortgagor or auction-purchaser, share allotted to, in partition—Mortgagee to accept partitioned share as security in place of undivided share—Substituted security, mortgagee's right as to, cannot be defeated by plea of bona fide purchase without notice—Charge—Equitable lien—Specified plots mentioned in mortgage of undivided share not falling to mortgagor in partition, mortgagee's right in respect of—Entire partitioned share of mortgagor to be looked to for security equal in value to that of specified plots—Proclamation of sale, mortgage charges not being notified in, effect on auction-purchaser of—Prior mortgagees, no duty of to get their mortgage-liens notified in sale of mortgaged property consequent on subsequent mortgagee's decree—Estoppel—Validity of mortgage by owner of property cannot be questioned by auction-purchaser of property.*

Where, after the mortgage of an undivided share, a partition has fairly been carried out, the mortgagee must exercise his right as such against the divided share as security in place of the undivided share, inasmuch as the co-sharers of the mortgagor take the land allotted to them free from the mortgage (a).

Such a right is not a mere charge or equitable lien which can be defeated by a plea of *bona fide* purchase without notice. It must be enforced against the property in the new form in which it comes to the mortgagor or the purchaser.

If there are some specified plots mentioned in the deed of mortgage of the undivided share and these plots fall in partition to the share of a co-sharer other than the mortgagor, and there is no evidence to show what plots the mortgagor received in exchange for the specified plots, the mortgagee has to look to the entire share, which the mortgagor received in partition, for a security equal in value to the security of the specified plots.

The subsequent mortgagee got a decree against the mortgagor and the prior mortgagees for sale of the mortgaged property. The prior mortgages were not notified in the proclamation of sale and the property was sold. In a

Mortgage—(Continued).**—1.—General—(Continued).**

subsequent suit by the prior mortgagees against the mortgagor and the auction-purchasers, the auction-purchasers contended that the mortgages were legally invalid and that the prior mortgagees were estopped from enforcing their claim against the property purchased in auction, inasmuch as the prior mortgagees did not get their mortgages notified at the time the sale was proclaimed:

Held, that—

(1) the auction-purchasers could not, as the representatives of the mortgagor, question the validity of the mortgages;

(2) no case of estoppel arose inasmuch as the prior mortgagees, whose interest as far as they were concerned was safe, were not bound to have their mortgages notified at the time of sale (b). **Sheikh Kifayat Ullah v. Mahabir Prasad**, 24 Ind. Cas. 2.

LINDSAY, J.C.

References:—(a) 21 W. R. 233, F. (b) 1 Ind. Cas. 122; 6 A.L.J. 34=9 C.L.J. 165=13 C.W. N. 249=15 M.L.T. 126=5 L.B.R. 25=11 Bom. L.R. 227=36 C. 323=19 M.L.J. 115=36 I.A. 32, *Distd.*

(36) *Unsuccessful redemption suit by mortgagor—Mortgagee whether entitled to add to his security the costs of defending such suit—Ss. 2 (b), 58, 60, 72, 92, Transfer of Property Act—Meaning of mortgage 'money'—Conditional tender—Validity.*

It is an undoubted rule of equity that, in taking the account between a mortgagee and a mortgagor, the former is entitled to be reimbursed all money properly and reasonably expended by him with reference to the mortgaged property. The payment of such expenses may be regarded as an implied term of the mortgage contract, or as a condition imposed by a Court of Equity upon the party who has invoked its assistance, and the amount is added to the sum due on the security (a).

The term 'mortgage money' in Ss. 58, 60 and 92 of the Transfer of Property Act must be taken to include all monies which, on taking an account between the parties, may be properly allowed to the mortgagee.

The preamble of the Transfer of Property Act shows that it is not a consolidating statute and the right of a mortgagee to a general account of the monies due to him under the mortgage contract is saved by the provisions of S. 2 (b), and his right has not been cut down to an account merely of the principal and interest by those sections.

Where a mortgagor brought an unsuccessful suit for redemption, the mortgagee is entitled to add to his mortgage amount his costs of defending that suit.

A person entered into a contract for purchasing the equity of redemption. *Held* that a tender by him conditional on the delivery of

Mortgage—(Continued).**—1.—General—(Continued).**

the title deeds to him was not valid. **Varadarajulu Chetty v. Dhanalakshmi Ammal**, 16 M.L.T. 365. *

BAKEWELL, J.

Reference:—(a) (1886) 31 Ch. D. 582, R.

(37) *Registration Act* (1877), S. 17—*Usufructuary mortgage—Mortgagees put in possession without registered document.*

A simple mortgage was made in favour of the plaintiff in 1874 of a house and certain groves. In 1877 the mortgagors entered into an arrangement with the mortgagees by which the groves only were transferred to the latter who were to remain in possession and realise profits in lieu of interest. Petitions were presented to the Revenue Court embodying this arrangement and the mortgagees were put in possession. Held, that the proceedings of 1877 not having been registered did not create a usufructuary mortgage but operated as an arrangement for payment of interest and the mortgagees could sue for sale upon the mortgage of 1874. **Deo Chand v. Pearay**, 12 A.L.J. 1133.

CHAMIER, J.

(38) *Mortgage—Tender of full amount due—No cessation of relationship of mortgagor and mortgagee—Suit by latter against the former for recovery of possession and for rent—Tender no defence to such suit—Court Fees Act, S. 7, cl. XI (cc)—Suit under—Title—Whether can be decided in such suit.*

In a suit brought under S. 7, cl. XI (cc) of the Court Fees Act on payment of the Court-fees upon one year's rent, the Court need not go into the question of the title of the plaintiffs.

Mere deposit of the mortgage amount due does not put an end to the relationship of mortgagor and mortgagee (a). Such deposit is no answer to a suit by the mortgagee for recovery of possession and of rent from the mortgagor who holds under a lease from the mortgagee. **Balapidhantam v. Perumal Chetti**, 27 M.L.J. 475.

SESHAGIRI IYER and KUMARASAMI SASTRI, JJ.

References:—(a) 34 C. 223; 31 B. 527, R.

(39) *Mortgage debt—Payment of whole to one of two joint mortgagees despite notice to the contrary from other—Mortgagor compelled to pay to other mortgagees—Mortgagees not bound to refund to mortgagor.*

If one of the two joint mortgagees gives notice to the mortgagor not to pay the whole of the mortgage debt to the other mortgagee, but the mortgagor disregarding the notice pays the whole amount to that other and is afterwards compelled to pay the share of the former, he cannot claim a refund from the latter whom he has paid in disregard of the notice. **Dakhni Din v. Bhawani Prasad**, 24 Ind. Cas. 88.

TUDBALL and CHAMIER, JJ.

Mortgage—(Continued).**—1.—General—(Continued).**

(40) *Foreclosure—Redemption—Time for payment of money when may be extended—Order granting or refusing extension of time—Appeal—Final decree to be drawn up as a necessary sequence to every preliminary decree—S. 105 and O. XXXIV, r. 3, O. XLIII, r. 1 (o), Civ. Pro. Code (1908).*

The cases in which time has been extended upon one ground or another, whether in England or in India, must not be taken as exhaustive. They are merely illustrative of an equitable practice. In every case the Court has to be satisfied, in the exercise of a reasonable discretion, that there is good cause for extending time. This good cause is not to be assumed either from non-payment or delayed payment. O. XXXIV, r. 3, requires that it should be shown. That is to say, it must be conveyed to the knowledge of the Court by judicial procedure. For a first enlargement the affidavit of the applicant, or of some person on his behalf, e.g., an intending assignee, should ordinarily be sufficient, unless there is a counter-affidavit, and the Court sees reason to doubt the truth of the applicant's statement; in which case evidence will be necessary. For each extension of time, subsequent to the first, a stronger case must be made out.

The rulings do not lay down any measure or standard of sufficient cause. That is necessarily a question of fact to be decided according to the circumstances of each particular case and the discretion of the Court in dealing with the same.

When a preliminary decree is followed by redemption a final decree for redemption should always be drawn up. This will avoid confusion. An order extending time merely opens the way to payment, and the payment being duly made a final decree for redemption is as necessary as is a final decree for foreclosure where payment is not made. One or the other is consequential of the terms of the preliminary decree.

Reading S. 105 (1) and O. XLIII, r. 1 (o), Civ. Pro. Code together, it is clear that no appeal lies against an order extending time for the payment of mortgage money, but only where there is an order refusing such extension. **Bal-kishan v. Atmaram**, 10 N.L.R. 150.

STANYON, A.J.C.

References:—7 N.L.R. 162; 3 N.L.R. 146; 2 N.L.R. 137; 3 N.L.R. 55; 2 C.P.L.R. 29; 30 B. 329, R.

(41) *Ijaradar—Perpetual lease—Unregistered mortgage executed to secure payment of the premium—Subsequent registered mortgage in favour of Ijaradar—Village becoming khalsa and Ijaradar appointed patel—Mortgagor recorded as occupant of the land—Mortgage by him to third person—Priority of mortgage—Applicability of principle of S. 43, Transfer of Property Act, to Berar.*

Mortgage—(Continued).**—1.—General—(Continued).**

Plaintiff J was an Ijaradar of a mauza under the Waste Land Rules of 1876. P, the 1st defendant, executed an unregistered mortgage of a field for Rs. 250, which was the premium for a perpetual lease of the same, in favour of the plaintiff. Subsequently on 27-8-1904, he executed a registered mortgage in favour of the plaintiff. The plaintiff Ijaradar had only a limited term of years which expired on 31-3-1905. Under the rules, J became a Patel of the village and P was recorded as the occupant of a survey number on the village becoming khalsa. On 30-8-1907 P mortgaged his rights to the 2nd defendant. The question was whether the mortgage in favour of J was enforceable as against the subsequent mortgagee and whether the title of P as a permanent tenant under J came to an end and whether, on the village becoming khalsa, P acquired a new and independent title unconnected with his original title under J.

Held that the mortgage in favour of J was valid in its inception and it did not come to an end in 1905. It fastened itself on P's right as an occupant of a survey number and was therefore enforceable against the subsequent mortgagee (a).

The principle of law underlying S. 43 of the Transfer of Property Act applied to Berar, as a rule of justice, equity and good conscience, even before the extension of the Act to Berar. *Jannadas v. Paiku*, 10 N.L.R. 170.

MITTRA, A.J.C.

References:—(a) 31 A. 53; 34 B. 175; 29 A. 163, R.

(42) Limitation—Mortgage—Acknowledgment under S. 19 of the Limitation Act—Secondary evidence—S. 65 of Act I of 1872.

Held, that a statement by mortgagees recorded at settlement in the *misl-i-tangih-i-huquq-muazarian* to the effect that a mortgage is still redeemable would, if signed or marked by the mortgagees, clearly be an acknowledgment under S. 19 of the Limitation Act.

Held, also that, when the detailed record of such a statement has been destroyed in the course of weeding of records, an entry in the index to the *misl-i-tangih-i-huquq-i-muazarian* showing that there was a written statement made by a certain party, taken together with the summary of that statement to be found in the settlement Superintendent's order, is good and sufficient secondary evidence of the contents of such written statement. *Mohay-Ud-Din v. Nowroz*, 5 P.W.R. 1914 (N.W.F.P.)=16 P.L.R. 1915.

DOBBS, J.C.

References:—53 P.R. 1905 (F.B.); 116 P.R. 1891; 99 P.R. 1910, ff.

(43) Mortgage deed—Construction—Patni of 9 villages—Mortgage of seven—Enumeration

Mortgage—(Continued).**—1.—General—(Continued).**

of total—Patni rent—Whether two villages not mentioned in mortgage-deed were mortgaged.

In a mortgage-deed there was an enumeration of seven villages, which were stated to be in district M in *Towzi Mahal* No. 390 and in a *patni*, in the name of P G, and were recorded in the *zemindari sherista* of J T of which the annual rent was Rs. 4,055-5. In fact, in so far as the deed stated that the annual rental was the sum mentioned in respect of the *patni* of these villages, the description was inaccurate inasmuch as the annual rent was payable in respect of the *patni* which included these villages as well as the two other villages not specifically mentioned:

Held, that, as there was a specific mention of certain properties followed by a description, which if taken literally would have the effect of widening the preceding description, the mortgage should be treated as operative in respect only of the seven villages mentioned in the deed. *Amrita Lal Chatterjee v. Nriya Gopal Ghosh*, 24 Ind. Cas. 465.

MOOKERJEE and BEACHCROFT, JJ.

(44) Mortgagor, right of—Decree nisi, payment of amount due under—Continuing right, limitation for—Limitation Act, Sch. I, Art. 181, 182 or 183.

Held, that the right of a mortgagor to pay in the amount due under a decree nisi is a continuing right and can be exercised at any time until an order absolute is passed. Such an application cannot be treated as one under Art. 181, 182 or 183, Limitation Act, *Vidyasagar v. Ratipal*, 17 O.C. 347.

STUART and KENDALL, J.CS.

(45) Jurisdiction of Civil and Revenue Court—Mortgage with possession—Absence of proof of relationship of landlord and tenant—Second appeal—Finding of fact.

Held, that a finding to the effect that A is the mortgagee and he has paid consideration of the mortgage cannot be challenged in second appeal.

This was a suit for possession of Revenue paying land mortgaged to plaintiff with possession by the defendant.

Held that the mere fact that land is mortgaged with possession and the mortgagors hold it under the mortgagee does not create the relationship of landlord and tenant, and consequently a suit for possession of such a land is cognizable by a Civil and not a Revenue Court. *Shadi Beg v. Ahmed Khan*, 168 P.W.R. 1914.

JOHNSTONE and SHADI LAL, JJ.

(46) Mortgagor and mortgagee—Mortgagor taking benami in revenue sale—Subsequent mortgage sale—Valid—Right of a bona fide lessee.

Where a plaintiff brought a suit on a mortgage and it was dismissed by the 1st Court and

Mortgage—(Continued).**—1.—General—(Continued).**

pending appeal the mortgagor let the revenue of the mortgage lands fall into arrears and purchased the property in his own behalf in the name of the 2nd defendant, and the plaintiff succeeded in appeal and the properties were sold:

Held that the sale was valid and conveyed the full title to the plaintiff, as the 2nd defendant was only the benamidar of the plaintiff's judgment debtors. *A bona fide lessee of the properties from the 2nd defendant is entitled to the crops, raised during the continuance of the lease. And the auction-purchaser can only get the rent during the remaining portion of the tenancy.*

S. 59 of the Revenue Recovery Act has no application in a case where the mortgagor purchases the property at a revenue sale benami in another person's name, and the revenue sale need not be set aside by a mortgagee suing on a mortgage. *Nukalapati Kani Reddi v. Yavilla Venkatesam*, (1914) M.W.N. 916.

SADASIVA IYER and NAPIER, JJ.

(46-a) Mortgage of right to recover malikana from the inferior proprietor—Remedies of mortgagee.

In this case the property mortgaged by a superior proprietor was merely a right to recover a certain sum of money called Malikana from the inferior proprietor. The money was charged on the village in the latter's possession and there was a personal covenant to pay the principal and interest.

Held, no suit would lie for possession of such right and the mortgagee's remedy would lie in a suit for money or in a suit for sale of the superior proprietary rights and there was no means of ejecting the inferior proprietor for non-payment of the malikana. *Ramgulum v. Balaprasad*, 10 N.L.R. 185.

MITTRA, OFFG. A.J.C.

Reference:—6 N.L.R. 20, F.

(47) Admission made in a deed—Admissibility in evidence—Auction-purchaser, proof of consideration—Plea of want of legal necessity, not generally to be raised by the auction-purchaser—Title complete—Adverse possession against all the members of the joint Hindu family with the mortgagor—Attesting witness, not seeing the executant sign—Further opportunity to produce evidence. *Pakshi Ram v. Lilla Dhar*, 11 A.L.J. 371=35 A. 353=21 Ind. Cas. 619. See Final Part, 1913, Col. 900.

(48) Mortgage suit—Equity of redemption, purchaser of—Instrument, alteration of—Insertion of clause for compound interest—Material alteration—Burden of proof—Appellate Court, power of, at the final decision of appeal. *Achhutanand Bhattacharji v. Ram Nath Bhattacharji*, 18 C.L.J. 354=21 Ind. Cas. 79. See Final Part, 1913, Col. 912.

(49) Mortgage or sale—Transfer of Property Act, S. 58 (c)—Evidence Act, S. 92—Deed of

Mortgage—(Continued).**—1.—General—(Continued).**

sale with condition of re-purchase, if mortgage—Extraneous circumstances if and when may be referred to to determine nature of deed—Mortgage transaction—Limitation Act, 1908, Art. 134—Perpetuity, rule against, whether applicable *Shazadi Bibi and Abdul Gaffur v. Shelkh Jama*, 17 C.W.N. 1053=18 C.L.J. 233=21 Ind. Cas. 90. See Final Part, 1913, Col. 916.

(50) Prior mortgage—Suit on mortgage—Puisne mortgagee not a party—Puisne mortgagee not bound to accept the amount of mortgage money as declared by decree—Suit by puisne mortgagee—Purchase by himself with permission of the Court—Puisne mortgagee entitled to all rights of mortgagor—His mortgage not extinguished—Transfer of Property Act, S. 101. *Shankar Venkatesh Karguppi v. Sadashiv Mahadji Kulkarni*, 15 Bom. L.R. 817=21 Ind. Cas. 39=38 B. 24. See Final Part, 1913, Col. 917.

(51) Suit by prior mortgagee—Puisne mortgagee not made party—Mortgaged property brought to sale—Unsuccessful bid, by puisne mortgagee—Puisne mortgagee not disclosing his mortgage when bidding—Whether estopped from suing on his puisne mortgage. *Fulmal v. Mt. Papabai*, 9 N.L.R. 160=21 Ind. Cas. 608. See Final Part, 1913, Col. 920.

(52) Suit on mortgage—Defendant combining in himself two-fold character—Holder of equity of redemption and prior encumbrancer—Defence that mortgage in suit is fictitious, whether available to him. *Shib Narain Mondel v. Balkunthanath Nath Santra*, 20 Ind. Cas. 864=19 C.L.J. 200. See Final Part, 1913, Col. 922.

(53) Mortgage by Hindu widow—Reverioners bound by mortgage even though only a portion of the mortgage-money was for legal necessity. *Gaya Din Upadya v. Triloki Nath Singh*, 16 O.C. 283=22 Ind. Cas. 261. See Final Part, 1913, Col. 922.

(54) Mortgage—Undertaking by mortgagor to pay money advanced on a later security along with money due on an earlier security—Consolidation of mortgages—Collateral transaction entered into simultaneously with the mortgage, security of—Clog on redemption—Discretion of Court to reduce interest. *Gaya Din Singh v. Harkaran Singh*, 16 O.C. 267=22 Ind. Cas. 132. See Final Part, 1913, Col. 923.

(55) Mortgage by two co-parceners—With the knowledge and consent of all—Subsequent partition—Shares of both co-sharers allotted to one—Mortgagee's right and liability of the mortgaged property not affected. *Sundar Lal v. Brij Lal*, 11 A.L.J. 916=35 A. 543=21 Ind. Cas. 734. See Final Part, 1913, Col. 923.

(56) Possession adverse to mortgagor whether affects rights of mortgagee. *Shelkh Nazarat v. Hiranman*, 9 N.L.R. 191=22 Ind. Cas. 94. See Final Part, 1913, Col. 924.

(57) Possession as mortgagee—Agreement between the mortgagor and the mortgagee that possession should be of full owner after a certain

Mortgage—(Continued).**—1.—General—(Continued).**

date—Binding between the parties. **Usman Khan v. Nagalla Dasanna**, (1912) M.W.N. 995=12 M.L.T. 330=23 M.I., J. 360=37 M. 545=16 Ind. Cas. 694. See Final Part, 1912, Col. 849.

(58) Mortgage decree—Right of mortgagee to execute decree after adjudication of judgment-debtor. See ACT III OF 1907 (PROVL. INSOLVENCY), No. 17, 7 S.L.R. 184.

(59) Suit by mortgagee of share of co-parcener in a joint Hindu family—Other members of family not necessary parties—Partition cannot be dehaanded in same suit. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 4, 21 Ind. Cas. 689.

(60) Mortgage—Provision for payment of debt by enjoyment of usufruct and by delivery of grain—Instalments—Default—Interest thereafter—Money value of usufruct at the time of mortgage. See ACT IX OF 1883 (C.P. TENANCY), No. 2, 10 N.L.R. 21.

(61) Mortgaged land included in patta land—Liability for land revenue—Liability as between mortgagor and mortgagee. See ACT II OF 1864 (MADRAS REVENUE RECOVERY), No. 2, 16 M.L.T. 226.

(62) Adverse possession of equity of redemption—Limitation. See ADVERSE POSSESSION, No. 10, 17 O.C. 294.

(63) Plaintiff not suing on mortgage for a long time—Presumption as to passing of consideration or as to payment of interest. See AMENDMENT, No. 4, 12 A.L.J. 635.

(64) Appeal against order absolute—Memorandum filed with 8 annas Court fee instead of *ad valorem*—Extension of time by Court to pay deficit Court fee—Payment of deficit within time—Limitation—Appeal whether filed in time. See APPEAL (GENERAL), No. 3, 21 Ind. Cas. 866.

(65) Assignment by mortgagee—Communication of the fact of assignment to debtor—No suit to set aside assignment—Payments to assignee—Validity. See ASSIGNMENT, No. 1, 15 M.L.T. 331.

(66) Sale in execution subject to mortgage lien—Mortgagee suing on mortgage—Defence that mortgage was fraudulent—Limitation. See CIV. PRO. CODE (1882), No. 32, 16 Bom.L.R. 645.

(67) Mortgage executed in favour of *karta* for benefit of family—Suit by *karta* alone—Parties—Limitation. See CIV. PRO. CODE (1908), No. 403, 22 Ind. Cas. 570.

(68) Mortgage decree—erroneously giving personal remedy—Duty of executing Court. See CIV. PRO. CODE (1908), No. 71, (1914) M.W. N. 152.

(69) Mortgage suit—Summons for final disposal—Practice—Procedure. See CIV. PRO. CODE (1908), No. 253, 16 Bom. L.R. 39.

Mortgage—(Continued).**—1.—General—(Continued).**

(70) Mortgage decree—Direction that unrealized balance of decree should be recovered from mortgagor personally—Application to execute if may be made after 12 years. See CIV. PRO. CODE (1908), No. 94, 18 C.W.N. 492.

(71) Preliminary decree—Interest—Discretion of Court to reduce interest. See CIV. PRO. CODE (1908), No. 407, 12 A.L.J. 233.

(72) Mortgage decree—Foreclosure—Foreclosed property included in earlier mortgage of other properties—Application for exclusion of foreclosed property from sale under prior mortgage decree—Appeal—Ss. 52, 56, 81, Transfer of Property Act. See CIV. PRO. CODE (1908), No. 6, 41 C. 418.

(73) Mortgage decree against two defendants—Private sale of mortgaged properties by one defendant—Adjustment in part—Validity—Balance due on mortgage—Prayer for personal decree—Personal decree when can be passed against the defendant who was not party to the sale. See CIV. PRO. CODE (1908), No. 415, 15 M.L.T. 235.

(74) Decree-holder's right to apply for order absolute barred under Art. 178 of the old Limitation Act—Right not revived by O. XXXIV, r. 5, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 412, (1914) M.W.N. 251.

(75) Suit for simple money-decree based on mortgage—Subsequent suit for sale on that mortgage—Averment in the former suit that right under the mortgage given up—Extinction of mortgage—Admission of liability on the mortgage contained in the previous written statement—Acknowledgment—Liability of mortgagor—Right to interest. See CIV. PRO. CODE (1908), No. 250, 12 A.L.J. 374.

(76) Suit on mortgage—Person asserting title paramount or opposed to that of mortgagor—Whether can be impleaded as a party. See CIV. PRO. CODE (1908), No. 404, 22 Ind. Cas. 976.

(77) Suit on subsequent mortgage bond—Prior mortgagee made party—Prayer for account as to amount due to prior mortgagee—Absence of prior mortgagee—*Ex parte* decree—Effect—*Res judicata*. See CIV. PRO. CODE (1908), No. 22, 18 C.W.N. 1013.

(78) Decree for sale of mortgaged property and personal decree against other property—Construction of decree. See CIV. PRO. CODE (1908), No. 416, 17 O.C. 153.

(79) Mortgage decree for principal and costs—Splitting up of decree—Appropriation of payments—Sale of mortgaged property—Limitation. See CIV. PRO. CODE (1908), No. 411, 12 A.L.J. 645.

(80) Estate under Court of Wards—Mortgage decree against person of proprietor—Not in accordance with S. 89, Transfer of Property Act—Effect—Propriety cannot be questioned in execution. See CIV. PRO. CODE (1908), No. 92, 27 M.L.J. 25.

Mortgage—(Continued).**—1.—General—(Continued).**

(81) Mortgage debt—Attachment—Mode of. See CIV. PRO. CODE (1908), No. 330, 27 M.L.J. 239.

(82) Mortgage decree—Costs of suit become part of mortgage debt. See CIV. PRO. CODE (1908), No. 408, 24 Ind. Cas. 63.

(83) Dispossession by auction-purchaser—Application by dispossessed mortgagee for restoration of possession disallowed—Appeal. See CIV. PRO. CODE (1908), No. 89, 24 Ind. Cas. 93.

(84) Decree for sale of mortgaged property—Costs awarded to judgment-debtor—Set-off—Cross-claims under same decree in mortgage suit. See CIV. PRO. CODE (1908), No. 322, 24 Ind. Cas. 376.

(85) Practice—Procedure—Suit upon mortgage by a Burman Buddhist—Failure to join his wife as party—Decree whether affects her share. See CIV. PRO. CODE (1908), No. 405, 7 L.B.R. 135.

(86) Payment of debt by mortgagor to one of several co-mortgagees—Whether valid discharge. See CONTRACT ACT, No. 38, 23 Ind. Cas. 8.

(87) Mortgagor cannot set up against his mortgagee the title of a third person. This rule applies where mortgagor is a trustee but not where mortgage is void. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

(88) Purchaser under a mortgage decree whether representative of mortgagor. See ESTOPPEL, No. 3, 12 A.L.J. 123.

(89) Mortgagee's right to deny mortgagor's title—Penami transaction. See ESTOPPEL, No. 5, 22 Ind. Cas. 655.

(90) Reversioner accepting mortgage of land sold by a widow when not estopped from claiming it. See ESTOPPEL, No. 4, 32 P.W.R. 1914.

(91) Sale or mortgage—Extrinsic evidence to show real nature of transaction—Sale clothed as mortgage—Right of pre-emption. See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

(92) Consideration—Recital in mortgage-deed—Admissibility in evidence against transferee of mortgagor—Finding based on such recital—Second appeal. See EVIDENCE ACT, No. 12, 21 Ind. Cas. 841.

(93) Neither original mortgage nor copy produced—Marginal witness illiterate—Admissibility of his evidence. See EVIDENCE ACT, No. 37, 12 A.L.J. 239.

(94) Mortgage-deed—Two attestors—One of them a marksman—Other attestor dead—Proof of document. See EVIDENCE ACT, No. 41, 12 A.L.J. 1114.

(95) Mortgage—Decree upon—Execution sale—Judgment-debtor's representatives—Omission to bring them on record—Decree-holder aware of judgment-debtor's death—Sale a nullity—Application to set aside sale—Limitation. See EXECUTION OF DECREE, No. 5, 26 M.L.J. 267.

Mortgage—(Continued).**—1.—General—(Continued).**

(96) Mortgage decree—Sale of mortgaged property—Reversal of decree—Sale whether can be set aside—Fund representing mortgaged property—Appropriate remedy. See EXECUTION SALE, No. 5, 20 C.L.J. 469.

(97) Joint family—Suit on mortgage—Managing member not party to suit—All members of joint family are necessary parties. See HINDU LAW (ALIENATION), No. 4, 21 Ind. Cas. 712.

(98) When incompleteness of mortgage is immaterial—Right of assignee of a mortgagee. See HINDU LAW (ALIENATION), No. 9, 23 P.L.R. 1914.

(99) Joint Hindu family—Mortgage by one member—No estoppel against his sons—Suit for sale on the mortgage—Only the heirs of the mortgagor made parties—Non-joinder—Effect. See HINDU LAW (JOINT FAMILY), No. 5, 12, A.L.J. 794.

(100) Sale by widow of mortgage-deed forming husband's estate—Validity—Suit by transferee of mortgagee rights against transferor and mortgagor—Widow's competence to transfer—Right of mortgagor to question payment of sale consideration. See HINDU LAW (WIDOW), No. 1, 21 Ind. Cas. 8.

(101) Transaction whether mortgage or sale—Test. See HINDU LAW (WIDOW), No. 19, 1914 M.W.N. 735.

(102) Mortgage decree against dar-patnidar by landlord—Execution of mortgage decree—Sale of dar-patni mahal subject to encumbrance of rent decree—Execution of rent decree against other property of dar-patnidar if allowable. See LANDLORD AND TENANT, No. 18, 23 Ind. Cas. 393.

(103) Joint liability for rent of two plots comprised in a holding—Landlord distributing the rent on each plot separately—Effect—Right of tenant to pay arrears of rent on one of such holdings—Rent decree passed in respect of holding on which no arrear is due—Effect on rights of mortgagees in possession—S. 85, C.P. Tenancy Act (1898). See LANDLORD AND TENANT, No. 29, 10 N.L.R. 129.

(104) Mortgage—Surplus sale proceeds—Suit to recover—Suit for money charged on immoveable property—Limitation. See LIMITATION ACT (1877), No. 15, 15 M.L.T. 62.

(105) Decree nisi for sale—Application for order absolute for sale—Limitation—Civ. Pro. Code (1908) would not revive a right already barred before its passing. See LIMITATION ACT (1877), No. 29, 16 Bom. L.R. 395.

(106) Sale in execution—Application to set aside sale of plots not specified in the mortgage-deed—Limitation. See LIMITATION ACT (1908), No. 147, 17 O.C. 94.

(107) Admission of receipt of consideration in mortgage-deed—Admissibility against purchase of mortgaged property. See LIMITATION ACT (1908), No. 9, 12 A.L.J. 941.

Mortgage—(Continued).**—1.—General—(Continued).**

(108) Suit for sale against mortgagor and person in adverse possession—Maintainability—Limitation. See LIMITATION ACT (1908), No. 123, 12 A.L.J. 982.

(109) Mortgaged property—Condition—More property to be considered subject to mortgage after partition of mortgagor's share—Such condition whether operative. See PARDANASHIN LADIES, No. 2, 27 M.L.J. 13.

(110) Suits upon mortgage—Receiver when may be appointed—Compromise decree for sale of the mortgaged properties whether can be followed by personal decree for balance of decree amount. See RECEIVER, No. 7, (1914) M. W.N. 771.

(111) Sale of mortgaged property under Putni Regulation—Surplus sale-proceeds in deposit with Collector—Landlord and mortgagee—Priority—Mortgage security transformed into judgment-debt—Purchaser in execution of rent decree if can avoid—Mortgage security how long subsists. See REG. VIII OF 1819 (PUTNI), No. 11, 20 C.L.J. 1.

(112) *Res judicata*—Mortgage suit—Prior decree for redemption against prior mortgages and for possession against mortgagors—Subsequent suit for possession alone—Bar of suit. See RES JUDICATA, No. 3, 12 P.R. 1914.

(113) Suit on prior mortgage—Subsequent suit on puisne mortgage—Want of legal necessity for the puisne mortgage not set up in the first suit—Dispute between co-defendants—Plea of want of legal necessity—*Res judicata*. See RES JUDICATA, No. 10, 12 A.L.J. 603.

(115) Deed of sale with power to re-purchase within certain time—Sale or mortgage—Construction. See SALE, No. 1, 21 Ind. Cas. 19.

(115) Mortgage or sale—Burden of proof—Usufructuary mortgage after simple mortgage—No mutation of name. See SALE, No. 8, 22 Ind. Cas. 806.

(116) Mortgage of land in Sonthal Parganas not completely settled—Suit on mortgage in Civil Court at Bhagalpur if lies. See SONTAL PARGANAS, No. 1, 18 C.W.N. 994.

(117) Mortgagee having two charges—Purchase under the first, mortgage—Rights under the second mortgage whether can be enforced—Partition in mortgagee's family—Different members becoming entitled to the two mortgages—Extinguishment of charge. See TRANSFER OF PROPERTY ACT, No. 86, 16 Bom.L.R. 26.

(118) Mortgage impugned as invalid is valid until rescinded—Mortgagee's right to redeem such a document. See TRANSFER OF PROPERTY ACT, No. 62, 22 Ind. Cas. 907.

(119) Mortgage of joint Hindu family property by one of family members not void but voidable—Remedy of mortgagee—Suit to recover mortgage-debt from mortgagor personally—Limitation—Execution of deed admitted—

Mortgage—(Continued).**—1.—General—(Concluded).**

Burden of proving undue influence and failure of consideration. See TRANSFER OF PROPERTY ACT, No. 66, 21 Ind. Cas. 581.

(120) Mortgagee in possession—Right to recover expenses incurred in suits for arrears of rent—Act of management. See TRANSFER OF PROPERTY ACT, No. 69, 17 O.C. 47.

(121) Meaning of 'Tanaka.' See TRANSFER OF PROPERTY ACT, No. 46, (1914) M.W.N. 270.

(122) Document whether creates a mortgage or a charge—Construction. See TRANSFER OF PROPERTY ACT, No. 53, 12 A.L.J. 290.

(123) Mortgage suit—Defendant setting up permanent tenure created before mortgage—Decree that defendant was subsequent encumbrancer and could redeem—Defendant if estopped from setting up tenancy before mortgage—*Benamidar* defendant in mortgage suit—Estoppel against *benamidar* whether binds beneficiary. See TRANSFER OF PROPERTY ACT, No. 93, 23 Ind. Cas. 762.

(124) Distinction between charge and mortgage. See TRANSFER OF PROPERTY ACT, No. 85, 23 Ind. Cas. 867.

(125) Mortgage of rights and interests of a grove-holder in a grove Registration. See TRANSFER OF PROPERTY ACT, No. 55, 23 Ind. Cas. 963.

(126) Applicability of obligations under S. 68, Transfer of Property Act, to charge-holder—Mortgagor's heir whether liable for waste—Applicability of S. 68 to mortgagor's representatives or assignees. See TRANSFER OF PROPERTY ACT, No. 67, 27 M.L.J. 494.

(127) Mortgagee in possession whether bound to pay Government revenue. See TRANSFER OF PROPERTY ACT, No. 71, 16 M.L.T. 317.

(128) Document named Diggu Bhogiam—Rents and profits to go in liquidation of principal and interest—Nature and effect of the document. See TRANSFER OF PROPERTY ACT, No. 47, 16 M.L.T. 441.

(129) Attestors not seeing executant sign or touch the pen of the scribe—Signature of attestors after acknowledgment of execution by executant—Effect—Document not valid as mortgage whether creates a charge—Mortgage—Charge—Difference between. See TRANSFER OF PROPERTY ACT, No. 59, 10 N.L.R. 81.

(130) Mortgage attested by one witness—Signature of scribe as a writer and not as witness—Validity of mortgage. See TRANSFER OF PROPERTY ACT, No. 56, 24 Ind. Cas. 375.

(131) Grant of cash nankar by mortgagee for mortgagor's maintenance whether amounts to grant of under-proprietary right. See UNDER-PROPRIETARY RIGHTS, No. 1, 22 Ind. Cas. 125.

Mortgage—(Continued).**—2.—By Conditional Sale.**

- (1) *Mortgage—Onerous provisions as to interest—Conditional sale clause—Three years fixed for redemption—Proceedings to enforce the clause under Reg. XVII of 1806—Failure to proceed against all heirs of mortgagors—No reference to S. 7 of the Regulation—Failure to mention amount due within the year of grace—Invalidity of proceedings—Grant of interest—Discretion of Court.*

In 1883, X, a collateral of the plaintiffs, mortgaged the suit lands with possession to the defendants. The latter obtained possession of the entire lands at once. The mortgage deed contained very onerous stipulations as to interest and also a conditional sale clause to the effect that, if the mortgage money was not repaid within three years, the land should be regarded as sold to the defendants. In 1887, the plaintiffs sued for redemption and the Court of first instance passed a decree for redemption, but on appeal by the defendants, the lower appellate Court found that the conditional sale clause had taken effect under valid notice proceedings taken by the mortgagees in 1887 and dismissed plaintiffs' suit.

Held, by the Chief Court, on second appeal that the notice proceedings were invalid, because (i) no attempt was made to proceed against all the heirs of the mortgagor (a), (ii) because the said proceedings made no reference to S. 7 of Reg. XVII of 1806 (b), and (iii) also because the amount to be paid by the mortgagor within the year of grace was not specified (c).

Held, also, that the lower appellate Court was wrong in allowing the defendants to raise the question in appeal inasmuch as they in explicit terms surrendered, in the lower Court, any plea of absolute title by virtue of the conditional sale clause.

Held, also, that, there being no independent covenant for interest, the defendants could not demand interest for more than three years (d).

Held also that, under the circumstances of the present case, post diem interest should not be awarded, the award of such interest being entirely discretionary with the Court (e). Bulanda and Nawab v. Fateh Din, 57 P.R. 1914 = 256 P.L.R. 1914.

KENSINGTON, C.J., and BEADON, J.

References:—(a) 51 P.R. 1892, R. (b) 24 P.R. 1895; 21 P.R. 1903 and 28 P.R. 1908, R. (c) 84 P.R. 1883, R. (d) 92 P.R. 1908, R. (e) 73 P.R. 1892; 95 P.R. 1902, R.

- (2) *Mortgage—Conditional sale—Alteration in terms—Reg. No. XVII of 1806, Ss. 7 and 8—Defective notice.*

Held that, when the terms of a conditional mortgage-deed are altered by mutual consent, there is an innovation of contract and that consequently the original sale clause cannot be enforced. A notice under S. 8 of Reg. XVII of 1806 is also defective when it does not state

Mortgage—(Continued).**—2.—By Conditional Sale—(Continued):**

correctly the amount due on the mortgage-deed. *Bishen Singh v. Inder Singh, 91 P.W.R. 1914 = 189 P.L.R. 1914 = 24 Ind. Cas. 684.*

KENSINGTON, C.J.

- (3) *Mortgage by conditional sale—Foreclosure—Post diem interest—Interpretation of document—Mortgage lien—Decree for foreclosure against auction-purchasers of mortgaged property—Execution-sales, whether Court gives warranty of title in.*

In a foreclosure suit based upon a mortgage by conditional sale, containing the stipulation to the effect that, if the principal with interest at the stipulated rate was not paid by the date on which the period of the mortgage expired, the mortgage was to be foreclosed in lieu of the sum so due on that particular date, the mortgagee claimed interest for the period subsequent to the date on which the term of the mortgage expired.

Held, that on the true construction of the document, the mortgagor was liable to pay post diem interest so claimed (a).

A certain lien was legally enforceable as against a certain property. The property was attached in execution of a decree, but the Court ordered only half of the lien to be notified, and the auction-purchaser bought it subject to this half of the lien. Subsequently a suit was brought for the enforcement of the whole lien on the property thus purchased:

Held, that the auction-purchaser could not avail himself of the Court's notification as to only half of the lien over the property purchased by him, for the Court in execution-sales gives no warranty of title. Rahas Behari Lal v. Bachchu Singh, 23 Ind. Cas. 871.

LINDSAY, J.C., and KANHAIYA ~~Esq.~~,
A.J.C.

References:—(a) 19 A. 39 = 23 I.A. 138 = 1 C. W.N. 52; 23 M. 534, R.

- (4) *Deed—Construction—Simultaneous execution of sale and re-sale—Mortgage by conditional sale.*

On the 7th November 1892, defendants sold their land to the plaintiffs' father for Rs. 300. The plaintiffs' father executed the same day a deed agreeing to re-convey the lands to the defendants if Rs. 300 were repaid in five years. From 1895 onwards the defendants remained in possession of the land as tenants of the plaintiff and paid Rs. 18 as rent every year. It was found that the price Rs. 300 was inadequate. The plaintiffs sued in 1910 to recover possession of the land. The defendants contended that the transaction of 1892 amounted to mortgage and claimed redemption. The first Court allowed the defendants' contention and gave them a redemption decree; but the lower appellate Court awarded plaintiffs' claim holding that the transaction of 1892 was a sale. The defendants having appealed:

Mortgage—(Continued).**—2.—By Conditional Sale—(Continued).**

Held, reversing the decree of the lower Court, the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale. **Madhavarao Keshvrao v. Sahebrao Gadpatrao**, 16 Bom. L.R. 769=39 B. 119.

BEAMAN and HAYWARD, JJ.

(5) *Deed, construction of—Sale—Mortgage—Simultaneous documents of sale and re-sale, and a lease.*

The plaintiff sold his house to the defendant for Rs. 399 on the 30th March 1900; and on the same day he passed another document to the defendant, taking the house on hire at Rs. 2-4-0 per month. The defendant passed a document to the plaintiff on the same day, agreeing that, if the plaintiff paid Rs. 399 within three years and if the rent was regularly paid, he (defendant) would re-sell the house to the plaintiff. The deed also provided that, if the house was destroyed by fire within three years, the defendant was entitled to recover the amount of Rs. 399 and the rent which might be due, from the person or the property of the plaintiff. In 1912, the plaintiff sued to redeem:

Held, that the three documents read together amounted to a mortgage of the house, that is to say, a transfer of the property with the right of redemption within a fixed period, and an agreement to pay rent in lieu of reasonable interest. **Nagindas Jekisondas v. Nana-bhoi Dullabhram**, 16 Bom. L.R. 774.

SCOTT, C.J. and HAYWARD, J.

(6) *Mortgage by conditional sale—Sale-deed and a deed to reconvey—Transfer of Property Act, S. 58—Evidence to prove—Surrounding circumstances.*

To find out whether a transaction is a mortgage by conditional sale and to see whether the ostensible sale referred to in S. 58 of the Transfer of Property Act when taken with the agreement for reconveyance was intended to operate as mortgage by conditional sale, it is well-settled that the surrounding circumstances have to be looked to. The Privy Council in 10 C. 30 do not mean that evidence is to be admitted to contradict the terms of the documents in which the parties have embodied their intentions, namely, the deed of sale and the agreement to reconvey. That is what is laid down in 27 A. 149 also.

Where a mortgage of the suit properties was executed and the mortgagor paid no interest and the mortgages bought the necessary Court fee to file a suit to realise his security, and thereon the sale-deed of the mortgaged property was executed to the mortgagor and an agreement to reconvey was given to the mortgagor if the amount was paid within a certain period, *held*, that the transaction did not amount to a mortgage by conditional sale but it amounted only to an absolute sale with an

Mortgage—(Continued).**—2.—By Conditional Sale—(Concluded).**

agreement to reconvey. **Swaminadha Iyer v. Appasami Iyer**, (1914) M.W.N. 906=27 M.L.J. 686.

WALLIS, C.J. and SESHAGIRI IYER, J.

(7) *Mortgage—Interest—No provision for post diem interest—Right to post diem interest—Interest Act—Applicability.* **Balyant Singh v. Gayan Singh**, 35 A. 534=21 Ind. Cas. 253=11 A.L.J. 829. See Final Part, 1913, Col. 935.

(8) *Mortgage by conditional sale ripening into a complete sale—Whether right to pre-empt exists.* See PRE-EMPTION, No. 11, 12 A.L.J. 611.

(9) *Foreclosure suit compromised—Right of pre-emption—Proof of custom.* See PRE-EMPTION, No. 25, 24 Ind. Cas. 271.

—3—Contribution.

Transfer of Property Act, S. 82—Contribution—Principle upon which it should be assessed—Code of Civil Procedure, O. 21, r. 89—Sale set aside—Fees paid—Whether subject of contribution.

Where several properties belonging to different persons are liable under the same mortgage and the owner of one of the properties discharges the mortgage, the owners of the other properties, liable under the mortgage, are bound to contribute their *quota* of the mortgage debt. Where the properties at the time of the mortgage belonged to one person, but were later on transferred to different persons, and one of them discharged the mortgage and a suit for contribution was brought, *held* that, in order to determine the proportionate liability of each, the Court has to ascertain (1) the value of their respective properties at the time of the mortgage and not necessarily the price which was paid for each of the properties by its present owners; (2) the rateable liability of each of the properties for the total amount of the mortgage debt; (3) the amount each party has contributed to the payment of the decretal amount, disregarding the purchase money; the Court has also (4) to apportion the liability between different properties by debiting each property with its own share of the liability (a).

Held, further that, where some of the mortgaged properties are sold by auction-sale and owner of the properties sold gets the sale set aside under O. 21, r. 89, Civ. Pro. Code, he cannot claim contribution under S. 82, Transfer of Property Act with respect to the 5 per cent. of the purchase-money paid to the purchaser or the auction fees paid by him. **Bhagwan Singh v. Muhammad Mazhar Ali Khan**, 12 A.L.J. 394=36 A. 272=23 Ind. Cas. 339.

RICHARDS, C.J. and BANERJI, J.

Reference :—(a) 19 A. 545, R.

—4.—Equitable.

(1) *Equitable mortgage—Transfer of—Whether requires registration—Transfer of Property Act—Registration Act.*

Mortgage—(Continued).**—4.—Equitable—(Concluded).**

A transfer of a mortgage by deposit of title-deeds does not require registration (a).

A transfer of mortgage is a transfer of the mortgage-debt with its attendant securities rather than a sale of immoveable property (b).

For a transfer of the mortgage by the mortgagee, registration is required neither under the Transfer of Property Act (c) nor under the Registration Act. **M.G. Dwarka Doss Govardana Doss v. O C. Danakoti Ammal**, 15 M.L.T. 198 = 23 Ind. Cas. 129.

WALLIS, J.

References :—(a) 3 B. 312, D.; 11 Beng. L.R. 405, R. (b & c) 18 M. 454, F.; 24 M. 469, D.; 26 B. 305, R.

- (2) *Mortgage by deposit of title-deeds—Such a mortgage entered into before the extension of the Transfer of Property Act to Burma—Assignment of such mortgage.*

Under S. 2, cl. (e) of the Transfer of Property Act, the equitable mortgage made prior to the 1st January 1905 can be assigned in the districts by deposit after that date. The equitable mortgage having been valid originally, the parties would be entitled by oral agreement to make the mortgage into one bearing compound interest by an oral agreement subsequent to 1st January 1905. **Ko Kyo v. A.K. Curpen Chetty**, 7 Bur.L.T. 140 = 24 Ind. Cas. 700.

ORMOND and PARLETT, JJ.

(3) Deposit of title-deeds—Property situate outside Bombay—Proof of intention—Essentials of equitable mortgagee. See TRANSFER OF PROPERTY ACT, No. 54, 16 Bom. L.R. 35.

—5.—Foreclosure.

- (1) *Foreclosure condition to follow on non-payment of two years' interest, whether can take effect—Interest, post diem, recoverable for six years only prior to suit.*

Where the foreclosure of a mortgage was covenanted to follow on failure of payment of two years' interest, on the mortgage-money.

Held, that there could be no foreclosure either under Regulation XVII of 1806 or under Cl. 7 of S. 8 and S. 12 of the "Rules for the Administration of Civil justice in the Punjab," etc.

Where interest is not made a charge upon the mortgaged property, the mortgagee cannot recover more than six years' interest. **Bulaki Mal v. Duni Chand**, 116 P.L.R. 1914 = 22 Ind. Cas. 837 = 95 P.W.R. 1914 = 94 P.R. 1914.

KENSINGTON, C.J., and SHAH DIN, J.

- (2) *Mortgage by conditional sale—Foreclosure—Transfer by mortgagee after foreclosure—Rights of transferee—Limitation Act, (1908), Sch. I, Art. 134—Applicability of*

Where a prior mortgagee by conditional sale having foreclosed his mortgage, transferred the rights, title and interest thus acquired, to a

Mortgage¹—(Continued).**—5.—Foreclosure—(Continued).**

third person and, a subsequent mortgagee of the same property brought a suit for sale on his own mortgage impleading the transferee.

Held, that a mortgagee when he forecloses his mortgage acquires all the rights of the original mortgagor and becomes the owner of the property; and any transfer made by him subsequent to the foreclosure proceedings conveys to the transferee not the mortgagee's interests but proprietary interests in the property. Consequently, the transferee cannot hold the prior mortgage by conditional sale as a shield against the claim of a subsequent mortgagee.

Held, further, that Art. 134 of the Limitation Act has no application to the suit by subsequent mortgagee for sale on his mortgage. **Munna Lal v. Munna Lal**, 12 A.L.J. 457 = 36 A. 327 = 23 Ind. Cas. 559.

PIGGOTT and RAFIQ, JJ.

- (3) *Suit for foreclosure—Subsequent mortgagee added as defendant on his own application and with plaintiff's consent after expiry of limitation for the suit—Effect—Suit whether barred as against him—Discharge or removal of such party from suit.*

The suit was on a mortgage of 1893. The plaint was presented on 5-8-1910, so that it was only just within time. L who held a subsequent mortgage over the property dated 13-7-1910 was not impleaded in the suit at its institution, but applied himself to be made a defendant in July 1911. Plaintiff said that he had no objection and L was added as a defendant. L however pleaded that, as he was joined as a co-defendant after the limitation for filing the suit as against him had expired, plaintiff was not entitled to have any foreclosure decree passed as against him.

Held that the suit was barred as against L (a).

Held also that plaintiff was entitled, under the circumstances, to ask that the order making L a party, to which he agreed under a misapprehension raised and encouraged by L, should be cancelled and that L's name should be removed from the list of defendants (b). **Narayan v. Mahadeo**, 10 N.L.R. 173.

HALLIFAX, A.J.C.

References :—(a) 35 A. 44; 35 C. 519, F. (b) 33 C. 425; 9 N.L.R. 38, R.

- (4) *Foreclosure suit—Total amount claimed exceeding the principal secured by the mortgage—Valuation for purposes of jurisdiction—Erroneous valuation—S. 11, Suits Valuation Act—Applicability—Change of forum consequent on under-valuation—Effect, Nana v. Mulchand*, 9 N.L.R. 161 = 21 Ind. Cas. 918. See Final Part, 1913, Col. 938.

(5) Mortgage of property within the limits of Calcutta Municipality—Effect of foreclosing the mortgage. See ACT III OF 1899 (CALCUTTA MUNICIPAL), No. 1, 19 C.W.N. 87.

Mortgage—(Continued).**—5.—Foreclosure—(Concluded).**

(6) Suit for foreclosure—Defendants' plea that they are members of agricultural tribe—Reference to Collector—Collector's finding that defendants not members of agricultural tribe—Case returned, to Civil Court—Power of that Court. See U.P. ACT, II OF 1903 (BUNDÉLKHAND LAND ALIENATION), No. 1, 12 A.L.J. 508.

(7) Mortgage of chattels—Foreclosure whether applies—Remedies of pledgees of moveable property—Mortgagee of intangible property whether entitled to foreclose. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

(8) Foreclosure—Sale of portion of mortgaged property to defendants—Subsequent purchase of the remainder by mortgagee—Suit to recover balance of mortgage money by sale of property in hands of defendants—Right of defendants to redeem the whole mortgage. See MORTGAGE (REDEMPTION), No. 17, 16 Bom. L.R. 645.

(9) Decree nisi—Foreclosure and sale—Sale of the mortgaged property under a money decree against mortgagor—Purchase by mortgagee—Foreclosure suit by mortgagee—Mortgagee failing to apply for decree absolute—Assignee of mortgagor suing for redemption—Suit allowed. See MORTGAGE (REDEMPTION), No. 18, 16 Bom. L.R. 687.

(10) Defects in notice—Misdescription of mortgaged property—Effect of non-payment of mortgage money. See REGULATION XVII OF 1806 (BENGAL LAND REDEMPTION AND FORECLOSURE), No. 5, 43 P.L.R. 1914.

—6.—Redemption.

(1) *Practice—Suit for redemption of a specific mortgage—Defendant admitted a mortgage but denied the mortgage set up—Plaintiff to prove a subsisting title to possession as alleged.*

Where the plaintiff alleges that he is entitled to possession by reason of the determination of a mortgage, it is for him to prove that he had at the commencement of the suit a subsisting title to the possession of the property and he must mention in his plaint facts to show that such title exists. He is not entitled to succeed merely because the defendant failed to prove the case he set up. **Ram Lal v. Sri Thakurji Kishori Ramanji Maharaj**, 12 A.L.J. 102=22 Ind. Cas. 574.

KNOX, J.

References:—9 A.W.N. 187, F.; 27 B. 271; Unreported S.A. No. 734 of 1912, D.

(2) *Appeal, Second—Practice—Finding of fact, when can be questioned in second appeal—Person inheriting part of mortgage property cannot redeem more than his share against will of mortgagee also acquiring part of the same.*

A finding of fact is binding upon a second Appellate Court, unless it can be shown that

Mortgage—(Continued).**—8.—Redemption—(Continued).**

in coming to the finding the first Appellate Court committed some error of law.

A person interested in part only of mortgaged property may insist upon redeeming the whole of it, but where the mortgagee has acquired part of the mortgaged property, a person inheriting a part only cannot redeem more than his own share against the will of the mortgagee (a). **Raj Bahadur Singh v. Mahabir Prasad**, 21 Ind. Cas. 251.

LINDSAY, J.C.

Reference:—(a) 10 O.C. 81, F.

(3) *Extinguishment of right of redemption by act of parties—Mortgage by way of conditional sale—Transfer of Property Act, S. 60.*

A executed in 1884, a mortgage by way of conditional sale in favour of B.

The mortgage provided that, after the expiry of five years from the date of its execution, the property mortgaged should be deemed to have been absolutely sold to the mortgagee.

In 1898, the mortgagee applied to the Revenue Court for his name to be recorded as absolute owner as the mortgage-money had not been paid within five years. The mortgagor consented to the mortgagee being recorded as absolute owner:

Held, that the right of redemption was extinguished by the act of parties. **Ibrahim v. Munshi**, 21 Ind. Cas. 87.

BANERJEE, J.

(4) *Title—Mortgage-decree—Mortgage of holding—Purchase in execution of mortgagee decree—Landlord obtaining rent decree against tenant—Purchase by landlord in execution of rent decree—Priority of title—Purchaser in execution of mortgage-decree, if should be allowed to redeem rent decree.*

The plaintiff purchased the land in dispute at a sale held in execution of a decree on a mortgage executed in his favour by the father of the defendants Nos. 4 to 6. Subsequent to the mortgage-decree but before the sale in execution, the landlords, the defendants Nos. 2 and 3, obtained a decree for rent against the tenants (defendants Nos. 4 to 6) and purchased the holding at the sale held in execution of that rent-decree, and settled the land with the defendant No. 1. The plaintiff sued for possession of the land.

Held, that the entire holding, including the interest of the plaintiff as purchaser, passed by the rent-decree sale, that he was not entitled to use his mortgage as a shield against the purchaser under the rent sale, and that he ought not to be allowed to claim redemption of the rent decree on the basis of his rights as mortgagee. **Kapil Rai v. Sheo Baran Rai**, 21 Ind. Cas. 126.

CHATTERJEA and WALMSLEY, JJ.

References:—13 Ind. Cas. 785=38 C. 923=16 C.W.N. 259, D.

Mortgage—(Continued).

—6.—Redemption—(Continued).

- (5) *Limitation—Redemption suit—Transfer of Property Act, S. 92—Final decree for redemption—Civ. Pro. Code (1908), O. XXXIV, rr. 7, 8—Application for final decree—Period of limitation—Three years from date of amendment.*

A final decree for redemption was passed under S. 92 of the Transfer of Property Act. The date fixed for payment of the money as finally amended in appeal was 20th October 1909. In November 1911, the plaintiff made an application under O. XXXIV, r. 8, for the passing of a final decree.

Held, that the application was not time-barred.

There is no period of limitation provided for the passing of a final decree in a suit for redemption, the passing of such a decree being the duty of the Court.

An application for execution of a decree filed within three years from the date of its amendment is within time.

Per Sadasiva Iyer, J.—Obiter dictum.

No application for a final decree can be made under O. XXXIV, rr. 7 and 8 of the Code, in a case where a final decree for redemption was passed under S. 92 of the Transfer of Property Act. *Doki Krodalo Potro v. Lingarapi Vidya Bushane*, 22 Ind. Cas. 283.

SADASIVA IYER and SPENCER, JJ.

- (6) *Sale in execution—Sale for arrears of rent—Suit for redemption—Burden of proof—Nature of evidence—General evidence quite sufficient.*

Where in a redemption suit a plaintiff relies as his title on a sale for arrears of rent, the burden of proving the validity of the sale lies on the plaintiff, but it is not necessary, in order to discharge that burden, that he should do so in a particular way by meeting each of the specific objections to the sale which his opponent alleges. It is sufficient if he offers general evidence as to sale, and of the subsequent conduct of parties, corroborative of it. *Rasa Gounden v. Sinnappayyan*, 22 Ind. Cas. 17.

AYLING and OLDFIELD, JJ.

References :—27 M. 94 (95) = 13 M.L.J. 479, R.

- (7) *Different mortgages to same person of same properties—Redemption of all and not one, allowable—Court Fees Act—Redemption suits—Subject matter—Right to redeem—Tarwad transactions—Karnavan and senior anandravans—Joint execution of document—Tarwad, assent of—Generally presumed.*

If there are different mortgages in favour of one and the same person, in respect of the same property, the mortgagor cannot seek to redeem one of them without redeeming the others (a).

Mortgage—(Continued).

—6.—Redemption—(Continued).

In suits for redemption and in appeals from those suits, the subject-matter in dispute, for the purposes of Art. 1 of the First Schedule of the Court Fees Act, is the existence of the right to redeem and any question as to the amount payable as a condition of redemption is merely incidental to that right (b).

When a document is executed by the *karnavan* and two senior *anandravans*, that by itself is usually taken as a sufficient evidence of the assent of the family to the transaction effected by the document (c). *Meloth Kannan Nair v. Kodath Kammuran Nair*, (1914) M.W.N. 231 = 22 Ind. Cas. 609.

AYLING and SPENCER, JJ.

References :—(a) 21 M.L.J. 562. (b) 20 M.L.J. 2, F. (c) 5 M. 20, R.

- (8) *Limitation Act (1908), Art. 120—Contract Act, S. 16—Redemption suit—interest—Limitation to six years not warranted by law—Agreement to pay interest—Not to be interfered with by Courts—Unless undue influence pleaded and proved or pleaded and presumed.*

In a redemption suit based upon a mortgage-deed, which provided that there could be no redemption until all principal and interest had been paid, the defendant mortgagee is entitled to interest up to the date of redemption, and his claim for interest as defendant cannot be limited to the period beyond which he could not have been given interest in case he had come forward as plaintiff.

In a suit upon a contract expressly providing for the payment of interest, the Court may interfere with the contract and reduce interest only if the exercise of undue influence is both pleaded and positively proved, or if it is pleaded and the circumstances are such that, under S. 16, Contract Act, undue influence should be presumed. *Joti Pershad v. Hakim Ali*, 73 P.L.R. 1914 = 41 P.W.R. 1914 = 22 Ind. Cas. 528.

JOHNSTONE and CHEVIS, JJ.

- (9) *Contract—Mortgage fixing 30 years for redemption—Fraud or duress—Hard and unconscionable bargain—Redemption before the expiry of the term fixed.*

Where there is no allegation of fraud or duress, the mere fact that a mortgage deed fixes a period of 30 years for the mortgagor to redeem the mortgaged property does not make the contract hard and unconscionable, and the mortgagor cannot bring a suit for redemption before the expiry of the period fixed therefor. *Dalthamman Singh v. Amardeo Singh*, 12 A.L.J. 492 = 23 Ind. Cas. 926.

RAFIQ J.

References :—10 A.L.J. 157; Unreported S. A. No. 936 of 1911, decided on 11th April 1911, F.; 1 A.L.J. 138, Not F.

Mortgage—(Continued).

—6.—Redemption—(Continued).

(10) *Civ. Pro. Code* (1908), S. 11 — *Withdrawal of suit, with permission to file fresh suit—Fresh suit instituted—Plea of res judicata—Transfer of Property Act, S. 95—Mortgage, redemption of, by one of original mortgagor's representatives—Charge on shares of other representatives of original mortgagor for proportionate expenses.*

Where a plaintiff obtains permission to withdraw his previous suit and to file a fresh one, the defendant cannot raise the plea of *res judicata* in the subsequent suit filed by the plaintiff.

A person redeeming a prior mortgage as one of the representatives of the original mortgagor is under S. 95 of the *Transfer of Property Act*, entitled to a charge on the shares of the other representatives of the mortgagor in the property for the proportionate expenses incurred in redeeming the mortgage and obtaining possession. That charge includes, in the case of a usufructuary mortgage, a right to retain possession over the others' shares till payment.

In cases where a co-mortgagor redeems a usufructuary mortgage and obtains possession, it is undesirable to place the other mortgagors in a worse position than they would have occupied, had the mortgage not been redeemed, by allowing the former a decree for sale. *Musammam Mamola v. Kedar Nath*, 22 Ind. Cas. 918.

KANHAIYA LAL, A.J.C.

(11) *Burden of proof—Redemption suit—Subsisting mortgage—Onus on plaintiff.*

In a suit for redemption, it is for the plaintiff to prove that he has a subsisting title and right to redeem. Where a suit was brought for redemption of a mortgage found to be in existence almost 60 years before the institution of the suit, and the defendant pleaded limitation, *held*, that it was not for him to prove that the mortgage was really anterior in date to the year in which it was found to be in existence. *Frank Hay v. Rafiuddin*, 12 A.L.J. 769.

RAFIQ and PIGGOTT, JJ.

References :—18 A. 203; 3 N.W.P.H.C.R. 33; 27 B. 271, R.

(12) *Redemption—Fixing long period—Provision hampering redemption—Enforceable or not.*

It is impossible to say what should or should not be regarded as an improper restraint or fetter on the right of redemption. The decision in each case must depend upon its own circumstances.

A Court of Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. Where a mortgage was made for forty years and a provision was inserted in the deed fixing a particular day on which

Mortgage—(Continued).

—6.—Redemption—(Continued).

it was to be redeemed failing which the mortgage was to be renewed for another term of forty years, *held* that the provision was designed to make redemption very difficult, if not impossible, and should not be enforced. *Sarhdawan Singh v. Bijai Singh*, 12 A.L.J. 927=36 A. 551=24 Ind. Cas. 705.

CHAMIER and RAFIQ, JJ.

References :—(1894) A.W.N. 143; 10 Ind. Cas. 243, R.

(13) *Right to redeem before expiry of term fixed for redemption.*

The mortgagor cannot be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage deed unless there is a contract to the contrary in favour of the mortgagor (a).

The observations in *Rose Ammal v. Regurathna Ammal* (b) which cannot be reconciled with the Privy Council Ruling in *Bakhtawar Begum v. Husain Khanum* (a) must be held to be overruled. *Bir Mahomed Rowther v. Nagoor Rowther*, 16 M.L.T. 163=27 M.L.J. 483.

SADASIVA IYER and NAPIER, JJ.

References :—(a) 36 A. 95 (P.C.) F. (b) 23 M. 33, R.

(14) *Civ. Pro. Code*, 1908, S. 11, *Expl. IV—Res judicata—Irrelevant point put in issue in former suit—Mortgage—Redemption—Defendant sub-mortgagee and purchaser of equity of redemption—Suit by mortgagee against defendant for redemption—Defendant incompetent to claim redemption of plaintiff's mortgage in suit.*

A mortgaged a certain house to W, and W subsequently mortgaged it to R. W sued R for redemption of the house. R pleaded that he was not sub-mortgagee, but really an assignee of W's mortgage rights, and that V had also sold the equity of redemption to him. The question whether the alleged sale of the equity of redemption was genuine or not was put into issue and decided in favour of R. W was, however, granted a decree for redemption on the ground that there was only a sub-mortgage between the parties and the sub-mortgage had not been extinguished by the sale of the equity of redemption, and the sub-mortgagee R was granted compensation for improvements.

R subsequently sued W for redemption of the mortgage on the basis of the sale of the equity of redemption in his favour;

Held, (1) that the genuineness or otherwise of the sale in favour of R was not *res judicata* between the parties;

(2) that it was not open to R as a defendant to a suit brought by W to claim redemption of W's mortgage, and hence R was not debarred

Mortgage—(Continued).**—6.—Redemption—(Continued).**

by Expl. IV of S. 11 of the Civ. Pro. Code.
Dewan Chand v. Hari Chand, 213 P.L.R. 1914
 = 135 P.W.R. 1914 = 24 Ind. Cas. 636 = 102 P.
 R. 1914.

RATTIGAN and SHADI LALL, JJ.

References :—2 A.L.J. 278 = A.W.N. (1905)
 107 ; 19 Ind. Cas. 291 = 17 C.W.N. 605 = 13 M.
 L.T. 437 = 11 A.L.J. 389 = (1913) M.W.N. 470
 = 17 C.L.J. 488 = 15 Bom. L.R. 489 = 35 A. 227
 = 25 M.L.J. 131 = 40 I. A. 74 (P.C.), R.

- (15) *Mortgage—Condition of fifty years, whether inequitable in absence of fraud or undue influence—Interest at Rs. 1-4 per cent. per mensem on part only of mortgage money, whether inequitable or onerous.*

In the absence of fraud or undue influence, a condition in the mortgage-deed that the mortgagor should have no right to redeem until the expiry of fifty years is not inequitable and will not be set aside, especially when it is found that the mortgagor went into the transaction with his eyes open and so far from having suffered from it had found it extremely profitable.

The condition as to interest to be charged at the rate of Rs. 1-4 per cent. per mensem on part only of the principal mortgage money is not inequitable or very onerous. **Sundar Singh v. Hukam Singh**, 219 P.L.R. 1914 = 24 Ind. Cas. 926.

SHAH DIN and SCOTT-SMITH, JJ.

- (16) *Absence of stipulation restraining redemption before a certain period, effect of—Redemption, postponement of, for a specified period as expressed in the deed—Principal and interest at a specified rate paid out of profits—Contract, essence of.*

In cases where there is no stipulation restraining redemption before a certain period, but only a period is fixed for payment, or within which the mortgage money is likely to be satisfied from the usufruct, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention is shown. In the absence of such an intention the mortgagor may redeem at any time before or at the end of the term (a).

In each case the important thing is to point out whether it was the intention of the parties as expressed in the deed to postpone redemption till the mortgagee had enjoyed the usufruct for the full period named. Such term may not form an essence of the contract, where the mortgagee is only to take interest at a specified rate from the profits of the mortgaged property and to credit the rest towards the principal money (b). **Gopal Singh v. Karan Singh**, 17 O.C. 218.

PANDIT KANHAIYA LAL, A.J.C.

References :—(a) 17 M.L.J. 177 ; 10 A. 602 ; 23 M. 33, R. (b) 23 M. 33 ; 39 C. 828, R.

- (17) *Foreclosure—Sale of a portion of the property to defendants—Subsequent purchase*

Mortgage—(Continued).**—6.—Redemption—(Continued).**

of the remainder by mortgagee—Suit to recover balance of mortgage money by sale of property in the hands of defendants—Right of defendants to redeem the whole mortgage.

The plaintiff took a mortgage of a house-site and a field. Subsequently, the mortgagor sold the house-site to the defendants. After this, the plaintiff by arrangement with the mortgagor purported to acquire the field and set off the price *pro tanto* against the mortgage-debt. He next sued the defendants to recover the balance of the mortgage-debt by sale of the house-site. The defendants claimed to redeem the original mortgage and to take over the field upon such redemption. The lower Courts having found that the sale to the plaintiff was for a fair value and free from collusion or fraud, passed a foreclosure decree. On appeal by the defendants :

Held, varying the decree, that inasmuch as the sale to the plaintiff was subsequent to the acquisition of the house by the defendants and without their privity or consent, the latter were not deprived of their right of redemption which had been in existence since they purchased the house-site. **Mahmadalli Kamruddin v. Abdul-ali Karimbhai**, 16 Bom. L.R. 645.

• **SCOTT, C.J., and BEAMAN, J.**

- (18) *Decree nisi—Foreclosure and sale—Sale of the mortgaged property under a money decree against mortgagor—Purchase by mortgagee—Foreclosure suit by mortgagee—Mortgagee failing to apply for decree absolute—Assignee of mortgagor suing for redemption—Suit allowed—Civ. Pro. Code (1908), Ss. 11, 47.*

Certain lands were mortgaged in 1890 with defendant No. 1. The mortgagor assigned his equity of redemption to the plaintiff in 1902. In the same year, a money decree was obtained against the mortgagor, in execution of which his right, title and interest in the mortgaged property was sold, and purchased by defendant No. 1 in 1906. In the meanwhile in 1905, the defendant No. 1 sued to recover the mortgage money by sale of the mortgaged property ; to this suit the assignee of the mortgagor was made a party. The suit ended in a decree on the 25th September 1905, which directed that the mortgagor or his assignee was allowed six months' time to pay the money due under the mortgage, and in default the defendant No. 1 was to recover the amount decreed by sale by applying for decree absolute. He never applied for a decree absolute but rested content on the purchase at the Court sale in 1906. In 1911, the assignee sued to redeem the mortgage. The lower Courts dismissed the suit on the grounds that it was barred by Ss. 11 and 47 of the Civ. Pro. Code, and that the mortgage in question had long since ceased to exist. The plaintiff having appealed :

Held, (1) that S. 47 of the Civ. Pro. Code was no bar to the suit; for the mortgagor in a suit for sale under a mortgage, who is given six months'

Mortgage—(Continued).**—6.—Redemption—(Continued).**

time to pay the decretal debt is not in the position of a decree-holder who has a decree to execute, but his right of payment within six months is a right which he has in mitigation of his liabilities under the decree.

(2) That the suit was also not barred by S. 11 of the Code, for the plaintiff did not go behind the decree and contend that the mortgage-debt fixed by the Court in the former suit was less at that time than it was found to be by the Court.

In a foreclosure suit, if the mortgagee does not apply for a decree absolute, he does not get rid of the relationship of mortgagor and mortgagee. A mortgagor or his representative can, therefore, file a fresh suit for redemption.

A dismissal for want of prosecution of a mortgagor's action for redemption is no bar to a fresh suit for redemption. *A fortiori*, his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption. **Rama Tulsa Mahar v. Bhagchand Motiram**, 16 Bom. L.R. 687 = 39 B. 41.

SCOTT, C.J., and BEAMAN, J.

(19) *Equity of redemption—Transfer of equity—Passing of Rajinama by mortgagor for mortgaged lands—Kabulayat by mortgagee to pay Government assesment for the lands.*

The plaintiff mortgaged certain lands to the defendant in 1876. He passed in 1879 *rajinama* relinquishing all his occupancy rights in the said lands in favour of the defendant, who, at the same time, gave the complimentary *kabulayat* agreeing to pay Government assessment in respect of the lands. The plaintiff having sued to redeem the mortgage:

Held, dismissing the suit, that the *rajinama* and the *kabulayat* effectually extinguished the plaintiff's equity of redemption. **Yenkaji Narayan Kulkarni v. Gopal Ramachandra Deshpande**, 16 Bom. L.R. 718 = 39 B. 55.

BEAMAN and HAYWARD, JJ.

(20) *Subsequent deed of mortgage creating a personal covenant not to redeem prior mortgage before the satisfaction of the subsequent mortgage, effect of.*

Where the executant of a deed of mortgage executes a subsequent deed, by which he creates a personal covenant not to redeem the prior mortgage until he has satisfied the amount due on the subsequent deed, *held*, that the covenant can be enforced against him personally, but not against a subsequent transferee of the mortgaged property. **Ramadhin Misra v. Sitla Baksh Singh**, 17 O.C. 303.

STUART, J.C.

References :—9 B. 233 ; 11 O.C. 248, D.

Mortgage—(Continued).**—6.—Redemption—(Continued).**

(21) *Covenant in the mortgage deed, effect of—Court's power to allow redemption irrespective of oppressive and unreasonable terms in the mortgage deed.*

As a general rule a mortgagor cannot compel the mortgagee to accept payment of the mortgage money before the date fixed for redemption, where there is a covenant in the mortgage deed that redemption shall not take place before that date. But a mortgagor cannot be precluded by any covenant from redeeming altogether, and where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor, or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may think fit. **Durga Singh v. Nawab Mirza Muhammad Raza Husain**, 17 O.C. 313.

PANDIT KANHAYA LAL, J.C.

(22) *Suit to redeem—Thirty years—Period of limitation—Mortgage—Sale—Burden of proof.*

Where A mortgaged a certain oil-well in 1875 and in 1879 took a further sum on the same security, and in 1908 an action was brought to redeem, the transaction of 1879 being in dispute as to whether it was a further mortgage or sale out and out:

Held, that it was proved to be a sale and that the suit was further barred by limitation as not being brought within thirty years from the date, when the right to redeem accrued. **Nga Lu Gale v. Nga Po Than**, 24 Ind. Cas. 310 (P.C.).

LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

(23) *Mortgage—Res judicata—Limitation Act (1908), Art. 95—Usufructuary mortgage—Widow of the mortgagor compromising suit for redemption—Compromise decree fraudulent and collusive—Subsequent suit for redemption by the mortgagor's reversioner maintainable—Need for suit for cancellation of a decree on the ground of fraud.* **Muhammad Faiyaz Ali Khan v. Bhikambar Das**, 11 A.L.J. 574 = 21 Ind. Cas. 605. See Final Part, 1913, Col. 943.

(24) *Redemption of first mortgage by sub-mortgagee of second mortgage—Scope of S. 74, Transfer of Property Act.* **Yenkatanna, ayanasami Reddi v. Kanni Ammal**, 14 M.L.T. 390 = (1913) M.W.N. 903 = 21 Ind. Cas. 560. See Final Part, 1913, Col. 946.

(25) *Mortgage—Payments due annually under mortgage transaction—Liability to pay at the time of redemption—Claim for payments that fell due more than six years previous to suit—Limitation—No bar.* **Parasurama Pattar v. Yenkatachalam Pattar**, 25 M.L.J. 561 = (1914) M.W.N. 198 = 21 Ind. Cas. 701. See Final Part, 1913, Col. 948.

Mortgage—(Continued).**—6.—Redemption—(Continued).**

(26) Cause of action—Redemption—Part of mortgaged property—Integrity of mortgage broken—Several tacking bonds—Deposit (under S. 83, Transfer of Property Act) of money ignored by mortgagee—Estoppel—Conditional decree for redemption—Validity of. **Narasingha Singh v. Achhaibar Singh**, 11 A.L.J. 1004 36 A. 36=22 Ind. Cas. 539. See Final Part, 1913, Col. 948.

(27) Res judicata—Prior mortgagee disposed by subsequent mortgagee—Decree obtained for possession—Suit by subsequent mortgagee for redemption—Claim for mesne profits not raised in first suit. **Mohan Lal Shukul v. Kesho Ram Shukul**, 11 A.L.J. 937=22 Ind. Cas. 70. See Final Part, 1913, Col. 949.

(28) Suit for redemption—Decree for redemption on payment of principal money—Appeal denying plaintiffs' right of redemption and claiming amount due on a deed of further charge, Court-fee payable on. **Lachhman Singh v. Bahadur Singh**, 16 O.C. 354=22 Ind. Cas. 642. See Final Part, 1913, Col. 949.

(29) Malabar tarwad—Possession, suit for, by a member—Subsistence of mortgages on property—Whether plaintiff should first sue to set aside mortgages—Right of junior members of Hindu family—Redemption of mortgage, suit for—Valuation—Jurisdiction. **Mandoth Yeetil Chappan v. Puthanpurayil Ranu**, 15 Ind. Cas. 587=13 M.L.T. 118=37 M. 420. See Final Part, 1912, Col. 882.

(30) Redemption suit—Oral sale—Consideration—Adverse possession—Prescriptive title—Sale or exchange—Registered document—Indispensability. **Ariyaputhira Padayachi v. Muthukumarasamy Padayachi**, (1912) M.W. N. 854=23 M.L.J. 339=15 Ind. Cas. 343=12 M.L.T. 425=37 M. 423. See Final Part, 1912, Col. 877.

(31) Mortgagor's right to redeem before expiry of term. See ACT II OF 1864 (MADRAS REVENUE RECOVERY), No. 2, 16 M.L.T. 226.

(32) Suit for redemption—Plaintiff's failure to prove mortgage—Plaintiff's possession through mortgagees proved—Decree in plaintiff's favour—Issue remitted by High Court—New case. See ADVERSE POSSESSION, No. 13, 12 A.L.J. 1233.

(33) Suit for redemption of mortgage by conditional sale—Limitation—Running of time from end of term or from time of payment where there is option to pay before end of term—Accrual of right to recover possession. See LIMITATION ACT (1877), No. 25, 18 C. W. N. 586.

(34) Suit for redemption—Statement in the plaint that co-mortgagors had a right to redeem—Admission of co-mortgagor's right—Acknowledgment. See LIMITATION ACT (1877), No. 4, 12 A.L.J. 674.

Mortgage—(Continued).**—6.—Redemption—(Concluded).**

(35) Entries in settlement record not signed by mortgagee—Whether amount to an acknowledgment. See LIMITATION ACT (1908), No. 54, 77 P.W.R. 1914.

(36) Integrity of mortgage broken—Redemption suit—Suit against some of the mortgagees—Maintainability. See RES JUDICATA, No. 11, 12 A.L.J. 619.

(37) Redemption after date fixed in mortgage deed—Mortgage impugned as invalid is valid until rescinded. See TRANSFER OF PROPERTY ACT, No. 62, 22 Ind. Cas. 907.

(38) Money decree obtained by mortgagee against Hindu father—Sale of property—Purchase by mortgagee—Right of sons to redeem—Estoppel of mortgagor—Possession of mortgagee—Waiver of claim. See TRANSFER OF PROPERTY ACT, No. 84, 12 A.L.J. 855.

(39) Mortgagee in possession of agricultural land—Construction of well by mortgagee without mortgagor's consent—Mortgagor whether bound to pay the cost of constructing the well on redemption. See TRANSFER OF PROPERTY ACT, No. 63, 10 N.L.R. 166.

(40) Redemption of mortgage without payment of deeds of further charge—Applicability of Es. 60, 62, Transfer of Property Act. See TRANSFER OF PROPERTY ACT, No. 61-C, 17 O.C. 388.

—7.—Subrogation.

(1) Right to subrogation when arises—Persons entitled to claim subrogation—Test—Ss. 68 to 72, Contract Act. **Karuppan Ambalagan v. Muhammad Sakuth Levval**, 14 M.L.T. 478= (1914) M.W.N. 131=26 M.L.J. 74=22 Ind. Cas. 253. See Final Part, 1913, Col. 957.

(2) Subrogation—Vendee discharging mortgage—Title of vendee defeated—Intention to keep alive mortgage. **Subaramnia Pillai v. Palaniappa Mudali**, 14 M.L.T. 585=21 Ind. Cas. 978=26 M.L.J. 94. See Final Part, 1913, Col. 957.

—8.—Usufructuary.

(1) Usufructuary mortgage—Net profits to be taken in lieu of interest—Years in which there was no profit—Mortgagee bound to pay land revenue—Liability to pay enhanced revenue—Intention of parties—Mortgagor taking possession—Effect—Personal covenant—Operation of.

Where, in a deed of usufructuary mortgage, the net profits were agreed to be taken as equivalent to the annual interest, the mortgagees were bound to pay the land revenue whether there was profit or loss, and they cannot ask credit for payment of land revenue in the years in which there was no profit.

In such cases it is unnecessary to enquire whether the land remained fallow through mortgagee's negligence or not.

Where the parties to a mortgage transaction contemplated the usual enhancements

Mortgage—(Continued).**—7.—Usufructuary—(Continued).**

which take place at periodical resettlements, the question as to whether the mortgagor or the mortgagee is bound to pay the enhanced revenue depends in each case upon the intention of the parties.

Where a mortgage is partly usufructuary and partly simple, and the mortgagors took possession of the land, held, that their conduct amounted to an acquiescence in the mortgagee's abandonment of the possession of the land and the personal covenant to pay at once became operative though not so expressly provided in the document, and the mortgagee is entitled to interest. *Harl v. Shridhar*, 10 N. L.R. 9=23 Ind. Cas. 131.

MITRA, OFFG. A.J.C.

References :—2 M.I.A. 487, F.; 22 A. 521; 27 A. 313; 31 A. 325, R.

- (2) *Usufructuary mortgage of share of co-parcener in joint family property—Right of mortgagee to joint possession with other co-parceners—Form of decree—Ss. 2, 44, Tr. P. Act—O. XXI, r. 35, Civ. Pro. Code.*

Per Oldfield, J.—A usufructuary mortgagee of the share of a co-parcener in joint family property is not entitled to a decree for joint possession. He is entitled to a decree declaring his right to possession of the mortgagor's share and his right to institute a partition suit to recover it (a).

Per Napier, J. (contra).—As usufructuary mortgagee, his only right is to possession for the purpose of working out the amount due from the mortgagor. Not being in possession, he is bound to ask for possession and cannot confine himself to a suit for a declaration. If the mortgagor had owned the whole interest, the mortgagee would have got a decree for possession of the whole property. But as the mortgage only passes the mortgagor's unascertained share, the mortgagee can only have a decree for common possession. *Kota Balabhadra Patro v. Ketra Doss*, 16 M.L.T. 229.

OLDFIELD and NAPIER, JJ.

Reference :—(a) 3 C. 198, R.

- (3) *Practice—Foreclosure clause—Suit for sale—Defences raised as in a suit for foreclosure—Defendant not prejudiced—Foreclosure decree.* *Manohar Singh v. Lachman Singh*, 11 A.L.J. 793=21 Ind. Cas. 457. See Final Part, 1913, Col. 261.

(4) *Mortgagee with possession—Intermediate landholder—Tenant's right to pay him.* See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 2, (1914) M.W.N. 939.

(5) *Mortgagee put in possession without registered instrument—Effect—Rights of mortgagee.* See MORTGAGE (GENERAL), No. 37, 12 A.L.J. 1133.

(6) *Suit for possession on redemption of usufructuary mortgage—Mortgage invalid in law*

Mortgage—(Concluded).**—7.—Usufructuary—(Concluded).**

—Plaintiff's title established—Plaintiff's right to recover possession. See POSSESSION, No. 3, 19 C.L.J. 532.

(7) *Improvements effected by mortgagee—Water-tax—Introduction of water-pipes—Building of granary—Right to be re-imbursed.* See TRANSFER OF PROPERTY ACT, No. 70, 22 Ind. Cas. 635.

Mother.

Minor daughter a ward of Court—Selection of bridegroom—Right of mother and step-brother. See GUARDIAN AND WARD, No. 1, 15 M.L.T. 146.

Motive.

Use of property which would be legal if due to proper motive cannot become illegal if prompted by improper or malicious motive. See EASEMENTS, No. 5, 20 C.L.J. 97.

Moveable Property.

(1) *Applicability of doctrine of *lis pendens* to.* See CIV. PRO. CODE (1908), No. 25, 16 M.L.T. 158.

(2) *Remedies of pledgee of.* See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

(3) *Suit for recovery of share of moveables on death of widow of brother—Contest between two brothers—Limitation.* See LIMITATION ACT (1908), No. 109, 13 P.L.R. 1914.

Muafi.

Land tenure—Resumption of Muafi—Settlement by Revenue authorities with a particular person—Latter's rights. See HINDU LAW (SUCCESSION), No. 4, 77 P.R. 1914.

Multifariousness.

Multifariousness—Suit against partners and purchasers from them—Prayer for an account from the former and for recovery of assets from the latter—Maintainability. See CIV. PRO. CODE (1908), No. 263, 88 L.R. 69.

Municipal Act.

See BEN. ACT III OF 1884.

See BEN. ACT III OF 1899.

See BUR. ACT III OF 1898.

See MAD. ACT V OF 1878.

See N.W.P. ACT I OF 1900.

See PUN. ACT XX OF 1891.

Municipality.

(1) *Validity of Municipal election whether can be questioned by suit.* See ACT I OF 1900 (U. P. MUNICIPALITIES), No. 5, 21 Ind. Cas. 655.

(1-a) *Non-payment of tax—Presentment of bill—Statutory requirements not specified in the bill—Notice of demand—Distress warrant—Payment under protest—Suit to recover the amount paid.* See ACT III OF 1901 (BOMBAY DT. MUNICIPALITIES), No. 1, 16 Bom. L.R. 749.

Municipality—(Concluded).

(2) Right of Municipal Board to close a drain. See ACT I OF 1900 (U.P. MUNICIPALITIES), No. 1, 12 A.L.J. 1102.

(3) Money spent by landlord under orders of—Liability of tenants—Suit for the money—Whether of small cause nature. See CONTRACT ACT, No. 58, 12 A.L.J. 931.

(4) Suit against Municipality for refund of octroi duty—Limitation. See LIMITATION ACT (1908), No. 69, 12 A.L.J. 952.

Musulman Wakf Validating Act.

See ACT VI OF 1913.

Mutation.

(1) Petition of compromise filed in mutation proceedings—Estoppel—Mutation proceedings whether evidence of title—Consent to entry of one's name in revenue papers—Effect—Withdrawal of gratuitous admission. See ACT III OF 1901 (U.P. LAND REVENUE), No. 12, 23 Ind. Cas. 965.

(2) Land partly in possession of plaintiffs and partly in possession of defendants—Some tenants acknowledging plaintiffs and some acknowledging defendants—Suit for declaration that mutation in favour of defendants is void. See DECLARATORY SUIT, No. 4, 217 P.L.R. 1914.

(3) Application in mutation proceedings—Matter compromised—Registration—Admission in evidence. See REGISTRATION ACT (1877), No. 3, 12 A.L.J. 1316.

Nambudris.

Law governing Nambudris—Son's liability to pay father's debts. See MALABAR LAW, No. 1, (1914) M.W.N. 149.

Nankar.

(1) Nankar grant—Land subject to burden of service—Right of grantor to put an end to tenure when grantee is willing to perform service. See GRANT, No. 4, 23 Ind. Cas. 300.

(2) Meaning of. See UNDER-PROPRIETARY RIGHTS, No. 1, 23 Ind. Cas. 125.

Natham Poramboke.

Gramanatham—Storing straw ricks—Possession and enjoyment whether adverse—Madras Act III of 1905. See ADVERSE POSSESSION, No. 5, 16 M.L.T. 48.

Nattukkottai Chetties.

(1) Practice of—Their family properties whether can be treated as trade assets—Practice of signing letters with the name of their family deity—Effect—Such signature whether an acknowledgment under S. 19, Limitation Act—Acknowledgment by member of a family firm who is also the manager of the family—Whether binds the firm—Agreement to discharge debt in a particular manner—Other remedies of creditor whether excluded.

The Nattukkottai Chetties are a trading community and they usually treat the family

Nattukkottai Chetties—(Concluded).

property as assets, making no distinction between their family property and their trade assets. Therefore, in the absence of any evidence to the contrary, the family properties of these chetties should be treated as trade assets.

These chetties, in writing their private letters, do not usually sign their names but only write words invoking the help of a deity. The particular deity whose name is given indicates the family, as it is the family God that is always invoked. At the top of the letter the writer's own name is given.

Held, under such circumstances, that the words invoking the deity were intended for the signature of the writer and would amount to acknowledgments under S. 19, Limitation Act.

An acknowledgment by a member of a family firm who is also the manager of the family is binding on the firm.

An agreement that a debt due may be discharged in a certain manner does not show that the creditor waived any other remedy which he might have. *Chidambaram Chetti v. Ramasami Chettiar*, 27 M.L.J. 631.

SANKARAN NAIR and SPENCER, JJ.

(2) No distinction between their family property and trade assets.

In the case of Nattukkottai Chetties, their family property should be treated as trade assets and no distinction should be made between the family property and the trade assets. *The Chartered Bank of India v. K. P. Velliappa Chetty*, 27 M.L.J. 654.

SADASIVA IYER and NAPIER, JJ.

Reference:—27 M.L.J. 631, F.

Natural Stream.

(1) Attributes of a natural stream—Rights of upper and lower land owners—Right of lower owner to obstruct the flow by a dam—Easements Act. S. 7, Ills (h) and (i). See WATER, No. 4, 16 M.L.T. 597.

Nazul Land.

Suit for possession of—Evidence—Burden of proof. See POSSESSION, No. 4, 12 A.L.J. 894.

Negligence.

(1) Negligence—Railway level-crossing, gate at, left open—Contributory negligence.

A gate at a railway level-crossing, left open, is an invitation to all comers to cross the line and an intimation that it could be crossed with safety, and is evidence of negligence for which the Railway Company may be made liable in the absence of contributory negligence on the part of the party injured in consequence of such negligence. *Bengal Provincial Railway v. Gopi Mohan Singh*, 18 C.W.N. 325—41 C. 308—23 Ind. Cas. 788.

JENKINS, C.J. and MOOKERJEE, J.

(2) Negligence—Drainage channel overflow owing to on repair—Damage—Liability—Municipality—Nonfeasance—Misfeasance—The

Negligence—(Concluded).

Dholka Town Municipality v. Desaihbhai Kalidas Patel, 15 Bom. L.R. 1034—38 B. 116—21 Ind. Cas. 847. See Final Part, 1913, Col. 965.

(3) *Negligence—Driving motor car at excessive speed—Railway crossing—Failure to negotiate the sharp curve of the road beyond the crossing and conceded from the driver's view—Injury to persons in the car—Liability for injury.* **Sorabji Hormusji Batliwala v. Jamshadji Merwanji Wadia**, 15 Bom. L.R. 959—38 B. 552—21 Ind. Cas. 705. See Final Part, 1913, Col. 966.

• (4), Subscriptions for constructing a mosque—Collection by the Treasurer of the Committee—Liability of negligence of the Treasurer. See **SUBSCRIPTIONS**, No. 1, 12 A.L.J. 261.

Negotiable Instruments.

(1) Negotiable securities endorsed over to Banks for loans obtained by deceased—Whether assets in the hands of administrator *pendente lite*—Such securities if pledges in the hands of the Bank and Bank if holders for value thereof to the extent of loan—Lien of Bank for loan on negotiable securities. See **ADMINISTRATOR**, No. 1, 18 C.W.N. 631.

(2) Mate's receipt—Transferability—Whether goods pass upon its transfer. See **SHIPPING COMPANY**, No. 1, (1914) M.W.N. 163.

(3) Deposit receipt is not a negotiable instrument. See **TRANSFER OF PROPERTY ACT**, No. 105, 16 Bom. L.R. 534.

Negotiable Instruments Act.

See **ACT XXVI OF 1881**.

Nethersole Settlement Khasra.

Is a public record—Certified copy produced at late stage—Acceptance as evidence. See **ACT X OF 1898 (C.P. TENANCY)**, No. 2, 23 Ind. Cas. 604.

Next Friend.

Suit by next friend—Abatement—Subsequent suit by minor, not barred. See **MINOR**, No. 1, (1914) M.W.N. 740.

Nimhowla Lease.

Stipulation in, against voluntary alienation by tenant to persons, other than landlord—Right of purchaser of tenure in execution of money decree. See **LEASE**, No. 9, 18 C.W.N. 1138.

Noabad Mehal.

Held under Government—Incidents—Acquisition of—Apportionment of compensation—Basis of calculation of Government interest. See **ACT I OF 1904 (LAND ACQUISITION)**, No. 16, 18 C.W.N. 531.

Non-compoundable Offence.

Agreement to compound a—Effect—Entering into agreement after due deliberation whether makes it lawful. See **CONTRACT ACT**, No. 20, 54 P.L.R. 1914.

North-West Frontier Provinces, Law & Justice Regulation.

See **REG. VII OF 1901**.

Notice.

(1) Notice to sue duly given—Amendment of plaint—No change in cause of action—Fresh notice whether necessary. See **ACT 111 OF 1899 (U.P. COURT OF WARDS)**, No. 3, 12 A.L.J. 1119.

(2) Notice of suit when necessary—Defective notice—Suit if to be dismissed or plaint only to be rejected. See **CIV. PRO. CODE (1908)**, No. 120, 18 C.W.N. 1840.

(3) Notice implied as to powers of statutory bodies. See **MANDAMUS**, No. 1, 18 C.W.N. 430.

(4) Purchaser aware of a previous mortgage by his vendor and his father—Father also living on the property sold—Sufficient notice to purchaser of father's interest in the property—Effect on purchase. See **SALE**, No. 3, 7 Bur. L.T. 69.

Nuisance.

Prescription to make a common nuisance. See **EASEMENTS**, No. 1, 19 C.L.J. 42.

Oath.

Agreement by father in litigation to be bound by oath—Whether binds sons. See **HINDU LAW (JOINT FAMILY)**, No. 7, 16 M.L.T. 163.

Oaths Act.

See **ACT X OF 1873**.

Occupancy.

(1) *Occupancy holding—Non-transferable—Co-sharer landlord, purchase by—Effect of—Joint possession—Bengal Tenancy Act (VII of 1865), S. 22, sub-S. (2).*

In 1907, before the Bengal Tenancy Act was amended, a co-sharer landlord purchased non-transferable occupancy holding. The tenant, after the transfer, vacated the land and the purchaser came into occupation thereof:

Held, that the other co-sharer landlords were entitled to joint possession of the land to the extent of their shares.

Sub-S. (2) of S. 22 of the Bengal Tenancy Act applies only to a case in which a transferable occupancy holding has been purchased. **Lakhi Kant Das Mahapatra v. Balabhadra Prosad Das**, 19 C.L.J. 400.

JENKINS, C.J. and MOOKERJEE, J.

Reference:—27 C. 473, F.

(2) *Occupancy holding, not transferable by custom—Transfer without landlord's consent, effect of—Purchaser of position, if may recover from landlord who has dispossessed him—If he may apply to set aside sale of holding—Civ. Pro. Code, 1882, S. 244—“Representative”—Holding, if may be transferred apart from occupancy right.*

Apart from custom or local usage, the transfer for value of the whole or a part of an

Occupancy—(Continued).

occupancy holding is operative as against the raiyat.

(a) where it is made voluntarily ;

(b) where it is made involuntarily, and the raiyat with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily, where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made. *

The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is the sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (a) an abandonment within the meaning of S. 87 of the Bengal Tenancy Act; or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case.

The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat.

A person who, without the landlord's consent, purchases a portion of an occupancy holding which is not transferable by local custom or usage, is a person whose immovable property has been sold and is a representative of the judgment-debtor under S. 244 of the Civ. Pro. Code of 1882.

A transferee of a portion of an occupancy holding not transferable by custom can by suit recover possession from the landlord who has forcibly dispossessed him.

A right of occupancy not transferable by custom or local usage can be transferred, but not the holding apart from the right of occupancy. **Dayamayl v. Ananda Mohan Roy Chaudhuri**, 18 C.W.N. 971=20 C.L.J. 52 (F.B.)

JENKINS, C.J., and STEPHEN, WOODROFFE, MOOKERJEE and HOLMWOOD, JJ.

(3) *Occupancy holding, if may be bequeathed by will—Bengal Tenancy Act (VIII of 1885), S. 26.*

Except under local usage, an occupancy holding is not capable of being bequeathed by will. **Kunja Lal Roy v. Umesh Chandra Roy**, 18 C.W.N. 1294.

FLETCHER and RICHARDSON, JJ.

References:—18 C.W.N. 1290, F.; 18 C.W.N. 971, B.

Occupancy—(Continued).

(4) *Occupancy holding, non-transferable, if may be disposed of by will—Title by estoppel—Testator or heir-at-law, if estopped—Statute, construction of—Right if may be taken to have been conferred by implication—Bengal Tenancy Act (VIII of 1885), Ss. 26, 178 (3) (d).*

Except under a local usage a raiyat is not competent to make a testamentary disposition of a non-transferable occupancy holding.

The heir-at-law of the raiyat is not estopped from questioning the validity of the devise (a).

Rights cannot be conferred by mere implication from the language used in a statute. There must be clear and unequivocal enactment (b).

The doctrine of estoppel cannot be applied as between donor and donee in every case.

There is no estoppel in favour of the executor or legatee as against the testator.

There is no estoppel in favour of the executor or the legatee as against the heir-at-law of an occupancy raiyat so as to deprive him of what he is entitled to take by statute. **Amulya Ratan Sircar v. Tarini Nath Dey**, 18 C.W.N. 1290.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 12 C.W.N. 1086=8 C.L.J. 261, Diss. (b) 2 K. and J. 574 (591)=110 R.R. 327, F.

(5) *Occupancy tenant transferring holding and giving notice of transfer to landlord—Liability for rent subsequent to transfer—Ss. 146 (2), 147 (3), Madras Estates Land Act—Ss. 55 (1) (j), 108 (j); Transfer of Property Act.*

An occupancy tenant is not any more liable for rent after he has transferred his holding and given notice of the transfer to his landlord. **Rangaramanuja Chariar v. Srinivasa Iyengar**, 16 M.L.T. 192=27 M.L.J. 397.

SADASIVA AIYAR and TYABJI, JJ.

References:—30 M. 410; (1911) 2 Ch. 1, R.

(6) *Burden of proof—Occupancy holding, attachment of, in execution of money decree—Burden on decree-holder to show transferability of holding.*

When a decree-holder for money wants to sell an occupancy holding belonging to his judgment-debtor in execution of the decree, the onus of proof is on him to establish that the holding is transferable by custom or local usage. **Nur Mia v. Chandra Mohan Roy**, 23 Ind. Cas. 939.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—24 C. 355=f C.W.N. 896, F.

(7) *Transfer of occupancy holding by tenant—Law before Act IX of 1883 (C.P. Tenancy)—Right of landlord.*

A transfer of an occupancy holding is voidable at the instance of the landlord unless he consented to the transfer at the time it was

Occupancy—(Continued).

made or subsequently, and this rule was merely affirmed in the Tenancy Act of 1883. Even before 1st January 1884, when the Tenancy Act came into force, an occupancy tenant had no right in his holding which he was authorized to transfer. *Jairam v. Sundarlal*, 10 N. L.R. 146.

HALLIFAX, A.J.C.

* *References* :—22 W.R. 22 (F.B.), F.; 1 C.P. L.R. 9; 3 C.P.L.R. 158; 6 N.L.R. 6, R.

(8) *Jurisdiction of Civil and Revenue Courts—Surrender of occupancy holding by tenant—Ejectment of mortgagee of that tenancy—Effect of Revenue Court decree for ejectment.* *Shiva Prakash v. Karnh*, 11 A.L.J. 671=35 A 464=21 Ind. Cas. 2. See Final Part, 1913, Col. 971.

(9) *Agra Tenancy Act (II of 1901)—Occupancy holding—Math—Whether a manager of a Math can acquire occupancy holding.* *Parmanand v. Mahant Ramanand Gir*, 11 A.L.J. 761=35 A. 474=21 Ind. Cas. 43. See Final Part, 1913, Col. 971.

(10) *Occupancy right—Holder of non-transferable occupancy right—Death—Liability of successor to pay his debts—Crops grown by latter—Liability of.* *Nathumal v. Mt. Mathoo*, 9 N.L.R. 137=21 Ind. Cas. 272. See Final Part, 1913, Col. 971.

(11) *Occupancy rights—Succession—Long possession—Presumption—S. 59 of Act XVI of 1887.* *Ude Singh v. Nur Mohammad*, 192 P.W.R. 1913=331 P.L.R. 1913=21 Ind. Cas. 561. See Final Part, 1913, Col. 972.

(12) *Suit for declaration relating to occupancy land or interest therein—Jurisdiction—Valuation.* See ACT VII OF 1887 (SUITS VALUATION), No. 1, 54 P.R. 1914.

(13) *Suit for establishing right as occupancy ryot and for recovering possession thereof—Valuation—Court-fee—Jurisdiction.* See ACT XII OF 1887 (BENGAL, N.W.P. AND ASSAM CIVIL COURTS), No. 4, 23 Ind. Cas. 964.

(14) *Occupancy right in village service lands.* See ACT XI OF 1898 (C. P. TENANCY), No. 2, 23 Ind. Cas. 604.

(15) *Mauza Ganga, Tahsil Sirsa—Tenants breaking up waste—Acquisition of occupancy rights—Test.* See ACT XVI OF 1887 (PUNJAB TENANCY), No. 3, 6 P.R. 1914 (Rev.).

(16) *Landlord purchasing tenant's right—No occupancy right acquired by the landlord—Ryot in possession acquires such right.* See ACT I OF 1908 (MADRAS ESTATES LAND), No. 22, (1914) M.W.N. 798.

(17) *Rights of widow in an occupancy tenancy—Abandonment by widow—Effect—Rights of male collaterals.* See ACT XVI OF 1887 (PUNJAB TENANCY), No. 4, 2 P.R. 1914 (Rev.).

(18) *Execution proceedings started against deceased judgment-debtor—Sale if may be set aside—Purchaser of occupancy holding if may apply—Limitation.* See CIV. PRO. CODE (1908), No. 78, 18 C.W.N. 1266.

Occupancy—(Concluded).

(19) *Non-transferable occupancy holding—Transfer of portion of holding—Sale of holding in execution of rent decree—Application by transferee for reversal of sale if maintainable—Transfer of entire holding and that of portion—Distinction.* See CIV. PRO. CODE (1908), No. 354, 23 Ind. Cas. 839.

(20) *Chukain rights in Rungpore—Nature of—Permanent element—Development into occupancy right—Transferability.* See CONTRACT, No. 8, 24 Ind. Cas. 193.

(21) *Suit for partition of joint family property—Occupancy holding included in suit—Mode of division.* See HINDU LAW (PARTITION), No. 3, 12 A.L.J. 696.

(22) *Joint family property including an occupancy holding—Mode of partition.* See HINDU LAW (PARTITION), No. 6, 24 Ind. Cas. 235.

(23) *Execution of muchilika by tenant whether estops him from raising plea of occupancy.* See INAM, No. 1, 22 Ind. Cas. 369.

(24) *Occupancy holding, absolute—Consent to transfer—Lambardar's power—Whether affected by institution of partition proceedings.* See LAMBARDAR AND CO-SHARERS, No. 3, 10 N.L.R. 89.

(25) *Non-occupancy holding, if heritable.* See LANDLORD AND TENANT, No. 15, 18 C.W.N. 828.

Octroi Duty.

Suit against Municipality for refund of—Limitation. See LIMITATION ACT (1908), No. 69, 12 A.L.J. 952.

Official Assignee.

Insolvency of judgment-debtor after attachment—Official Assignee if takes subject to attachment—Official Assignee how to be bound by execution proceedings—Substitution of Official Assignee for judgment-debtor if necessary—Necessity of notice of proceedings to bind Official Assignee—Stay of execution proceedings when judgment-debtor declared insolvent. See INSOLVENCY, No. 4, 18 C.W.N. 1058.

Oudh.

Thakur families in Oudh—Custom of exclusion from inheritance. See HINDU LAW (EXCLUSION FROM INHERITANCE), No. 1, 22 Ind. Cas. 138.

Oudh Civil Digest.

(1) *R. 24—Plaint or application, refusal to accept, for different date on stamp—Plaint and labels, entry of actual date of presentation in.*

Held, that O. 14 of the Oudh Civil Digest does not justify refusal to accept a plaint or application on the ground that the Court-fee which is on the plaint or application was not purchased on the date on which the presentation was made. All that the rule required is that the actual date of presentation should be

Oodh Civil Digest—(Concluded).

entered both on the plaintiff itself and upon the labels on the plaint. **The Deputy Commissioner of Bahraich for Jagtapur Estate v. Raja Ram**, 17 O.C. 148—24 Ind. Cas. 119.

LINDSAY, J.C.

(2) Para. 272, r. 9—Assessment of pleader's fees. See ACT I OF 1894 (LAND ACQUISITION), No. 8, 17 O.C. 284.

Ouster.

(1) Meaning of 'ouster.' See CO-SHARERS, No. 2, 18 C.W.N. 328.

(2) Co-sharers—Mere excess of enjoyment by one co-sharer does not amount to ouster of the other co-sharers. See MESNE PROFITS, No. 1, 23 Ind. Cas. 122.

Outcasts.

Member of family becoming outcaste and excluded from enjoying co-parcenary properties for more than 12 years—Effect. See HINDU LAW (ALIENATION), No. 5, 15 M.L.T. 186.

Ownership.

Question of ownership—What is necessary to decide—Mixed question of fact and law—Second appeal. See APPEAL (SECOND APPEAL), No. 8, 19 C.L.J. 539.

Pakka Adatia.

(1) Pakka adatia—*Marwari merchants—Transactions by Munim—Principal bound—Relations between pakka adatia and up-country constituents—Forward transactions—Dealing in differences—Common intention to wager.*

The defendant, a Marwari merchant, had a branch shop at Cawnpore, which was managed from 1897 to 1911 by a sole *munim* who was remunerated by a six annas share in the profits of the Cawnpore business. The *munim* entered into forward contracts in the name of the defendant for the purchase or sale of silver, cotton and seeds, with the plaintiffs, a firm of marwari *pakka adatias*, in Bombay. No delivery was given or taken in any of the transactions. These forward transactions were entered in the Cawnpore shop books up to 1908. The defendant went to Cawnpore from time to time but never himself examined the books. In 1908, an adjustment of accounts was arrived at which showed Rs. 81 as due to the defendant and embraced accounts of forward transactions entered into by the *munim*. From 1908 to 1911 the transactions between plaintiffs and the defendant related solely to Hindus; and no trace of forward transactions was found in defendant's Cawnpore books in 1910 and 1911. The *munim* however continued them. The defendant asked the plaintiffs on the 1st April 1911 to send to him information of any goods which might have been bought and sold through them. The plaintiffs supplied the information; and on the 22nd April 1911 demanded Rs. 40,000 from the defendant as margin-money on his forward contracts. The defendant failed to pay. The

Pakka Adatia—(Concluded).

plaintiffs having filed a suit to recover Rs. 48,045 the defendant contended that his *munim* had no authority from him to enter into forward transactions; and that the orders given to the plaintiffs by the *munim* were merely in respect of wagering and gambling transactions and were entered into by the plaintiff on that understanding. The first Court dismissed the suit on the second line of defence.

On plaintiffs' appeal:

Held, confirming the decree of the first Court, (1) that the transactions in suit were within the apparent authority of the *munim*;

(2) that, inasmuch as the plaintiffs, being *pakka adatias*, were *qua* defendant principals, and not disinterested middlemen bringing two principals together, the common intention of the parties with regard to the settlement or completion of the transactions in dispute should be ascertained:

(3) that the evidence as a whole pointed to the common understanding that the parties should deal in differences and settle accordingly.

The existence of the *pakka adati* relationship does not of itself negative the existence of an understanding between the *adatia* and his constituent that no delivery should be given or taken under forward contracts and that only difference should be recovered. **Chhogmal Balkisondas v. Jainarayan Kanaiyalal**, 16 Bom. L.R. 213=39 B. 1=24 Ind. Cas. 743.

SCOTT, C.J., and BATCHELOR, J.

(2) Pakka adatia—*Wagering contracts—Forward contracts in linseed—Sub contract by the pakka adatia settled by payment of differences—Contracts between pakka adatia and clients settled mostly by payment of differences—Inference of wager.* **Burjorji Buttanji Bomanji v. Bhagvandas Parasheram**, 15 Bom. L.R. 716=20 Ind. Cas. 834=38 B. 204. See *Firmal Part*, 1913, Col. 975.

Palas.

Incidents of Palas of Kalighat temple. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

Panchayat.

Powers of, in caste matters—Jurisdiction of Courts. See CASTE, No. 1, 23 Ind. Cas. 301.

Paper-book.

(1) *Paper-book, preparation of—Contract—Undertaking—Vakil, duty of.*

Per Curiam :—An agreement to prepare paper-books is an agreement between the parties and the Court, which the Court expects them to fulfil. It is upon the faith of such agreement that the Court permits the appellant to abstain from making the necessary deposit in Court for the expense of the paper-book in time. An attempt to withdraw such agreement should be made by a notice to the Court.

Per Trevelyan, J.—An undertaking to prepare a paper-book is a contract which is capable of being enforced by the Court, and which will, if

Paper-book—(Concluded).

necessary, be enforced in the same way as similar contracts by attorneys can be enforced.

The trust given to a pleader, who is an officer of the Court and who is allowed to undertake the preparation of a paper-book, would not be fulfilled if he were allowed to have reservation as regards non-receipt of money from the client, in his mind, and to take an undertaking to mean only an undertaking to prepare a paper-book if he is paid for it. It is the business of a pleader who gives an undertaking of this description, if he wants to run no risk, to see that he is indemnified before he gives the undertaking. *Satis Chunder v. Saroda Prasad*, 19 C.L.J. 432.

TOTTENHAM and TREVELYAN, JJ.

(2) Incompetency of a party to use document not printed in paper-book—Power to use other evidence on this point. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

Paper Currency Act.

See ACT III OF 1905.

See ACT II OF 1910.

Pardanashin Ladies.

(1) *Pardanashin lady, suit against—Commission note signed by am-mukhtear of lady—Actual details of agreement not explained to her—Liability of lady.*

A suit was brought against a *pardanashin* lady (defendant No. 1) to recover commission which the plaintiff alleged he was entitled to under the terms of an express agreement with reference to the sale of certain immoveable properties. The agreement was contained in a letter or commission note signed by the defendant No. 1's son-in law and *am-mukhtear*, by which she undertook that the remuneration of the plaintiff would be a sum of Rs. 500 in the event of his finding a purchaser for her share in the properties:

Held, that the contract, if it was entered into by her *am-mukhtear* or attorneys authorised to act on her behalf, would bind her, apart from the fact that she had not the actual details of the agreement to pay the commission explained to her. *Rajendra Nath Kindu v. Nabakumari Nandini Das*, 22 Ind. Cas. 657.

FLETCHER and CHATTERJEA, JJ.

(2) *Pardanashin lady—Pleader and client—Mortgage by lady and her brother—Property solely of lady—Pleader securing mortgage in name of another—Benami transaction—Deed not explained to lady—Burden of proof—Extortionate bargain—Gross advantage taken of unprotected position of lady—Void deed—Mortgaged property—Condition—More property to be considered subject to mortgage after partition of mortgagor's share—Such condition, whether operative.*

Where a legal adviser to a *pardanashin* woman, acting the part of money-lender to her,

Pardanashin Ladies—(Continued).

procures the execution by her of a mortgage-bond to secure its re-payment, the Court would be entitled, and indeed obliged, to examine the transaction with closer scrutiny, or to insist more sternly on the mortgagee supporting the heavy onus of showing that the lady was fully aware of the meaning and effect of the deed, and that the transaction was a fair and honest one.

A *pardanashin* lady and her younger brother were engaged in family litigation to recover their shares of inheritance in the property of their father. A decree of partition was passed in their favour but before the time for appeal expired, their pleader got a mortgage-bond executed *benami* in favour of another person. The property mortgaged belonged solely to the lady and by the transaction of the mortgage her brother obtained the discharge of debts for which he alone was liable. The interest stipulated in the mortgage-deed was compound interest at the rate of one per cent. per month (with half-yearly rests). In addition a clause was inserted in the mortgage bond that after the partition the whole of the property allotted to the lady shall be substituted for the property mortgaged. The effect of this clause would be to quadruple the amount of property mortgaged. It was further established that the other relatives of the lady were also taking gross advantage of her unprotected state by refusing to give consent to her marriage unless she surrendered the whole of her share in the family property. It was also proved that the terms of the mortgage-bond had not been adequately explained to the lady and she did not understand the terms of the deed.

Held, that the terms of the mortgage-bond were extortionate and, therefore, the deed, which was void, could not be enforced against her.

Held, also, that, if the mortgage bond had been held valid, the clause relating to the substitution of the whole of the lady's share for what had been originally mortgaged would have been operative and would have subjected the whole of her share to the mortgage. *Lala Mahabir Prasad v. Musammat Taj Begam*, 27 M.L.J. 13=23 Ind. Cas. 642=19 C.W.N. 162 (P.C.).

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(3) *Purdanashin lady, deed of gift executed by—Independent advice, if absolutely necessary—Legal protection as distinguished from legal disability—Outside advice and outside control distinguished—Proof of intelligent and free execution—Burden of proof—Facts showing executant a capable woman of business and disposition not unnatural, effect of—Explanation of deed to the grantor—Gift to son of mukhtar and paramour—Undue influence, when to be presumed—Evidence of betrayal or abuse of trust needed.* *Kali Bakhsh Singh v.*

Pardanashin Ladies—(Concluded).

Ram Gopal Singh, 18 C.W.N. 282=(1914) M.W.N. 112=16 O.C. 373=15 M.L.T. 130=26 M.L.J. 121=12 A.L.J. 115=19 O.L.J. 172=21 Ind. Cas. 985=36 A. 81=16 Bom. L.R. 147 (P.C.). See Final Part, 1913, Col. 1027.

(4) Doctrine of "independent advice" when to be applied. See MAHOMEDAN LAW (GIFT), No. 8, 23 Ind. Cas. 547.

(5) Conveyance by—Document read over after execution and receipt of consideration—Inclusion of property not agreed to be sold objected to—Document not 'executed.' See REGISTRATION ACT (1908), No. 21, 23 Ind. Cas. 10.

(6) If unfit to be guardian of infant of 15 years. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 17, 18 C.W.N. 1198.

(7) Document executed by—Effect. See CIV. PRO. CODE (1908), No. 434, 19 C.W.N. 45.

(8) Mortgage of their property executed in favour of their husbands' creditor—Undue influence of husband—Document if fairly taken—Onus on whom. See CONTRACT ACT, No. 7, 23 Ind. Cas. 401.

Parsi Marriage and Divorce Act.

See ACT XV OF 1865.

Parties.

(1) Suit on bond against the widow of the executant—Defendant wrongly described—Defendant accepting summons—Decree ex parte—Right of defendant or her successor in interest to question decree as *ultra vires*.

A suit was brought on a bond against the widow of the executant of the bond. She was wrongly described as Lalita whereas her real name was Lakshmi. She nevertheless accepted the summons, and allowed an *ex parte* decree to be passed against her. *Held*, that, as she had signed the summons, she must have known that she was being sued as representing the estate of her deceased husband, and that, in the absence of any fraud practised on her, neither she nor her successor in interest would be at liberty to question the decree as *ultra vires*. *Mt. Manjula v. Shankar*, 10 N.L.R. 144.

MITTRA, OFFG. A J.C.

(2) Party—Necessary party—Non-joinder of necessary party Failure of suit—Partnership suit—All parties to be joined or suit should fail—Civ. Pro. Code, 1908. O. I, r. 9 Limitation. *Ambika Charan Guha v. Tarini Charan Chanda*, 19 Ind. Cas. 963=18 C.W.N. 464. See Final Part, 1913, Col. 977.

(3) Practice—Order of Judge to add party leaving issue of misjoinder to be decided later—Successor's order to exercise option to plaintiff to strike off—Not irregular. *Ramanathan Chetty v. Kadiresan Chettiar*, (1913) M.W.N. 993=14 M.L.T. 511=21 Ind. Cas. 604. See Final Part, 1913, Col. 977.

(4) Plea of non-joinder of co-plaintiff—Dismissal of suit on plea not raised. See CIV. PRO. CODE (1908), No. 232, 21 Ind. Cas. 182.

Parties—(Concluded).

(5) Party not before lower appellate Court—Whether can be joined in second appeal. See CIV. PRO. CODE (1908), No. 238, 12 A.L.J. 1277.

(6) Defect of parties—Suit when not to be defeated—What person can be made defendant—Power of appellate Court to add respondent after time. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(7) Writ of Mandamus against University—Government—Whether necessary party. See MANDAMUS, No. 1, 18 C.W.N. 430.

(8) Co-defendant added after expiry of limitation for suit against him—Effect—Discharge or removal of such party from the list of defendants. See MORTGAGE (FORECLOSURE), No. 3, 10 N.L.R. 173.

(9) Non-joinder of—Addition of party defendant at hearing of appeal—Effect on other defendant—Absence of prejudice. See PUTNI, No. 1, 18 C.W.N. 259.

(10) Suit instituted against dead man—Substitution of heirs of defendant—Jurisdiction. See SUBSTITUTION, No. 1, 24 Ind. Cas. 112.

Partition.

(1) Partition—Amin—Commissioner—Fees—Whether Commissioner can execute order of Court directing parties to deposit his fees.

Obiter dictum.—The order of a Court directing the parties to a partition suit to deposit the Amin's fees is one which cannot be executed by the Amin, there being no final decree in the case. *Lalit Mohan Banerjee v. Basdeo Narain Singh*, 21 Ind. Cas. 191.

CHATTERJEA and WALMSLEY, JJ.

Reference:—10 C.W.N. 234, R.

(2) Partition—Oral evidence—Inference—Adverse possession—Interrupted possession—Strange grazing cattle—Hostile title, assertion of.

A partition may be occasionally established by oral evidence, which, though not directly proving the *factum* of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors. If, for instance, each of the co-tenants has, for a long period of time, occupied a distinct part of the land of the co-tenancy, has apparently exercised the rights of a sole owner and has been recognised by his companions in interest as entitled to possession in severalty, these facts may be treated as evidence tending to prove an antecedent partition. Similarly, the circumstance that one of the co-tenants has spent considerable money in improvements of the parcels in his exclusive possession may furnish evidence that the distribution of the land was intended to be permanent (a).

Where there were *firstly*, a transfer by one member of the family to another, of cultivated lands in his occupation, *secondly*, long possession of specific parcels and sub-division among

Partition—(Continued).

members of a particular branch, *thirdly*, reclamation and improvement of waste lands at considerable cost, *fourthly*, direct admission of parties that there had been a previous partition, and *fifthly*, separate occupation of land and collection of rent from the separate tenants and the institution of suits by the superior landlord against the members of the family as if they were separate tenants and the separate enforcement of decrees so obtained.

Held, that these circumstances were sufficient to establish partition between the members of the family.

If lands cultivated during one season and left fallow during the two following seasons, were taken exclusive possession of and the owner was ousted, the mere fact that a stranger grazed his cattle during the period that the land was not under cultivation, would not interrupt the operation of adverse possession.

The fact of a co-sharer cultivating a larger area than what would fall to his share upon the distribution of all the lands, did not constitute adverse possession.

In order to constitute adverse possession of a co-sharer as against other co-sharers, there must be an assumption of hostile title for more than a period of 12 years before the commencement of the suit. **Kulada Prasad Tewari v. Sadhu Charan Tewari**, 20 C.L.J. 32.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 18 C. 302 and 15 B. 201, R.

(3) *Final decree, effect of—Partition, suit for—Preliminary decree, appeal against—Final decree, passing of, pending appeal—Preliminary decree, setting aside of.* **Abdul Jalil v. Amar Chand Paul**, 18 C.L.J. 223=21 Ind. Cas. 510. See Final Part, 1913, Col. 978.

(4) *Partition—Commissioner appointed by Court—Division made by him—Orders of Court approving the same—No final decree passed according to S. 396, Civ. Pro. Code, 1882—Orders conclusive—Repudiation of contracts—Rights in futuro—Extinguishment—Applicability of the principle to rights of property.* **Yadlamaneti Srinivasa Dikshatulu v. Yadlamaneti Venkataramiah Pantulu**, 14 M.L.T. 157=20 Ind. Cas. 908=1914 M.W.N. 144. See Final Part, 1913, Col. 979.

(5) *Partition, suit for—Plots belonging to some only of the co-sharers.* **Ramtaran Nag Mazumdar v. Hari Charn Nag Mazumdar**, 18 C.L.J. 556=22 Ind. Cas. 30. See Final Part, 1913, Col. 981.

(6) What property is partible. See ACT IV OF 1893 (PARTITION), No. 1, 7 S.L.R. 117.

(7) *Suit for—Ijmal lands—Previous partition—Lands jungle of submerged in three mouzas—Separate suits for partition—Maintainability.* See ACT XII OF 1887 (BENGAL, N.W.P. AND ASSAM CIVIL COURTS), No. 6, 23 Ind. Cas. 442.

(8) Revenue Court's decision on questions of title raised in partition proceedings bars Civil

Partition—(Concluded).

Courts from re-opening those questions—Objection to partition filed beyond time fixed by Revenue Court whether entertainable if partition not yet granted—Effect of complete partition—Forum of appeal from order of Revenue Court disallowing objection to partition. See ACT III OF 1901 (U.P. LAND REVENUE), No. 12, 23 Ind. Cas. 965.

(9) Joint property partitioned by every individual co-sharer by suit—Property left in possession of last co-sharer less than his proper share—Suit by that co-sharer to correct previous allotments—That co-sharer defendant in all previous suits—Effect of partition—*Res judicata*. See CIV. PRO. CODE (1892), No. 4, 27 M.L.J. 76.

(10) Suit for—Preliminary decree—Appeal—Final decree—No appeal against it—No bar to the hearing of appeal against preliminary decree. See CIV. PRO. CODE (1908), No. 13, 12 A.L.J. 876.

(11) Partition suit—Cross objections by one respondent against another—Practice. See CIV. PRO. CODE (1908), No. 447, 12 A.L.J. 892.

(12) Partition suit—Preliminary decree—Power of Court—Equities of parties—Dispute as to constitution of estate to be divided—Order for enquiry into such dispute—Whether can be made in preliminary decree. See CIV. PRO. CODE (1908), No. 223, 8 S.L.R. 28.

(13) Partition of properties assessed to land revenue—Form of decree. See CIV. PRO. CODE (1908), No. 307, 24 Ind. Cas. 113.

(14) Partition suit—Award of costs—Discretion of Court. See COSTS, No. 1, 21 Ind. Cas. 746.

(15) What is. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

(16) Defendant applying to Revenue authorities for partition—Plaintiff claiming property as his whole property—Plaintiff referred to civil suit—Entry in revenue papers as joint—Effect—Cause of action—Limitation. See LIMITATION, No. 4, 163 P.L.R. 1914.

(17) Partition proceedings—Claim to *chak*—Admission of claim—Suit for possession of land allotted at partition—Adverse possession—Limitation. See LIMITATION ACT (1877), No. 23, 22 Ind. Cas. 575.

(18) Undivided ancestral property—Mortgage by one co-heir—Right of another co-heir to claim share in mortgage money—Limitation. See MORTGAGE (GENERAL), No. 1, U.B.R. (1913), 3rd Qr., 178.

(19) Mortgage of undivided share—Partition after execution of mortgage—Rights of mortgagee. See MORTGAGE (GENERAL), No. 35, 24 Ind. Cas. 2.

Partition Act.

See ACT IV OF 1893.

Partnership.

- (1) *Partner entering into agreement for services to be rendered to the partnership—His claim for remuneration for the services not to be allowed without dissolution of partnership and accounts.*

Where the defendants and the plaintiff entered into an agreement under which the plaintiff contracted to perform for remuneration certain work for the partnership.

Held, that it would be inequitable to allow the plaintiff to claim the remuneration without dissolution of the partnership and rendition of accounts. *Pala Ram v. Chena Mal*, 80. P.L.R. 1014=38 P.R. 1914=22 Ind. Cas. 571.

SHAH DIN and BEADON, JJ.

References:—110 P.R. 1901; 1 Ind. Cas. 384=33 M. 76=4 M.L.T. 456=19 M.L.J. 10, D.

- (2) *Sums collected by certain partners—Suit for recovery of his share by another partner—Instituted within 3 years from date of collection—Lapse of more than 3 years from date of dissolution of partnership—No bar of limitation.*

A suit for the recovery of the plaintiff's share of the sums collected and received by the other partners within 3 years before suit is not barred by limitation, even though more than 3 years have elapsed from the date of dissolution of the partnership. *Gottipati Chinna Kondian v. Gottipati Narasappa Naidu*, 26 M.L.J. 221=22 Ind. Cas. 947.

SADASIVA AIYAR and SPENCER, JJ.

- (3) *Death of one partner—Effect—New partnership—Legal representatives not bound to continue partnership—Practice—Procedure—Compelling a party to call his adversary as his witness—Not to be allowed.*

When a partnership is continued after the death of one partner, there is technically a new partnership. Although the surviving partners may in certain cases have a claim for damages against the estate of a deceased partner in respect of obligations contracted before his death, they cannot compel the legal representatives of a deceased partner to continue the partnership (a).

A procedure which compelled the plaintiff to call one of the defendants as his witness is not one to be commended. It placed the plaintiff in this respect at a disadvantage, although in the present case it did not affect the merits. Clearly it should not be allowed (b). *Seth Ramdas, son of Seth Shivandas v. Diwan Partabrai, son of Gurdassmal*, 7 S.L.R. 85=23 Ind. Cas. 771.

PRATT, J.C. and KEMP, A.J.C.

References:—(a) 6 Hare 118, R. (b) 32 A. 104, R.*

- (4) *Partnership accounts—Duty of each partner to discover all documents—Arbitration, reference of dispute with customer to, by one partner—Others, if bound—Question if*

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one of law—Agreement to refer not originally binding becoming binding by acquiescence or acceptance of benefit—Question if should be allowed to be taken for the first time on appeal—Partner charged with entering into agreement to refer negligently and improperly—Measure of damages—Onus of proof.

For the purpose of working out a partnership decree, each party to the action is bound to produce and discover all documents in his possession relating to the partnership, and an application by the plaintiff for discovery of documents in the possession of a defendant in such an action ought not to have been refused:

Held, that the decision of the High Court in so far as it was of opinion that the accounts taken by the Commissioner (and affirmed by the trying Court) were not properly taken or supported by evidence and must be investigated afresh was correct.

A sum of money, paid by a customer as the result of a reference to arbitration in which the legal personal representatives of a deceased partner were no parties, having been brought into the partnership accounts, the latter, who did not dispute the item in the first Court, for the first time on appeal contended that, not being parties to the reference, they were not bound by it.

Held, that the question whether the legal personal representatives of the deceased partner were bound by the agreement to refer and by the award was not a simple question of law to be decided without reference to the facts of the case or any evidence which might have been available if it had been raised at the proper time, and the contention should have been rejected as having been put forward at too late a stage.

An agreement to refer not originally binding might become binding later on by the acquiescence of the party or his acceptance of benefits thereunder.

Held further, that if the legal personal representatives of the deceased partner were not bound by the award, they would not be entitled to relief on the footing that it was binding, but had been negligibly and improperly entered into.

That if relief could be given on this footing the difference between the amount originally claimed against the customer and the amount paid by him under the award would not necessarily be the measure of damages; nor could the *onus* of proving that it was any less sum be thrown on the person accused of negligence and improper conduct. *Rai Dwarka Nath Sarkar Bahadur v. Haji Mahomed Akbar*, 18 C.W.N. 1035=27 M.L.J. 192= (1914) M.W.N. 876=16 M.L.T. 521=17 Bom. L.R. 5=24 Ind. Cas. 307=21 C.L.J. 1 (P.C.).

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Reference:—14 C.W.N. 1106, R.

Partnership—(Continued).

(5) *Lease—Partner—Liability of partner on lease executed by other partners—Obligation of partners specially defined in partnership deed—Damages for use and occupation, suit for.* J D. Pappademetriou v. Rose Holiday, 7 L.B.R. 42=21 Ind. Cas. 3=6 Bur. L.T. 164. See Final Part, 1913, Col. 984.

(6) *Suit for dissolution of—Subsequent suit for recovery of property held not as partners but as co-owners—N. bur.* See CIV. PRO. CODE (1908), No. 240, 83 P.L.R. 1914.

(7) *Decree against firm—Suit against firm—Names of partners not disclosed in plaint—Application for service of summons on certain person as partner—Representation made at the time of service—Effect—Refusal to accept—Service on outer door of firm office—No written notice as to capacity in which summons was served—Duty of person served.* See CIV. PRO. CODE (1908), No. 81, 19 C.L.J. 581.

(8) *Suit in the name of a firm—Verification of plaint.* See CIV. PRO. CODE (1908), No. 393, 12 A.L.J. 1020.

(9) *Partnership suit—Duty of Court—Amendments when may be allowed.* See CIV. PRO. CODE (1908), No. 180, 23 Ind. Cas. 564.

(10) *Sale of business by some of the partners—Effect—Dissolution of the—.* See CIV. PRO. CODE (1908), No. 263, 8 S.L.R. 69.

(11) *Debts due to a firm—Death of one of the partners—Right of surviving partners to sue without joining legal representatives of deceased partner—Refusal of surviving partners to suit—Remedy of representative of deceased partner.* See CONTRACT ACT, No. 42, 24 Ind. Cas. 268.

(12) *Hindu Law—Joint family partnership—Death of one of the partners—Effect upon dissolution of partnership—Agreement between survivors to continue the partnership—Liability of surety—Suit for dissolution and accounts—Art. 106, Limitation Act (1908).* See CONTRACT ACT, No. 104, 301 P.R. 1914.

(13) *Hindu family—Partnership—Death of partner—Succession by son—Debts of the firm—Presumption.* See HINDU LAW (DEBTS), No. 5, 24 Ind. Cas. 86.

(14) *Factors determining whether a person is mere creditor or partner.* See INSOLVENCY, No. 3, 22 Ind. Cas. 14.

(15) *Practice of Nattukottai Chetties—Acknowledgment by member of a family firm who is also the manager of the family whether binds the firm.* See NATTUKOTTAI CHETTIES, No. 1, 27 M.L.J. 631.

(16) *Agent appointed to carry on the business of a money lending partnership—Right of agent to sue for dissolution of the partnership—Amendment of plaint—Formal defect.* See POWER-OF-ATTORNEY, No. 2, 7 Bur. L.T. 202.

(17) *Principal and Agent—Money deposited with manager of business not in the course of*

Partnership—(Concluded).

*business—Liability of proprietor—*Westoppel. See PRINCIPAL AND AGENT, No. 5, 247 P.L.R. 1914.

(18) *Partner's liability in respect of partnership debts and obligations prior to becoming partner.* See TRADE MARKS, No. 1, 19 C.W.N. 1.

(19) *Suit on—Withdrawal of suit by plaintiff—Effect on claim between co-defendants.* See WITHDRAWAL OF SUIT, No. 1, (1914) M.W. N. 155.

Pasturage.

Right of cultivators to pasture lands—Right based on custom—Reasonableness—Grazing cattle from time immemorial—Sufficient pasturage left in village. Syed Ali v. Sajam Ali, 19 Ind. Cas. 890=18 C.W.N. 735. See Final Part, 1913, Col. 985.

Patents.

Patent Act—Infringement—Defence—Want of subject-matter—Want of novelty—English and Indian Law. See ACT V OF 1888 (INVENTIONS AND DESIGNS), No. 1, (1914) M.W.N. 817.

Patni.

See PUTNI.

Patni Taluqs Regulation.

See REG. VIII OF 1819.

Pattah.

(1) *No period fixed—Construction—Condition that after a certain year rent shall be so much—Permanent tenure.* See LANDLORD AND TENANT, No. 34, 24 Ind. Cas. 58.

(2) *House site in mirasi village held under pattah from Government—Mirasidar's right to recover possession of house site.* See MIRASI-TENURE No. 2, (1914) M.W.N. 537.

(3) *Whether Government are under obligation to issue pattah to ryotwari landholder—Non-issue of pattah—Effect on ryot's rights.* See SHIVAJI-JAMA TENURE, No. 1, (1914) M.W.N. 388.

Pauper.

(1) *Unstamped memo of appeal filed within time along with application to be allowed to appeal as pauper—Application rejected—Appeal memo, stamped after expiry of limitation—Appeal barred.* See APPEAL (GENERAL), No. 2, 7 L.B.R. 90.

(2) *Pauper applications when to be rejected—Amendment of pauper petition—Courts' inherent power.* See CIV. PRO. CODE (1908), No. 401, 26 M.L.J. 343.

(3) *Defendant entitled to adduce evidence to disprove plaintiff's pauperism.* See CIV. PRO. CODE (1908), No. 399, 23 Ind. Cas. 974.

Payments.

Money paid under compulsion of legal proceedings cannot be recovered. See KHORPOSH GRANT, No. 1, 19 C.W.N. 102.

Pedigree.

(1) Pedigree extracted from Settlement records—Presumption—Reversioner, what must prove. See EVIDENCE ACT, No. 20, 21 Ind. Cas. 274.

(2) Entries in books of Haridwar priests—Evidentiary value as to. See EVIDENCE, No. 5, 171 P.L.R. 1914.

Peishcush.

Decision that certain lands do not form part of Zamindari—Claim for refund of proportionate *peishcush*—Maintainability. See ACT XXVIII OF 1860 (MADRAS SURVEYS AND BOUNDARIES), No. 1, 27 M.L.J. 529.

Penal Assessment.

Possession short of the statutory period whether sufficient for a declaratory suit—Levying of penal assessment when amounts to interference with possession—Penal assessment when leviable. See SPECIFIC RELIEF ACT, No. 24, 37 M. 298.

Penal Code.

(1) Ss. 182, 211—Application in Judge's Court—False information—Prosecution sanctioned by Judge—Legality. See SANCTION TO PROSECUTE, No. 1, 12 A.L.J. 278.

(2) Ss. 482, 486. See COMPANY, No. 3, 7 Bur. L.T. 116=15 Cr.L.J. 337.

Penalty.

(1) Relief against penalties in compromise decree. See COMPROMISE, No. 1, (1914) M. W.N. 92.

(2) Bond—Condition—Twenty five per cent. more to be paid on default in payment on fixed day with 12½ per cent. per annum interest on the consolidated amount—Whether penal. See CONTRACT ACT, No. 74, 23 Ind. Cas. 542.

3) See INTEREST.

Pensions Act.

See ACT XXIII OF 1871.

Perjury.

Perjured evidence whether a ground for setting aside decree. See FRAUD, No. 2, 18 C.W.N. 447.

Permanent Settlement.

Saltpetre, exclusive right to dig—Nimak Sayer Mahal, *Permanent Settlement of—Reasonable right of user—Permanent Settlement—Assets—Grant—Review—Appeal, restoration and re-hearing of*. Golab Chand v. Janki Koer, 18 C.L.J. 151=17 C.W.N. 1195=20 Ind. Cas. 650=41 C. 286. See Final Part, 1913, Col. 987.

Permanent Settlement Regulation.

See REG. I OF 1798.

See REG. XXV OF 1802.

Permanent Tenure.

Amaram tenure—Resumability—Circumstances telling against the right of permanent occupancy. Raja of Venkatagiri v. Mukku Narasayya, 8 M.L.T. 258=7 Ind. Cas. 202=37 M. 1. See Final Part, 1910, Col. 1016.

Pilgrimage.

Hindu widow—Pilgrimage to Gaya—Feast given after return from Gaya whether legal necessity—Right of reversioner. See HINDU LAW (WIDOW), No. 18, 18 C.W.N. 1303.

Plaint.

(1) *Presentation of plaint, out of office hours, to officer of Court, authorized to receive within office hours, whether proper presentation—Ratification.*

A presentation, out of office hours, of a plaint to an officer of a Court authorized to receive plaints within office hours only, is not a proper presentation, unless ratified by the Court on that very day. C. M. Appaya Pillai v. Sheikh Amir Sahib, 23 Ind. Cas. 360.

SADASIVA IYER and SPENCER, JJ.

(2) Suit filed by two plaintiffs—One alone signing plaint—Return of plaint—Authority to sign on behalf of the other not proved—Representation of plaint with signature of the other after expiry of period of limitation—Whether saves bar of limitation. See ACT XXVI OF 1881 (NEG. INSTRUMENTS), No. 4, 26 M.L.J. 494.

(3) Order returning plaint for presentation to proper Court—Appellate Court setting aside order—Duty of lower Court. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 1, 16 M. L.T. 244.

(4) Order returning plaint for presentation to proper Court—Appeal. See CIV. PRO. CODE (1903), No. 163, 12 A.L.J. 21.

(5) Suit by corporation—Plaint signed by principal officer who is also *am-muktear*. is sufficient. See CIV. PRO. CODE (1908), No. 392, 22 Ind. Cas. 674.

(6) Suit in the name of the firm—Verification of plaint. See CIV. PRO. CODE (1908), No. 393, 12 A.L.J. 1020.

(7) Return of plaint—Refusal to exercise jurisdiction—Revision. See COURT-FEES, No. 1, 19 C.L.J. 15.

(8) Claim for mesne profits beyond pecuniary jurisdiction—Presentation of plaint in Court of competent jurisdiction if to be deemed new suit. See MESNE PROFITS, No. 4, 24 Ind. Cas. 232.

(9) Agent authorized to enter appearance in suits—Power to sign amended plaint. See PRINCIPAL AND AGENT, No. 3, 7 Bur. L.T. 199.

Pleader.

(1) *Application for enrolment—Concealment of conviction—Misconduct—Dismissal.*

A pleader who conceals his past conviction by intentionally omitting to recite it in his

Pleader—(Concluded).

application for admission is liable to be dismissed. *In the matter of a Second Grade Pleader*, 15 Cr. L.J. 587=25 Ind. Cas. 339.

HARTNOLL and ORMOND, JJ.

(2) Letter written by vakil—Suggestion of his ability to influence Magistrate—Professional misconduct. See LETTERS PATENT (MADRAS), No. 1, 26 M.L.J. 429.

(3) Use of special powers of attorney to evade the provisions of the law relating to the appointment of pleaders and advocates. See REGULATION I OF 1896 (UPPER BURMA CIVIL COURTS), No. 1, 7 Bur. L.T. 206.

Pleader and Client.

(1) *Vakil and client—Vakil empowered to execute decree—Power to execute decree implies power to receive money outside Court.*

The power given to a vakil by his *vakalat-nama* to execute the decree on behalf of his client implies a power to receive money from the judgment-debtor outside the Court on behalf of his client. *Shankara Raja v. Sri Rama Desikachariar*, (1914) M.W.N. 220=15 M.L.T. 162=22 Ind. Cas. 277.

SADASIVA AIYAR and SPENCER, JJ.

Reference:—(1912) M.W.N. 1204, F.

(2) *Pleader—Appearance for one side—Appearing for the other—Civil Rules of Practice—R. 277.*

Under r. 277 of the Civil Rules of Practice, a pleader who had been retained by a party and has drafted the written statement is entitled to appear for the opposite side when the party originally retaining him does not seek to employ his services but has engaged other pleaders in the case. *Achutaramayya v. Secretary of State*, (1914) M.W.N. 785.

KUMARASWAMI SASTRI, J.

(3) *Pleader and client—Appearance for one party in proceedings under S. 145, Crim. Pro. Code—Subsequent institution of suit in Civil Court by the opposite party—Pleader appearing for the latter in Civil Court—Refusal of audience by Court—Propriety—Power of Court to refuse audience—When arises—Professional misconduct—Civ. Rules of Practice, r. 277—'Proceeding'—Scope of the term—'Matter connected with the proceeding'—Meaning—Principle of the rule—Power of Courts to apply such principle. *Srinivasa Row v. Pichai Pillai*, 25 M.L.J. 56²=21 Ind. Cas. 629. See Final Part, 1913, Col. 989.*

(4) *Damages—Pleader retained by one party accepting vakalat from the other side—Breach of contract. *Tumpluri Venkataramayya v. Lakshmi Narasimha Charyulu*, 14 M.L.T. 589=(1914) M.W.N. 98=26 M.L.J. 72=22 Ind. Cas. 38. See Final Part, 1913, Col. 990.*

(5) *Pro-note for money spent by vakil on client's behalf for Commissioner's fees, outfees, etc.—Pro-note not filed in Court—Maintainability of suit thereon—Power to pass decrees for*

Pleader and Client—(Concluded).

sum actually due to vakil—Pro-note, whether operates as an acknowledgment of liability. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 3, 27 M.L.J. 738.

(6) *Suit for money due for fees and litigation expenses—Oral agreement—Validity. See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), No. 2, 20 C.L.J. 445.*

(7) *Admission by party or pleader in another suit—Weight to be attached. See APPEAL (SECOND APPEAL), No. 7, 19 C.L.J. 541.*

(8) *Vakil—Authority to compromise—Question of fact—Powers in Vakalatnama. See CIV. PRO. CODE (1908), No. 387, 8 S.L.R. 91.*

(9) *Civil Rules of Practice (Madras), r. 277, as amended—Pleader retained for a party—Pleader drafting written statement and not engaged for the subsequent stages of the suit—Whether entitled to appear for the opposite side—Onus. See CIVIL RULES OF PRACTICE (MADRAS), No. 2, 16 M.L.T. 349.*

(10) *Gross carelessness of pleader whether "sufficient cause" for filing appeal beyond time. See LIMITATION ACT (1908), No. 6, 9 P.L.R. 1914.*

(11) *Preparation of paper book—Contract—Undertaking—Duty of vakil. See PAPER-BOOK, No. 1, 19 C.L.J. 432.*

(12) *Mortgage by pardanashin lady and her brother—Property solely of lady—Pleader securing mortgage in name of another—Deed not explained to lady—Burden of proof. See PARDANASHIN LADIES, No. 2, 27 M.L.J. 13.*

Pleader's Fees.

(1) *Assessment of, See ACT I OF 1894 (LAND ACQUISITION), No. 8, 17 O.C. 284.*

(2) *In appeal from order under Ss. 244, 212, Civ. Pro. Code (1882). See CIV. PRO. CODE (1908), No. 227, 24 Ind. Cas. 283.*

Pleadings.

(1) *Plaint—Pleadings—Issues—Joint Hindu family—Trading family partnership—Each may exist independently.*

Where the defendants were sued, not as the surviving members of a joint Hindu family, which had been carrying on a family business, but simply as the proprietors of a trading firm known as N.M. and J.M. on whose behalf G., defendant No. 2, in his capacity of agent of the firm, drew the *hundis* sued upon in favour of the firm of R. B. and G.M. and where, in the subsequent pleadings in the issues framed by the District Judge, there was no mention of the defendants constituting a joint Hindu family:

Held, that the plaintiffs should not have been allowed to adduce any proof in support of the existence of alleged joint family, and the District Judge should have only decided the point whether the defendants were the proprietors of the trading partnership known as N. M. and J.M., when the *hundis* in question were

Pleadings—(Continued).

drawn, and whether they were liable upon those *hundis* as such proprietor at the time when the present suit was brought.

Held, further, that the question whether, at the time of the execution of the *hundis*, G. was competent to draw them on behalf of the firm and also whether he in fact drew them in the name of the firm and as its agent in the ordinary course of business, should have been decided without reference to the alleged fact of the defendants being members of a joint Hindu family. *Amar Nath v Gurdas Mal*, 94 P.L.R. 1914 68 P.W.R. 1914 = 22 Ind. Cas. 716.

SHAH DIN and BEADON, JJ.

(2) *Pleadings—Written statement—Failure to deny allegations, in plaintiff's effect of—Plaint, amendment of—Court's discretion—Civ. Pro. Code (1908), O. VIII, r. 5.*

There was nothing in the Code of Civil Procedure of 1882, corresponding with O. VIII, r. 5, of the Code of 1908. The effect of failure under the latter Code to deny in the written statement the allegation of fact in the plaintiff, does not necessarily amount to a proof in the plaintiff's favour.

It is in the discretion of the Court to allow or disallow an application for amendment of plaintiff. *Satyas Chandra Sarkar v. Monmohini Das*, 19 C.L.J. 518.

JENKINS, C.J. and MOOKERJEE, J.

(3) *Pleading—Construction—Civ. Pro. Code—O. VIII, rr. 2-5—Evidence Act, S. 58—Malabar Law.*

Oldfield, J.—Where the parties are Chetties residing in Malabar, Malabar law is not applicable to them in the absence of a special allegation that it is so.

Tyabji, J.—Whether or not a matter is open upon the proceedings sufficiently to give the Court the right to form a judgment upon it must be dependent upon the particular facts and upon the allegations in and form of the pleadings. Whatever system of pleadings may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues. This being the object of pleadings (1) allowance must be made for very inaccurate mode of setting forth the claims of persons and the answers or defences to them. Plaints in Indian Courts ought not to be looked at in the same manner as declarations in an English Court. (2) The responsibility of clearly perceiving and raising points which arise upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice rests on the Court as much as on the parties or their pleaders. (3) In regard to construction of pleadings, the primary though not the only consideration is not so much what a careful draftsman would intend to express if he had used the words in question nor what meaning the Court or the opposite party ought to have put on these

Pleadings—(Continued).

words, but in what sense as a matter of fact the words were understood. The Court must look not to the mere wording of the plaintiff but to the issue which was settled for trial and to the manner in which the case was treated in the lower Courts. (4) Courts do not exist for the sake of discipline but for the sake of deciding controversy.

Madho Prasad's case affords still sufficient guidance for the construction of written statements under O. VIII, rr. 2 to 5, of the Civ. Pro. Code (1908) and S. 58 of the Evidence Act. *Azimanilla Vettil Kannu Pillel v. Kayloari Gopalram Nair*, (1914) M.W.N. 883.

OLDFIELD and TYABJI, JJ.

(4) *Pleadings, falsification of, whether punishable.*

Pleadings are statements required by law to be true; and, therefore, a wilful falsification is punishable by the criminal law. *The British India Steam Navigation Co., Ltd. v. M. N. Fakir Mahomed*, 7 L.B.R. 257 = 25 Ind. Cas. 805.

PARLETT, J.

(5) *Pleadings—Change of case—Issues—Suit to set aside a deed of gift as fraudulent, failing, claim for accounts of a share as from agent. Sayedani Mahmada Khatun Chowdhrahi v. Mahomed Elahabad Khan Pani*, 17 C.W.N. 427 = 23 Ind. Cas. 332 (P.C.). See Final Part, 1913, Col. 992.

(6) *Suit for redemption—Plaintiff's failure to prove mortgage—Plaintiff's possession through mortgagees proved—Decree in plaintiff's favour—Issue remitted by High Court—New case. See ADVERSE POSSESSION, No. 13, 12 A.L.J. 1233.*

(7) *Admission of one defendant whether binding on co-defendant. See APPEAL (GENERAL), No. 6, 22 Ind. Cas. 916.*

(8) *Pleadings faulty—Claim in plaintiff based on wrong grounds—No objection by defendant—Amendment. See CRYLON CIV. PRO. ACT, No. 1, 18 C.W.N. 617.*

(9) *Plea of non-joinder of co-plaintiff—Dismissal of suit on plea not raised. See CIV. PRO. CODE (1908), No. 232, 21 Ind. Cas. 182.*

(10) *Allegation of want of reasonable and probable cause—When sufficient. See DAMAGES, No. 3, 18 C.W.N. 1189.*

(11) *Defendant's plea contained in a booker drawn up at the first hearing—Decision thereon—Effect. See EASEMENTS ACT, No. 9, 12 A.L.J. 455.*

(12) *Party when estopped by his pleadings. See ESTOPPEL, No. 1, 21 Ind. Cas. 61.*

(13) *Pleadings raising issue with sufficient clearness—Whether issue should be in a particular form. See FRAUDULENT TRANSFERS, No. 1, (1914) M.W.N. 555.*

(14) *Point taken for the first time in second appeal—Maintainability. See MORTGAGE (GENERAL), No. 4, 21 Ind. Cas. 554.*

Pleadings—(Concluded).

(15) Decree not to be given on the basis of claim not set up in plaint or appeal petition or raised in the issues. See POSSESSION, No. 7, (1914) M.W.N. 784.

(16) Petition for compromise — Pleading — Registration. See REGISTRATION ACT (1908), No. 3, 22 Ind. Cas. 35.

Pledge.

(1) Remedies of pledgee of moveable property. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

(2) Specific moveable property — Person entrusted for inspection with a view to sale — Pledge by him — Suit by true owner to recover from pawnee — Limitation. See LIMITATION ACT (1908), No. 79, 15 M.L.T. 221.

Political Pension.

Property granted by Government for political considerations whether a—Exemption from attachment. See CIV. PRO. CODE (1908), No. 105, 12 A.L.J. 437.

Ports Act (Calcutta).

See BEN. CALC IX OF 1890.

Possession.

(1) *Title—Possession for less than statutory period—Decree in possession suit—Symbolical possession—Suit for recovery of possession on—Title of defendant, is to be investigated—Specific Relief Act, S. 9—Limitation.*

Mere previous possession for less than the statutory period would not, according to the law of this country, enable a party to succeed in a suit for ejectment, when the relief by a possessory suit under the Specific Relief Act is gone (a).

The plaintiff's predecessor, K, was, in 1897, put in symbolical possession, not in actual possession, under S. 9, of the Specific Relief Act. The defendant was not a party to the suit under S. 9. K died one month after he was put in possession. In 1910, the plaintiff brought a suit for recovery of possession, but failed to prove his title:

Held, that the plaintiff's suit should be dismissed and the Court should not investigate the defendant's title. **Satyendra Nath Misra v. Latif Khan**, 21 Ind. Cas. 118.

COXE and RAY, JJ.

References:—(a) 26 C. 579=3 C.W.N. 568, *Rel.*

(2) *Suit for possession—Plaintiff proving his possession for a number of years and payment of rent to the admitted landlord, but failing to prove the specific title on which he based his claim—Effect—Defendant having no title to possession.*

Suit for recovery of possession of land from defendant, alleging that plaintiff purchased it in 1804 B.S. from T who was in possession for more than 12 years, and that since then he had been in possession on payment of rent to the

Possession—(Continued).

admitted proprietor of the land up to 1814 B.S. when he was dispossessed by defendant. Defendant denied title and possession of plaintiff. It was found that T, from whom plaintiff alleged to have derived his title had no title. *Held* that, although plaintiff failed to prove the specific title under which he claimed, yet, as plaintiff's possession over a considerable number of years and his payment of rent to the admitted proprietor were established, the legal inference flowed that plaintiff was in possession by virtue of a title derived from the owner of the land which gave plaintiff a right to possession, and plaintiff was therefore entitled to recover it from defendant. **Adhar Chandra Pal v. Dibakar Bhuyan**, 41 C. 394.

JENKINS, C.J. and MOOKERJEE, J.

(3) *Possession, suit for—Usufructuary mortgage, redemption of—Mortgage invalid in law—Plaintiff's title established—Plaintiff to recover possession—Suit, nature of, if changed.*

A suit for possession on redeeming a usufructuary mortgage is in substance a suit for possession of the land.

In a suit for possession of land on redeeming a usufructuary mortgage, if the plaintiff establishes his title and the only answer that the defendant has is that the mortgage is void in point of law, the plaintiff is entitled to get the land, because the defendant on his own showing has no title whatever to retain possession of the land. **Annada Hait v. Khudiram Hait**, 18 C. L.J. 532.

JENKINS, C.J., and MOOKERJEE, J.

(4) *Evidence—Burden of proof—Suit for possession—Nazul land—Secretary of State for India in Council.*

The Secretary of State for India in Council claimed possession of a plot of land as part of what is known as the *Nazul* land of which he was the proprietor and proved that the land was part of the *Nazul* land. *Held* that it was sufficient for the Secretary of State for India in Council to show that the plot of land claimed was part of the *Nazul* land and it was not necessary for him to prove possession over that particular plot. **Inait Husain v. The Secretary of State**, 12 A.L.J. 894.

PIGGOTT, J.

Reference:—14 A. 193, R.

(5) *Defendant in possession as trespasser—Suit for possession—Burden of proof—Plaintiff to prove his title.*

In a suit for possession, though the defendant is found to be in the position of a mere trespasser, it is none the less necessary for the plaintiff, who seeks to oust the defendant, to prove his own title. The defendant's failure to plead a *ius tertii* does not absolve the plaintiff of this duty. **Kanakammal v. Ananthamathi Ammal**, 37 M. 293.

WHITE, C.J., and SANKARAN NAIR, J.

Possession—(Continued).

- (6) *Possession within 12 years of suit—Limitation Act, Art. 142—Undisturbed possession—Discontinuance of possession.*

In a suit for ejectment of a trespasser from certain land allowed to remain fallow for many years by the owner, the defendant pleaded that the land had been waste land for 40 years and he cleared the jungle with the permission of the Thugyi and was in occupation.

Held that the suit was governed by Art. 142, Limitation Act, and the plaintiffs must prove that they were the rightful owners and were in possession at some time within 12 years before the suit.

Discontinuance of possession means an abandonment of possession by one person followed by the actual possession of another person. *Nga Po v. Nga So Pe*, 7 Bur.L.T. 255.

MCCOLL, J.C.

- (7) *Possessory title—Cause of action must be clearly set out.*

A suit against a trespasser can be based on mere possession of the property, but the plaintiff must clearly set up such a case so that the contesting defendants may know what they have to meet. The plaintiff should not be given a decree on the basis of a claim not set up in the plaint or raised in the issues or even set up in the appeal petition. *Maikal Servai v. Thambuswami Servai*, (1914) M.W.N. 784.

AYLING and HANNAY, JJ.

- (8) *Cause of action, absence of—Possession, suit for, upon proof of title—Dispossession, date of, whether material—Possession within 12 years of suit sufficient—Civ. Pro. Code (1882), S. 335—Effect of proceeding under S. 335, what is—Variance between pleading and proof—Dismissal of suit. Nabadwipendra Mookerjee v. Madhu Sudan Mandal*, 16 Ind. Cas. 741=18 C.W.N. 473. See Final Part, 1913, Col. 995.

- (9) *Doctrine of possession following title—Application where plaintiff has to prove possession at a particular point of time. See ACT VIII OF 1885 (BENGAL TENANCY), No. 86, 19 C.W.N. 18.*

- (10) *Person having title and exercising acts of ownership only over a portion and leaving the rest as waste—Presumption as to having possession over the whole—Applicability of presumption to the case of trespasser. See ADVERSE POSSESSION, No. 6, 23 Ind. Cas. 520.*

- (11) *First^o suit for specific performance—Second suit for possession not barred. See CIV. PRO. CODE (1909), No. 239, 15 M.L.T. 103.*

- (12) *Suit for declaration of title and recovery of possession—Ascertainment of mesne profits—Appeal—Remand—Decision with regard to possession whether a preliminary decree. See CIV. PRO. CODE (1909), No. 7, 19 C.L.J. 346.*

- (13) *Suit by one of many joint owners for possession—Other co-owners pro forma defendants—Form of decree. See CO-OWNERS, No. 1, 21A.L.J. 23.*

Possession—(Concluded).

- (14) *Presumption that co-owner's possession is on behalf of all owners—Possession by biggest adult shareholder—Character of—Trustee for minor co-owners—Reason for rule. See CO-OWNERS, No. 2, 23 Ind. Cas. 562.*

- (15) *Suit for possession of land by proprietor of undivided half-share—Nature of decree that plaintiff may be entitled to—Proprietor of undivided half-share if can eject any one of the land from the whole of it. See CO-SHARERS, No. 6, 18 C.W.N. 1011.*

- (16) *See EJECTMENT, No. 1, 21 Ind. Cas. 256.*

- (17) *Suit for possession—Symbolical possession delivered to plaintiff more than 12 years ago as against defendant—Presumption of continuance of possession—Finding that no actual possession ever obtained—Limitation—Recovery of rent decrees against raiyats within 12 years if possession. See HINDU LAW (WIDOW), No. 10, 18 C.W.N. 940.*

- (18) *Long possession without payment of rent—Rent free grant—Presumption. See LANDLORD AND TENANT, Nos. 39, 41, 42 and 44, 24 Ind. Cas. 286, 319, 354, 424.*

- (19) *Ouster—Suit for joint possession—When maintainable. See LEASE, No. 1, 18 C.W.N. 420.*

- (20) *Expiration of lease—Lessee's right to eject a trespasser—Acquiescence of landlord—Effect. See LEASE, No. 10, 37 M. 281.*

- (21) *Suit for share of moveables on death of widow of brother—Contest between two brothers—Limitation. See LIMITATION ACT (1908), No. 109, 13 P.L.R. 1914.*

- (22) *Suit for possession of the land free of the house and trees—Claim merely for removal of trees—Limitation. See LIMITATION ACT (1908), No. 132, 17 O.C. 252.*

- (23) *Suit for redemption of a specific mortgage—Defendant admitted a mortgage but denied the mortgage set up—Plaintiff to prove a subsisting title to possession as alleged. See MORTGAGE (REDEMPTION), No. 1, 12 A.L.J. 102.*

- (24) *Suit for possession as full owner—Alternative claim for pre-emption. See PRE-EMPTION, No. 20, 12 A.L.J. 798.*

- (25) *Dispossession in respect of the whole—Whether person entitled to moiety can proceed under S. 9, Specific Relief Act. See SPECIFIC RELIEF ACT, No. 1, 19 C.L.J. 117.*

- (26) *Suit for possession—Whether under S. 9, Specific Relief Act—Inference from the fact that the suit was brought within six months—Also from the fact that the suit was for possession only and not declaration of title—Whether appeal lies to the Divisional Court. See SPECIFIC RELIEF ACT, No. 2, 7 Bur. L.T. 10.*

- (27) *Possession short of the statutory period whether sufficient for declaratory suit—Levying of penal assessment when amounts to interference with possession—Penal assessment when leviable. See SPECIFIC RELIEF ACT, No. 24, 37 M. 293.*

Post.

Use of post mark in evidence—Date of notice if proof of being posted on that date—Delivery of articles—Inference—Post mark of the receiving office—Refusal to take delivery—Endorsement on the cover of the registered article—Admissibility in evidence—Tender—Presumption. See TRANSFER OF PROPERTY ACT, No. 89, 20 O.L.J. 455.

Power of Attorney.

- (1) *Construction—Powers of Agent under a general power.*

Per *Spencer, J.*—While it is true that established law requires a power of attorney to be construed strictly, it is also correct to hold that, when an agent has a general power of attorney to act in some business or series of transactions, he may be assumed to have all usual powers.

Every document must be construed with reference to its particular terms, and differently worded documents afford but little assistance for correctly construing the document in a particular case.

The words in a power of attorney authorized an agent "to conduct and manage all the other estate, property, moneys, affairs and concerns of the Zamindari . . . in all respects as fully and absolutely as the principal himself is empowered to do and (subject as aforesaid) to do, perform and carry out all such acts and deeds and things whatsoever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own proper person if these presents had not been executed." Held that the words conferred on the agent such plenary powers as would include the transfer for a proper purpose to another person of decrees obtained in the name of the principal himself. *Lingam Kristna Bhooapati Deo v. Basavi Reddy*, 15 M.L.T. 143=26 M.L.J. 185=23 Ind. Cas. 235.

SADASIVA AIYAR and SPENCER, JJ.

References:—12 M.L.T. 528=23 M.L.J. 595, D.; 13 M.L.T. 114=(1913) M.W.N. 72. R.

- (2) *Power of Attorney—Construction—Can an agent appointed to carry on the business of a money lending partnership sue for the dissolution of the partnership—Amendment of plaint—Formal defect—Civ. Pro. Code—O. VI, r. 14.*

A power enabling the agent, to carry on the business of a firm shall not entitle him to sue for a dissolution of the firm. The proper course for the Court is to allow amendment of the plaint by requiring the principal himself to sign the plaint, since the defect does not go to the root of the case but is a mere irregularity which does not affect the merits and which would not justify the reversal of a decree on appeal. *P. L. K. Palanappa Chetty v. R. M. A. R. Arunachalam Chetty*, 7 Bur. L.T. 202.

TWOMEY and ROBINSON, JJ.

- (3) *Power to execute decrees and collect outstanding—Whether includes power to collect*

Power of Attorney—(Concluded).

decree debts and file execution applications therefor. See EXECUTION OF DECREES, No. 4, (1914) M.W.N. 872.

- (4) *Construction of.* See PRINCIPAL AND AGENT, No. 4, 23 Ind. Cas. 516.

(5) *Use of special powers of attorney to evade the provisions of the law relating to the appointment of pleaders and advocates.* See REGULATION I OF 1896 (UPPER BURMA CIVIL COURTS), No. 1, 7 Bur. L.T. 206.

Practice.

(1) *Practice—Order returning plaint—Appellate Court setting aside—Lower Court not competent to go behind.* See MADRAS ACT I OF 1908 (ESTATES LAND), No. 1, 16 M.L.T. 244.

(2) *Summons for final disposal—Mortgage suit—Practice—Procedure.* See CIV. PRO. CODE (1908), No. 253, 16 Bom. L.R. 39.

(3) *Duty of Court to draw up preliminary decree—Practice.* See CIV. PRO. CODE (1908), No. 186, 16 Bom. L.R. 67.

Pre-emption.

- (1) *Pre-emption—Wajib-ul-arz — Re-sale of property during pre-emption suit to person with a preferential right, but after extinction of his right to pre-empt by reason of limitation—Effect of.*

During the pendency of a pre-emption suit based on village custom, the vendee re-sold the property to a person who, in accordance with that custom, had a right of pre-emption, preferential to that of the plaintiff, but the sale made was more than one year after the date of the first sale which gave rise to the pre-emption suit. Held that the person to whom the property was re-sold by the vendee having taken no steps to enforce his rights until after the period of limitation had expired, was in no better position than he would have been, had the property been expressly offered to him and he had refused to buy it, and he could not by his subsequent purchase defeat the suit for pre-emption filed by one who had the next claim. *Kamta Prasad v. Ram Jag*, 12 A.L.J. 9=36 A. 60=22 Ind. Cas. 266.

RICHARDS, C.J., and TUDBALL, J.

References:—27 A. 544; 21 A. 374; 21 A. 441, D.

- (2) *Pre-emption—Suit instituted by the father, who has preferential right—Son not entitled to it himself cannot maintain the suit instituted by the father.*

A son, who could not have maintained a suit for pre-emption against the vendee had he instituted it himself, could not take advantage of the fact that his father, at the time the suit was instituted, had a preferential right as against the vendee on the ground that he was a nearer relation. *Partap Singh v. Daulat*, 12 A.L.J. 18=36 A. 63=22 Ind. Cas. 678.

RICHARDS, C.J., and TUDBALL, J.

- (3) *Pre-emption — Custom — Wajib-ul-arz—Construction—Muafi plots.*

Pre-emption—(Continued).

Where a *Wajib-ul arz* provides for pre-emption only in case a co-sharer sells his share in the *zamindari*, the provision is insufficient to prove a custom of pre-emption in respect of *munfi* lands. **Abid Ullah v. Ahmad Hussan**, 21 Ind. Cas. 53.

RICHARDS, C.J., and TUDBALL, J.

- (4) *Evidence Act*, S. 92—Sale or gift—*Extrinsic evidence to show real nature of transaction—Oudh Laws Act* (XVIII of 1876), Ss. 9, 13—*Pre-emption—Transfer in lieu of dower—Consideration.*

As between the persons not parties to a deed, extrinsic evidence is admissible to show that what is ostensibly a sale is really a gift (a).

In determining whether a transfer made by husband to wife in lieu of dower gives rise to a right of pre-emption under the Oudh Laws Act, the question of the adequacy of consideration is material, for, though, under the Muhammadan Law, a *hiba-bil-ewdz* gives rise to a right of pre-emption, it may or may not amount to a sale under S. 9 of the Oudh Laws Act, unless the extent or the nature of the consideration and other circumstances attending the transfer show that it was intended to operate as a sale. The real nature of the transaction should be inquired into; if it was intended that it should operate as a *bona fide* sale, a right of pre-emption would accrue under the said Act, irrespective of the question of consideration (b). **Alla Baksh v. Hajjin Imdadi**, 21 Ind. Cas. 60.

KANHAIYA LAL, A.J.C.

References:—(a) 27 M. 329; 28 A. 473 = A. W.N. (1906) 89 = 3 A.L.J. 314; 2 C.L.J. 338; 11 Ind. Cas. 398 = 38 I.A. 85 = 8 A.L.J. 373 = 15 C.W.N. 521 = 13 C.L.J. 510 = 13 Bom.L.R. 391 = 10 M.L.T. 23 = 33 A. 340 = (1911) 2 M.W.N. 370 = 21 M.L.J. 1126, R. (b) 5 A. 65 = A.W.N. (1882) 175; 88 P.R. 1901 = 145 P.L.R. 1901; 86 P.R. 1902 = 4 P.L.R. 1903; 2 O.C. 7; 3 Ind. Cas. 590 = 12 O.C. 185; 4 Ind. Cas. 466 = 13 C. W.N. 160; 11 Ind. Cas. 928 = 14 O.C. 214, R.

- (5) *Khatas sold with share in shamilat—Pre-emptor agnate and co-sharer in khata—Vendee agnate and co-sharer in shamilat—Right of pre-emption.*

In a suit for pre-emption, the plaintiff was an agnate and also a co-sharer with the vendor in the *khatas* sold. The vendee also was an agnate but was a co-sharer only in the undivided *shamila* of the village. Plaintiff sued for pre-emption both in respect of the *khatas* and the *shamila* appertaining thereto:

Held, that the vendee could not, on the basis of the share in the *shamila*, assert a right to take the *shamila* appertaining or accessory to the *khatas*. **Khair Din v. Ghulam Mohd-uddin**, 52 P.L.R. 1914 = 22 Ind. Cas. 401 = 43 P.R. 1914 = 142 P.W.R. 1914.

RATTIGAN and BEADON, JJ.

- (6) *Pre-emption—Right of Mosque to claim pre-emption through its Mutwali—S. 13 (1)*

Pre-emption—(Continued).

of the Punjab Pre-emption Act II of 1905, Seventhly—Vicinate—Behr Dar-wasa wali Mosque in the town of Multan.

Held, that, a Mutwali of a Mosque is competent to claim pre-emption in respect of the property sold on behalf, and for the benefit, of the Mosque. **Jindu Ram v. Hussain Bakhsh**, 52 P.W.R. 1914 = 147 P.L.R. 1914 = 59 P.R. 1914 = 24 Ind. Cas. 100.

JOHNSTONE and SHAH DIN, JJ.

References:—153 P.R. 1884, F.; O.A. No. 1525 of 1882, practically overruled 100 P.R. 1885; 26 A. 212, R.

- (7) *Pre-emption—Vendee becoming owner by exchange of land before the property was sold—Sanction given by the Collector under the Punjab Alienation of Land Act after institution of the case—Effect of this sanction.*

Held, that a permanent alienation of land subject to the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act if eventually sanctioned by that officer becomes effective from its original date. Consequently a suit for pre-emption on the ground of the vendee not being an owner in the subdivision in which the land in dispute is situate fails, if, before the sale of the land under pre-emption the vendee becomes owner therein by exchange, although it was sanctioned during the pendency of the suit for pre-emption. **Muhammad Baksh v. Chhanga**, 56 P.W.R. 1914 = 143 P.L.R. 1914.

RATTIGAN, J.

References:—79 P.R. 1913 = 59 P.W.R. 1913, Overruling 82 P.R. 1912 = 219 P.W.R. 1912, and C.A. 647 of 1910, F.

- (8) *Payment of pre-emption money into Court—Its receipt by a wrong person—Responsibility of pre-emptor.*

Held, that, where a pre-emptor deposits a part of the pre-emption money under S. 19 of the Pre-emption Act, and on obtaining the decree he withdraws some money out of it and the rest is sufficient to meet the pre-emptive price, but the Court decreeing the claim pays it to a person not entitled to get it, the pre-emptor does not lose his decree as it is no fault of his. **Muhammad Hayat v. Narsingh Dass**, 62 P.W. R. 1914 = 158 P.L.R. 1914.

CHEVIS, J.

- (9) *Custom—Wajib-ul-arz—Custom what does not constitute to establish—Claim for pre-emption, single instance of, effect of.*

Where the *Wajib-ul-arz* of a village provided that "her ek hissadas ke apne hissa ke intigual ka bazarie bai ke ikhtyar hai ki jiske hath chahe bai kare," *held*, that such a clause in the *Wajib-ul-arz* was sufficient proof of the fact that no custom of pre-emption, prevailed in the village.

Held further, that a single instance of a claim for pre-emption having been put forward

Pre-emption—(Continued).

and allowed in which no defence was put forward to the effect that the custom did not obtain in the village could not be of any particular value to establish the custom. **Abdul Rahman (Shaikh) v. Kale Khan**, 17 O.C. 105 = 23 Ind. Cas. 943.

LINDSAY, J.C.

- (10) *Pre-emption—Wajib-ul-arz for a settlement for certain period—Reference to pre-emption in the wajib-ul-arz—Custom or contract.*

The mere fact that a *Wajib-ul-arz* was to remain in force for a settlement which was to continue only for a certain fixed period did not prevent the co-sharers from recording their customs therein, and a reference to pre-emption in it was not necessarily a reference to an arrangement between the co-sharers but was *prima facie* to be taken as a reference to custom rather than to contract. **Ghansam v. Biranchi Lal**, 12 A.L.J. 527.

RICHARDS, C.J., and TUDBALL, J.

- (11) *Pre-emption—Mortgage by conditional sale—Ripening into a complete sale—Whether right to pre-empt exists.*

Where a pre-emption clause in a *Wajib-ul-arz* deals first with the case of a simple sale and makes provision for pre-emption in the case of such sale, and then deals with the case of conditional mortgage, the custom applying to the case of simple sale does not apply to a transfer of property which takes place after a mortgage by conditional sale has ripened into a complete transfer by a foreclosure suit. **Kamta Parshad v. Gulzar Singh**, 12 A.L.J. 611.

RICHARDS, C.J., and TUDBALL, J.

- (12) *Pre-emption—Alternative claim—Custom and Mahomedan law—Falling back on latter.*

A plaintiff in a pre-emption suit can base his claim in the alternative, on contract, custom or Mahomedan Law. But when there is an established custom of pre-emption and the pre-emptor fails to bring himself within that custom he cannot fall back on the Mahomedan Law. **Muhammad Ahsan Ullah v. Shams un-Nissa Bibi**, 12 A.L.J. 681 = 36 A. 456 = 24 Ind. Cas. 425.

RICHARDS, C.J., and TUDBALL, J.

- (13) *Sale of a plot of land and trees appertaining to a grove—No bar to pre-emption—Grove-hold—Dispute as to price paid—Market value.*

There is no bar to a right of pre-emption arising in the case of a sale of a plot of land and trees forming a grove, where it is the share of the co-sharer vendor or part of the share as distinct from a mere grove-hold.

In a suit for pre-emption, where there is a dispute as to the price actually paid, and the Court disbelieves the evidence of both parties, it should base its finding on the market value

Pre-emption—(Continued).

of the subject-matter of the sale. **Ahmed Ullah Khan v. Zor Mohammad**, 12 A.L.J. 690 = 24 Ind. Cas. 609.

RICHARDS, C.J., and TUDBALL, J.

- (14) *Pre-emption—Price mentioned in the sale-deed fictitious—Evidence of market value—Admissibility of special circumstances for payment of higher price.*

In a suit for pre-emption it was alleged that the sale price was fictitious and put into the sale-deed for the purpose of defeating pre-emption. Held that it was open to the pre-emptor to give evidence to show that the market value was far below that stated in the deed, notwithstanding that it was proved that the amount stated in the deed was paid before the Sub-Registrar. Held also that it was for the vendee to prove the special circumstances under which the price mentioned in the deed was actually paid. **Ram Sarup Sahau v. Karam Ullah Khan**, 12 A.L.J. 692 = 36 A. 464.

RICHARDS, C.J., and BANERJI, J.

References:—29 A. 618, R.; 28 A. 617, Not F.

- (15) *Pre-emption—Wajib-ul-arz—Confiscation by Government—Custom recorded in subsequent Wajib-ul-arz—Relation through female, karibee and khandani.*

In a 16 anna mahal a four anna share, belonging to two co-sharers, was confiscated by the Government after the mutiny and was awarded to others. Custom of pre-emption was recorded in the *Wajib-ul-arzes* of 1833 and 1860 and *Khewat zamina* of 1884. Held that the confiscation of the four anna share did not affect the custom of pre-emption prevailing in the mahal.

Where the *Wajib-ul-arz* recorded a preferential right of pre-emption in favour of *karibee* and *khandani* co-sharers and the pre-emptor, a female Hindu, is related to the vendor through a female and is 12 degrees removed from him, held that the pre-emptor is not a *karibee* and *khandani* co-sharer of the vendor and has no preferential right. **Durga Prasad Pande v. Fateh Bahadur Singh**, 12 A.L.J. 725 = 36 A. 451.

RICHARDS, C.J., and TUDBALL, J.

- (16) *Execution of decree—Pre-emption—Questions of varying the decree—Money deposited in Court as directed by decree—Part of money attached and taken out by a creditor of plaintiff—Deposit rendered insufficient—Plaintiff must make good the deficiency—Court should not have allowed payment to creditor until after final decree in the suit.*

A decree for pre-emption was passed conditional on the plaintiff paying into Court Rs. 1,000 by a certain date. The plaintiff paid into Court Rs. 1,000 by the date fixed. A creditor of the plaintiff attached a portion, namely, Rs. 193-4-6, of the money and the Court allowed him to take out that sum although the plaintiff objected that the money belonged to the vendee to whose credit it was lying in Court. This

Pre-emption—(Continued).

attachment and payment took place after the decree for pre-emption had been set aside on appeal and before the plaintiff had filed a second appeal to the High Court. Ultimately the original decree was upheld. In execution thereof the plaintiff prayed for possession and the vendee objected that the full amount of Rs. 1,000 was not in Court.

Held, that the vendee had the clearest equity to be paid back the full amount of money which he had paid for the property to his vendor and that the plaintiff, who had been benefited by the payment to his creditor, must make good the deficiency before he could obtain possession.

Held, also, that it was wrong of the Court which granted the attachment of the money in Court to order its payment out until a final decree had been made in the pre-emption suit. **Sheo Gopal v. Najib Khan**, 12 A.L.J. 732=36 A. 398=23 Ind. Cas. 869.

RICHARDS, C.J., and BANERJI, J.

Reference :—(1897) 17 A.W.N. 31, D.

(17) *Pre-emption—Sale—Perpetual lease—Plenary proprietary rights transferred—Nominal malikana reserved—Evidence to contradict terms of document.*

A deed, whereby all the proprietary rights in certain land have been transferred in consideration of the payment of a substantial sum of money, is in reality a deed of sale, although it purports to be only a perpetual lease creating occupancy rights in the transferee, and although a small amount of *malikana* has been nominally reserved by the deed as being payable by the so-called lessee to the so-called lessor. **Amar Singh v. Sadhu Singh**, 187 P.L.R. 1914=115 P.W.R. 1914=23 Ind. Cas. 970.

SHAH DIN and CHEVIS, JJ.

References :—7 Ind. Cas. 930=33 A. 104=7 A.L.J. 1022, *Rel.* ; 136 P.R. 1907, *Dist.*

(18) *Lis pendens—Pre-emption suit, effect of dealing with property after filing of.*

A suit for pre-emption was instituted by the plaintiff-respondent on 13th September, 1910, which was the last day of limitation. The defence was that the vendee had sold the property to the appellants, who had admittedly a better right of pre-emption than the plaintiff, by a deed, dated 12th September, 1910, which was registered on 21st September, 1910. It was found that the sale in favour of the appellants, though purporting to be made on 12th September, was really made at a later date subsequent to the institution of the pre-emption suit.

Held, that the law of *lis pendens* applies and that no dealing with the property after the institution of the suit can defeat the plaintiff's right. **Ram Shankar v. Nanik Prasad**, 17 O.C. 150=24 Ind. Cas. 82.

LINDSAY, J.C.

References :—30 A. 467 ; 12 A.L.J. 8, R.

Pre-emption—(Continued).

(19) *Pre-emption—Suit decree—Appeal by vendee—Further sum allowed—No time fixed for payment—Reasonable time.*

In a pre-emption suit the pre-emptor was ordered to pay a certain sum of money within a certain time and that amount was enhanced by the Court of appeal, which however omitted to mention in the decree the time within which this additional amount was to be paid. The pre-emptor paid the additional amount into Court.

Held, that the pre-emptor was entitled to a reasonable time within which he might pay the amount, and if he paid it within such reasonable time he was entitled to execute his decree and obtain possession of the property pre-empted. **Guptar Tewari v. Debi Saran Tewari**, 12 A.L.J. 642=36 A. 514.

RICHARDS, C.J., and TUDBALL, J.

(20) *Practice—Alternative claims—Suit for possession as full owner—Alternative claim for pre-emption.*

A plaintiff in a suit for pre-emption can also set up his right for possession of the property as full owner, and his suit cannot be dismissed on the ground that he has put his case in the alternative. **Bhagwati Saran Man Tewari v. Parmeshar Das**, 12 A.L.J. 799=36 A. 476.

RICHARDS, C.J., and TUDBALL, J.

(21) *Pre-emption—Wajib-ul-arz—Entry clear and distinct—No evidence of custom.*

Where the entry in the *Wajib-ul-arz* as to the right of pre-emption is clear and distinct, and there is no evidence to the contrary, the Court ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists. **Fazal Husain v. Mohammad Sharif**, 12 A.L.J. 900=36 A. 471=24 Ind. Cas. 464.

RICHARDS, C.J., and TUDBALL, J.

References :—33 A. 196, R.; 8 A.L.J. 786, D.

(22) *Pre-emption—Suit based on Mahomedan Law—Custom found to be in existence—Effect of—Whether amendment of plaint necessary.*

In a suit for pre-emption based on Mahomedan Law, if the Court finds that a custom of pre-emption exists apart from the Mahomedan Law, it should decree the suit without amendment of the plaint. **Abdul Hamed v. Maslo-tullah**, 12 A.L.J. 966=36 A. 573.

RICHARDS, C.J., and TUDBALL, J.

(23) *Pre-emptors and vendee both occupying position of a co-sharer—Oudh Laws Act, S. 59—Pre-emptor vendee, effect of circumstances arising subsequent to decree of first Court in determination of the right of—Co-sharer holding subject to the danger of being attacked by a claim for pre-emption, position of.*

A vendee, defendant in a pre-emption suit, occupied, when that suit was instituted against him, the position of a co-sharer with an absolute

Pre-emption—(Continued).

right of transfer and of enjoyment but subject to the danger of being attacked by a claim for pre-emption by virtue of recent purchases. A decree for pre-emption was passed against him in that suit. Before his appeal came to be decided, a suit for pre-emption in respect of one of the other properties had been brought and had been dismissed and the decree had become final in his favour.

Held, that the vendee and the pre-emptors having become persons equally entitled to purchase the property in dispute before the case was finally disposed of in appeal, lots must be cast under S. 9, Oudh Laws Act, in order to determine which of them shall exercise the right to buy the property.

In a pre-emption suit, in determining the right of the pre-emptor or of the vendee, the appellate Court may consider any circumstances which have arisen during the pendency of the suit, in appeal, even though these circumstances may have come into being subsequent to the decree of the first Court. *Onkar Singh v. Bhagwan Dat Singh*, 17 O.C. 242.

KENDALL, A.J.C.

(24) *Pre-emption, right of—Birt Shankalp granting heritable and transferable rights in lieu of Nazrana and annual rent, effect of.*

Where the superior proprietor of a village executed deeds styled as *Fattas of Birt shankalp* purporting to grant heritable and transferable rights in certain plots in lieu of a Nazrana or premium taken in advance and an annual rent reserved thereby, *held*, that the transactions did not amount to sales so as to give rise to a right of pre-emption. *Data Ram Tiwari v. Deokali Tiwari*, 17 O.C. 299.

STUART and PANDIT KANHAYA LAL, J. C.S.

(25) *Pre-emption—Custom, proof of—Foreclosure decree in case of conditional mortgage—Whether suit can lie.*

A conditional mortgage was executed in 1874. In 1910 a foreclosure suit was brought on the strength of that mortgage which was compromised and the mortgagor gave up his right of redemption. The *Wajib-ul-arz* of the village provided for pre-emption in cases of sales, mortgages with possession and mortgages by way of conditional sale. Basing his claim on the custom set forth in the *Wajib-ul-arz* the plaintiff brought a suit to pre-empt the sale effected by the foreclosure decree:

Held, that the suit could not lie (a).

Held, further, that the issue in a pre-emption case based on custom is not the construction of the *Wajib-ul-arz*. The issue is, "does or does not the custom of pre-emption prevail," the onus lying on the plaintiff to prove the custom. (b) *Hameed-ud-Din v. Ragunath Pershad Miser*, 24 Ind. Cas. 271.

RICHARDS, C.J., and TUDBALL, J.

References:—(a) 27 A.L.J. 12=1 A.L.J. 353 = A.W.N. (1904) 149, R. (b) 12 Ind. Cas. 98=8 A.L.J. 996=33 A. 605, F.

Pre-emption—(Continued).

(26) *Pre-emption—Custom, or contract—Proper issue—Wajib-ul-arz—Evidence.*

In a case of pre-emption based on custom, the issue is not what is the true construction of the particular *Wajib-ul-arz* but, "does the custom of pre-emption exist?" The *Wajib-ul-arz* is a piece of evidence to be carefully considered, but the construction of a particular expression in it is not the issue. *Zulfikar Halder v. Durga*, 24 Ind. Cas. 422.

RICHARDS, C.J., and TUDBALL, J.

References:—12 Ind. Cas. 98=8 A.L.J. 996; 33 A. 605, F.

(27) *Pre-emption—Wajib-ul-arz—Contract—Perfect partition, effect of.*

A *Wajib-ul-arz* contained an agreement as to pre-emption between co sharers. After the preparation of the *Wajib-ul-arz* the village was perfectly partitioned and no fresh contract was entered into:

Held, that the *Wajib-ul-arz* contract as to pre-emption had ceased to be binding on the co-sharers. *Pargas Singh v. Mansab Ali*, 24 Ind. Cas. 416.

RICHARDS, C.J., and TUDBALL, J.

(28) *Pre-emption—Collusive suit—Object to secure the land for the vendee—Desire to annoy and defeat a rival pre-emptor—Effect.*

D sold the land in dispute to K, vendee, for an alleged consideration of Rs. 5,000. On the last day of limitation, H and S, who were proprietors in the village and in the *patti*, brought a suit for pre-emption claiming that the price had not been fixed in good faith and offering to pay Rs. 2,000 or market value. On the same day and immediately after the institution of the first suit, A, brother of the vendor, also instituted a suit for pre-emption offering to pay the full price of Rs. 5,000.

A's right of pre-emption was admittedly superior to that of his rivals, but his claim was dismissed by the lower Courts on the ground that he was acting in collusion with the vendee and in the latter's interest.

Held, on further appeal, that, before dismissing A's suit as being collusive, it must be shown by the strictest evidence that his object was really to secure the land for the vendee, and it was not enough that his motive was to annoy and defeat his rivals. *Held* also that the claim of A should have been decreed. *Amar Singh v. Kishen Singh*, 103 P. R. 1914.

RATTIGAN and SHADI LAL, JJ.

References:—139 P.R. 1894; 87 P.R. 1896; 19 P.R. 1898; 10 P.R. 1902; 67 P.R. 1907; 7 P.R. 1912; 58 P.R. 1912, R.

(29-a) *Pre-emption decrees—Jurisdiction of Court to extend period fixed for payment—Application for extension of time—Civ. Pro. Code, S. 148.*

Held, that a Court has no jurisdiction to extend the period fixed for payment in a pre-emption decree, whether the application for

Pre-emption—(Continued).

extension is made before or after the expiration of the period permitted. *Hasibunnissa (Musammāt) v. Mahmudunnissa (Musammāt)*, 17 O. C. 377.

STUART and KANHAIYA LAL, A.J.CS.

References:—13 O.C. 28; 16 O.C. 5, R.

(28 b) *Pre-emption—Oudh Laws Act, S. 10—Decree for foreclosure in respect of under-proprietary lands—Rent Act (Oudh), Ss. 152 and 154—Statutory liability to pay arrears of rent cast upon transferee and land that came into his possession—Pre-emptor's liabilities to pay arrears of rent recovered from vendee.*

One M a mortgagee obtained a decree for foreclosure in respect of certain under-proprietary lands on the basis of his mortgage, but he failed to give the notice required by S. 10, Oudh Laws Act. At the time of foreclosure there were outstanding certain arrears of rent which in spite of his objections were realised from M by the Taluqdar. Subsequently the appellants instituted a suit for pre-emption and claimed a decree on payment merely of the sum which was found to be due under the foreclosure decree.

Held, that, after M had obtained the under-proprietary tenure by foreclosure, it was impossible for him to escape the statutory liability cast by Ss. 152 and 154 of the Oudh Rent Act both upon the transferee and upon the land which came into his possession.

Held further, that plaintiffs, who are seeking to have themselves placed in the situation in which M stood at the time he obtained foreclosure, cannot avoid any liability to which M was then subject.

Held also, that the payments made by him were in the nature of salvage made to save the property from sale and on that principle also the plaintiffs were bound to pay the amount. *Hazari Lal v. Ram Narain*, 17 O.C. 379.

LINDSAY, J.C.

Reference:—21 C. 142, R.

(29) *Pre-emption—Co-occupant made party to prior mortgage suit—Failure to advance claim for pre-emption—Effect—Right not barred—Fact of being party to such suit—Whether notice—S. 206, Berar Land Revenue Code—Requirements of. Bapu v. Anand*, 9 N.L.R. 143=21 Ind. Cas. 287. See Final Part, 1913, Col. 1009.

(30) *Money deposited in Court as required by the pre-emption decree—Appeal against that decree—Decree-holder of pre-emptor removes a portion of the money deposited—Pre-emption decree finally upheld—Pre-emptor entitled to possession without further payment—Matter Sub-judice—Money lying in Court to the credit and at the peril of the party to whom the Court may direct that it should go. Najib Khan v. Shiva Gopal*, 11 A.L.J. 668=21 Ind. Cas. 67. See Final Part, 1913, Col. 1009.

Pre-emption—(Continued).

(31) *Sale—Specification of shares of vendees but money to be paid expressed in lump sum—Indivisible transaction—Stare decisis—Specification of shares and amount to be paid—Transaction divisible—Persons concealing nature of their transaction—Pre-emptor induced to treat transaction as a whole—Estoppel—Oral evidence to show different nature of transaction not allowed. Maghi v. Narain*, 256 P.L.R. 1913=20 Ind. Cas. 31=165 P.W.R. 1913=6 P.R. 1914. See Final Part, 1913, Col. 1010.

(32) *Wazib-ul-arz—Partition of village in several mahals—Dasturdehi relating to whole village—Suit by co-sharer of one mahal against vendor co sharer of another mahal on ground of nearness in relationship. Yad Ram v. Chhodda Lal*, 11 A.L.J. 766=35 A. 478=21 Ind. Cas. 628. See Final Part, 1913, Col. 1011.

(33) *Custom—Evidence Act—Sales to strangers—Every instance, a material evidence—Vague statement as to sales to strangers, not good evidence. Janki Misar v. Ranno Singh*, 11 A.L.J. 759=35 A. 472=21 Ind. Cas. 72. See Final Part, 1913, Col. 1011.

(34) *Pre-emptor suing jointly with person having no right—Right not forfeited—Plaintiff not born at date of sale, not entitled to pre-empt—Hindu child begotten subsequently born, has all rights of child in existence. Mangli v. Sobha Singh*, 20 Ind. Cas. 272=218 P.W.R. 1913=1 P.L.R. 1914. See Final Part, 1913, Col. 1013.

(35) *What pre-emptor must claim—Mahomedan Law—Zamindar's right to pre-empt house situated in his zamindari. Abdur Rahman v. Hidayatullah*, 20 Ind. Cas. 367=12 A.L.J. 88. See Final Part, 1913, Col. 1014.

(36) *Pre-emption decree—Order dismissing pre-emption suit for non-payment of purchase money within time appealable as decree—Revision against such order not entertainable by second appellate Court. See ACT XVIII OF 1976 (ODH LAWS), No. 7, 24 Ind. Cas. 109.*

(37) *Sharer in the Mahal being related to the vendor—Preferential right of pre-emption over sharer not so related. See ACT XVIII OF 1976 (ODH LAWS), No. 3, 17 O.C. 339.*

(38) *Vendee joining stranger in the purchase whether can resist pre-emption. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 5, 128 P.L.R. 1914.*

(39) *Nature of right of—Right in the land when arises. See ACT II OF 1905 (PUNJAB PRE-EMPTION), No. 8, 218 P.L.R. 1914.*

(40) *Pre-emption—Absence of good faith—Market value where to be allowed. See APPEAL (SECOND APPEAL), No. 5, 76 P.R. 1914.*

(41) *Order dismissing pre-emption suit for non-payment of purchase-money within time whether appealable as decree. See CIV. PRO. CODE (1908), No. 5, 21 Ind. Cas. 193.*

(42) *Mortgage with possession—Mortgagee also co-sharer—Sale of equity of redemption—Suit for pre-emption—Money deposited by pre-emptor and removed by vendee—Pre-emptor*

Pre-emption—(Concluded).

full owner by operation of law—Execution of decree unnecessary. See CIV. PRO. CODE (1908), No. 84, 12 A.L.J. 521.

(43) Object of O. XXI, r. 88, Civ. Pro. Code—Persons entitled to pre-emption—Vendee a complete stranger—Effect. See CIV. PRO. CODE (1908), No. 344, 12 A.L.J. 1148.

(44) Sale clothed as mortgage—Right of pre-emption. See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

(45) Pre-emption—Limitation as against second purchaser of property sought to be pre-empted—Cause of action and relief against vendee's assignee. See LIMITATION ACT (1908), No. 70, 24 Ind. Cas. 116.

(46) Sale by Shia—Suit by Sunni for—Law applicable. See MAHOMEDAN LAW (PRE-EMPTION), No. 2, 12 A.L.J. 813.

(47) Unpaid vendor's lien—Property sold pre-empted—Pre-emptor paying money which vendee was bound to pay—Effect. See TRANSFER OF PROPERTY ACT, No. 44, 12 A.L.J. 921.

(48) Pre-emption money declared to be payable by pre-emptor is not the criterion to determine the course of appeal in land suits. See VALUATION OF SUIT, No. 1, 10 P.L.R. 1914.

(49) Record in *wajib-ul arz* as to custom of pre-emption—Evidentiary value. See WAJIB-UL-ARZ, No. 1, 12 A.L.J. 19.

Pre-emption Act (Punjab).

See PUNJAB ACT II OF 1905.

Prescription.

(1) See EASEMENTS, No. 1, 19 C.L.J. 42.

(2) Right to take water—Extent of right of prescription how measured. See EASEMENTS, No. 5, 20 C.L.J. 97.

Presidency Small Cause Courts Act.

See ACT XV OF 1892.

Presidency Towns Insolvency Act.

See ACT III OF 1909.

Principal and Agent.

(1) Agent's duty to carry out a sale on behalf of principal for particular sum—Acceptance by the agent of secret commission from vendor—Knowledge of agent—Failure to communicate that knowledge to his principal—Commission, right to—Apportionment of remuneration—Interest—Penalty—Higher rate of interest till certain date—Lower rate on punctual payment—Retention of money by agent entitled to interest at the contract rate.

When an agent, who is employed for the single purpose of procuring the sale to his principal of certain property for a specified sum withholds from his principal the fact that on the date of his employment the vendor was willing to part with the property for that sum, and accepts from the vendor a secret commission for bringing about the sale, commits a

Principal and Agent—(Continued).

gross breach of duty towards his principal, so as to disentitle him to any remuneration (a).

Where there is an agreement to pay a single sum as remuneration for doing a specified work, such remuneration cannot be split up, so as to be apportioned between the part of the work found to be legal and the part found to be illegal.

Where a contract of mortgage provides that the mortgagor shall pay interest at the higher rate (24 per cent.) with a proviso that, if no default is made and the instalments are paid punctually, interest at the lower rate (12 per cent.) shall be payable, the provision as to the payment of the higher rate of interest is not by way of penalty and is recoverable (b).

Where an agent retains in his hands a sum of money as interest on the principal amount subsequently found not to be due from the principal to the agent, the principal is entitled to be credited with the amount of interest on the principal amount thus retained by the agent in his own hands and the principal is also entitled to be credited with interest on the principal amount thus retained at the contract rate (c).

Where there is a provision in a document that the principal amount secured thereby should be paid in instalments and on failure to pay on "due date," higher rate of interest should be charged, the word "due date" should be construed as referring not to two instalments only but to all the instalments when they become due. *Abdul Rahman v. D. Rangiah Gounden*, 22 Ind. Cas. 597.

WHITE, C.J., and OLDFIELD, J.

References:—(a) (1905) 1 K.B. 1=74 L.J.B. 68=92 L.T. 20=21 T.L.R. 5, D.; (1903) 2 K.B. 635=72 L.J.K.B. 835=89 L.T. 450=52 W.R. 126=19 T.L.R. 620, F. (b) 18 Ind. Cas. 417=24 M.L.J. 135=13 M.L.T. 20=36 M. 229 (F.B.); 21 Ch. D. 243 (261)=47 L.T. 989=52 L.J.Ch. 145=31 W.R. 214; 5 Ind. Cas. 665=7 A.L.J. 394=32 A. 448, F.; 20 M. 371, F. (c) 16 B. 141, D.

(2) Property purchased by the agent, with principal's money—Liability of the agent to account—Joining of a third person as a vendee.

When an agent uses a debt due to his principal in order to obtain valuable property for himself, he in fact realises that debt for and on behalf of his principal and is liable to account for the same to the principal. It is of no consequence in the transaction for the sale of the property that a third person was joined with him as a vendee. *Birbal v. Kishori Lal*, 12 A.L.J. 469.

RAFIQ and PIGGOTT, JJ.

(3) Suit by principal against his agent for neglect or misconduct—Limitation Act, Arts. 89 and 90—Starting of limitation—From the time the misconduct of agent became known to principal—Is such knowledge to be presumed before getting books of account—Recognised agent—His power,

Principal and Agent—(Continued).

In a suit by a principal against his agent for damages for misconduct and neglect, knowledge of the acts of agent's misconduct can be fully obtained only when the principal gets back his books of account from the agent.

Where, after the termination of an agency, the agent first handed over the books of account to a Panchayat from whom the principal secured them after some time, held that the period of limitation under Art. 90, Limitation Act, for principals's suit against agent for his misconduct would run from the day on which he got the books of account from the Panchayat.

An agent authorized to enter appearance in suits can sign the amended plaint when once the suit has been instituted with the approval of the plaintiff. **P. R. N. Palaniappa Chetty v. P. M. R. M. Firm**, 7 Bur. L.T. 199.

ORMOND and PARLETT, JJ.

- (4) *Agency—Powers of agent—Chetty banking, usage of—Power of attorney—Construction—Surety—Guarantee—Agent's power to give guarantee or sign negotiable instruments—Burden of proof.*

Unless expressly so empowered an agent cannot make his principal a surety for another's loan, nor can he borrow money in his principal's name for another, nor can he thrust a partner upon his principal or sign a promissory note for his principal jointly with another person.

It is not a necessary incident in a Chetty banking and money-lending business that the Chetty must necessarily guarantee another Chetty, that is, it is no part of the Chetty business to stand guarantee for others who are not Chetties.

Powers-of-attorney must be construed strictly and unless an express power is given to an agent to enter into contracts of guarantee on behalf of his principal or to execute negotiable instruments for his principal jointly with others, it rests on the person alleging such power in the agent to show that in fact the agent had authority to enter into such a transaction. **Ramanathan Chetty v. The Bank of Bengal**, 23 Ind. Cas. 516=7 Bur. L.T. 126.

ORMOND and PARLETT, JJ.

- (5) *Principal and Agent—Partnership—Money deposited with manager of business not in course of business—Liability of proprietor—Estoppel.*

The plaintiff sued the defendant on a document which purported to be a receipt in favour of the plaintiff for a certain sum of money as a deposit bearing interest. The amount was stated to be on account of plaintiff's one-third share deposited by his grand-father for the plaintiff during his minority. It was not signed by the defendant but by a person who was alleged by the plaintiff to be the partner of the defendant in a business and who was admittedly acting as its manager. It was not shown that

Principal and Agent—(Continued).

he had received the money and signed the document in the course of the business, but, on the contrary, it was found that the money was advanced to the executant to buy up the business, from the defendant, who was its sole proprietor. It was urged on behalf of the plaintiff (1) that the document was a promissory note; and (2) that the defendant had in correspondence described himself as part-proprietor of the business.

Held, that the document could not be treated as a promissory note and that the plaintiff had no cause of action against the defendant, and that the defendant was in no way estopped by merely describing himself as a part proprietor from showing the true nature of the transaction. **Divan Daya Kishen Kaul v. Frank B. Pool**, 247 P.L.R. 1914=159 P.W.R. 1914.

KENSINGTON, C. J. and SHAH DIN, J.

- (6) *Promissory note executed by agent after settlement of accounts for sum due to principal—Representatives in interest of and surety for deceased agent, suit against, by principal—Surety if entitled to go behind promissory note, and have accounts taken in his presence—Set-off if can be pleaded—Interest when to run from—S. 3, Civ. Pro Code (1881). **Kalanand Singh v. Girdhar Das**, 17 C.W.N. 1060=19 Ind. Cas. 901=19 C.L.J. 122. See Final Part, 1913, Col. 1017.*

- (7) *Servant of plaintiff conveying an order for work to be done to plaintiff under instructions from defendant—Defendant's liability to pay for work done. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 7, 12 A.L.J. 271.*

- (8) *Suit for account against gomastha—Hypothecation of property for due performance of duties—Suit for recovery of amount found due from hypothecated property—Limitation See CIV. PRO. CODE (1882), No. 3, 24 Ind. Cas. 18.*

- (9) *Act done by agent in course of employment—Whether binding upon principal—Presumption by third party that act of Managing Director is regular—Specific performance against Company. See COMPANY, No. 6, 24 Ind. Cas. 209.*

- (10) *Agent compromising without power to do so—Principal not bound. See COMPROMISE, No. 7, 212 P.L.R. 1914.*

- (11) *Sub-agent—Written contract with agent—Exclusive credit given to agent—Parol evidence to prove contract on behalf of principal—Admissibility—Absence of priority of contract with principal—Effect—Contract by agent with stranger—Latter when sub-agent—Principal's right to sue—Defense of set-off and other equities when available. See CONTRACT ACT, No. 96, 27 M.L.J. 501.*

- (12) *Contract by agent—Non-disclosure of principal's name—Agent whether personally liable. See CONTRACT ACT, No. 98, 24 Ind. Cas. 415.*

Principal and Agent—(Concluded).

(13) Lease by agent—Apparent authority—Knowledge of principal if necessary for ratification. See *LEASE*, No. 12, 19 C.W.N. 56.

(14) Nature of relation between. See *LIMITATION ACT* (1908), No. 28, 22 Ind. Cas. 936.

Privy Council Appeals Act.

See *ACT VI OF 1874*.

Privy Council Rulings.

Binding nature of. See *HINDU LAW (MAINTENANCE)*, No. 2, 60 P.L.R. 1914.

Probate.

(1) *Probate—Revocation—Citing person in Probate proceeding, whether makes him defendant—Limitation Act* (1908), *Sch I, Art. 164—Probate and Administration Act* (V of 1881), *Ss. 50, 83—Absence of citation or failure to serve notice, whether sufficient for revocation of probate—Proof in solemn form.*

Merely citing a person in a Probate application does not make him a defendant. Under *S. 83* of the *Probate and Administration Act*, the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant.

The limitation laid down in *Art. 164* of the *Limitation Act* applies to the case of a defendant only. Therefore, it does not apply to the case of an application for revocation of the Probate of a will, by a person who was not cited in the Probate proceeding, because he was not a defendant in the proceeding.

The absence of citation or failure to serve notice is not sufficient for revoking a probate granted *ex parte*. The proper course is to give the executor an opportunity for proving the will in solemn form. Should the will be found to be forged, an order for revocation will follow. *Abhoya Charan Basak v. Srimati Saroja Sundari Basak*, 24 Ind. Cas. 27=41 C. 819.

IMAM and CHAPMAN, JJ.

(2) *Caveat if may be entered by widow of a pre-deceased son—Maintenance of widow of pre-deceased son, if may be affected by probate proceedings—Obligation of the heir—Sufficient interest. In the goods of Gobindra Chandra Babaiee*, 17 C.W.N. 1141=23 Ind. Cas. 539. See *Final Part*, 1913, Col. 1019.

(3) *Application for probate—Jurisdiction of District Judge to determine question of title. Cullen v. Mrs. Elkins*, 9 N.L.R. 152=21 Ind. Cas. 599. See *Final Part*, 1913, Col. 1019.

(4) *Application for probate—Caveator—Locus standi—Order refusing Caveator to oppose—Appeal, if lies. Sri Proshad Narain Singh v. Musammatt Dulain Genda Koer*, 18 C.L.J. 612=22 Ind. Cas. 276. See *Final Part*, 1913, Col. 1019.

(5) *Probate proceeding—Costs—Pleader's fee, assessment of—General Rules and Circular*

Probate—(Concluded).

Orders of the High Court, Appellate Side, Vol. I—Chap. VI, Rules 36-A, 42-A—Chap. X, Rule 26—Probate and Administration Act (V of 1881), *S. 83, Baijnath Prasad Singh v. Sham Sunder Kuer*, 18 C.L.J. 643=22 Ind. Cas. 402=41 C. 637. See *Final Part*, 1913, Col. 1020.

(6) Decision of Probate Court—Whether can be destroyed by adjudication in a regular suit. See (*BOMBAY ACT*) *ACT II OF 1863 (SUMMARY SETTLEMENT)*, No. 1, 16 Bom. L.R. 164.

(7) Executor applying for probate—Effect. See *CIV. PRO. CODE* (1908), No. 378, 16 M.L. T. 547.

(8) Probate case—Decree that costs should come out of estate—Execution of decrees—Mode of execution. See *COSTS*, No. 4, 24 Ind. Cas. 214.

(9) Probate proceeding—Refusal of probate—Effect—Suit—*Res judicata*. See *EVIDENCE ACT*, No. 27, 16 Bom. L.R. 5.

(10) Mohunt purporting by a document to appoint his successor and to make over to him the Asthal properties, etc.—Document whether a will—Probate—Application for probate—Court will not go into question of title. See *WILL*, No. 8, 20 C.L.J. 307.

Probate and Administration Act.

See *ACT V OF 1881*.

Procedure.

(1) Right of parties to waive rules of procedure. See *EVIDENCE ACT*, No. 1, (1914) M.W.N. 931.

Profession Tax.

(1) District Judge of Cuddalore—Stay for over 60 days in Kodaikanal—Payment of profession tax in Kodaikanal—Liability to pay in Cuddalore. See *MADRAS ACT IV OF 1884 (DISTRICT MUNICIPALITIES)*, No. 3, (1914) M.W.N. 171.

(2) Who is a money lender—Exemption from. See *MADRAS ACT IV OF 1884 (DISTRICT MUNICIPALITIES)*, No. 2, 16 M.L.T. 98.

Professorship.

Honorary Professorship—Conditional appointment—Right to lecture, if a personal right, and enforceable by Mandamus. See *MANDAMUS*, No. 1, 18 C.W.N. 430.

Promissory Note.

(1) *Pro-note—Payable to specified person—Onus of proving consideration—Negotiable Instruments Act XXVI of 1881, Ss. 13 and 118—Onus wrongly thrown—Revision.*

Held, that, a pro-note simply payable to a specified person is not negotiable within the meaning of *S. 13* of *Act XXVI of 1881*; therefore, the onus of proving that the debtor received the consideration lies on the creditor as the presumption of *S. 118* of the Act does not apply to such a document. An erroneous view taken by the lower Courts as to the onus is a good ground of revision under *S. 70 (1) (a)*,

missory Note—(Continued).

Act XVIII of 1894. **Tirath Ram v. Sardar Autar Singh**, 8 P.W.R. 1914 = 32 P.L.R. 1914 = 22 Ind. Cas. 861.

SCOTT-SMITH, J.

Reference :—O.R. 1091 of 1904, F.

- (2) *Promissory note—Not given as security for previous debts—"Rukka indul talub," meaning of—Construction of document.*

Where a note, given as a security for sums already due but not payable on demand, contained the words "*rukka indul talub*."

Held, that the note being a new contract, altering the terms and conditions upon which the money was previously payable, was a promissory-note. **Abdul Ghani Khan v. Abdul Majid Khan**, 21 Ind. Cas. 199.

SABONADIÈRE, A.J.C.

References :—3 O.C. 195; 22 B. 986, D.

- (3) *Promissory note—Debt due by two persons—Intention of parties that both should execute the note—Signature by only one—Invalidity of the note even against person signing—Principle of invalidity by material alteration—Applicability to cases of forgery at the time of making the note.*

Where two persons were intended to be jointly liable for a debt and were together to execute a promissory note for the debt, but only one of them signed the instrument.

Held that the promissory note cannot be enforced even against the person who had already signed it (a).

The principle that a material alteration invalidates the whole note applies also to a case where there seems to have been no alteration after the note came into existence, but the note was created in the first instance itself with a forged signature of a material character. **Amrithan Pillai v. Nanjah Gounden**, 15 M. L.T. 205 = 26 M.I.J. 257 = (1914) M.W.N. 250 = 23 Ind. Cas. 464.

SADASIVA IYER, J.

Reference :—(a) 25 M. 389, F.

- (4) *Promissory note—Execution of, in favour of a deceased member of joint Hindu family—Payee and one other member alone of the family entitled to the benefit of it—Suit by the other member or by all surviving members—Maintainability.*

Where a promissory note taken in the name of a deceased Hindu, who has left a widow, was found to be taken for the joint benefit of the deceased and the first plaintiff who constituted a family partnership, and it was not found to be for the benefit of the other members in the joint Hindu family to which they belonged.

Held that neither the first plaintiff nor all the surviving members of the family could bring a suit upon the promissory note. **Gopala**

Promissory Note—(Continued).

Aiyengar v. Venkatakrishna Aiyengar, 26 M. L.J. 224 = 23 Ind. Cas. 612.

SANKARAN NAIR and AYLING, JJ.

Reference :—30 M. 88, R.

- (5) *Promissory note—Giving evidence, only consideration—Agreement void, being opposed to public policy.*

In a suit brought by A on a promissory note, executed in his favour by B in consideration of A's friend giving evidence for B in a former suit to which the latter was a party, *held*, the suit was rightly dismissed, as the agreement is void as opposed to public policy and also as not supported by good consideration. **Adiraja Chetty v. Vittil Bhatta**, (1914) M.W.N. 322 = 23 Ind. Cas. 540.

SADASIVA IYER, J.

Reference :—127 R.R. 604, D.

- (6) *Pro-note on an unstamped paper—Whether admissible—Is there independent cause of action?*

Where the plaintiff sued for money lent but it was proved that at the time of the transaction defendant executed a pro-note which was written on an unstamped paper.

Held, that the said unstamped document could not be admitted in evidence or acted on, on account of its being insufficiently stamped, and plaintiff can succeed only if he can show and that he has a cause of action independently of the document.

Held, further that, in the case, the promissory note was the contract and S. 91 of the Evidence Act debarred the production of any other evidence but the writing itself. **Bally Singh v. Bhugwan Dass Kalwar**, 7 Bur. L.T. 95 = 23 Ind. Cas. 975 = 7 L.B.R. 101.

TWOMEY, J.

- (7) *Negotiable instrument—Promissory note, silent about interest, oral agreement as to, if provable—Negotiable Instruments Act, S. 80—Evidence Act, S. 92 (2).*

Where there was no mention of interest in a promissory note and it was sought by the plaintiff to prove that by a contemporaneous oral agreement it was settled between the plaintiff and the defendant that interest would run at the rate of 5 per cent. per mensem :

Held, that under S. 92 (2), Evidence Act, the plaintiff was not entitled to prove any such oral agreement as to the rate of interest.

Where the defendant admitted in his written statement that he had verbally agreed to pay interest on the promissory note at the rate of 12 per cent. per annum, S. 80 of the Negotiable Instruments Act was no bar to the interest being decreed at that rate. **Lachmi Chand Jawar v. Hemendra Prasad Ghosh**, 18 C.W.N. 1260.

JENKINS, C.J., and WOODROFFE, J.

- (8) *Promissory note—Endorsement for collection, what constitutes—Negotiable Instruments Act (XXVI of 1881), S. 78.*

Promissory Note—(Continued).

Where, from the terms of an indorsement on a promissory note, no accountability can be inferred between the indorser and indorsee, it is not an indorsement for collection merely, and the holder alone can bring a suit on the note. **Patoju Sangayya v. Patoju Sanyasi**, 13 Ind. Cas. 545.

SESHAGIRI AIYAR, J.

References:—30 M. 88=1 M.L.T. 377=16 M.L.J. 508 (F.B.), F.

- (9) *Pro-note alleged to have been executed by two persons, but found not to have been executed by one of them or with his consent—Admission of the other that both executed—Liability of person admitting.*

A pro-note was alleged to have been executed by the 1st and 2nd defendants, but the lower Court found that it was not executed on the date it bore and that it was not executed by the 2nd defendant or with her consent. The 1st defendant was examined in the case and he made the admission that he and the 2nd defendant executed the note to the plaintiff and that he received the amount. The lower Court dismissed the suit, holding that the plaintiff cannot get a decree against the 1st defendant either.

Held, the plaintiff must be given a decree as against the 1st defendant upon his own admission. **Tanugunta Brahmaya v. Sangam Rami Reddi**, 16 M.L.T. 185=(1914) M.W.N. 705.

HANNAY, J.

Reference:—26 M.L.J. 257, D.

- (10) *Promissory note—Execution by karnavan—Signed not as karnavan—Liability of tarwad property.*

Where a suit is based upon a promissory note executed by the deceased karnavan, who does not sign himself as karnavan, no decree can be given against the tarwad property. **P. Govindan Nair v. K. Nannu Menon**, (1914) M.W.N. 782=27 M.L.J. 595.

WALLIS, C.J., LYLING and SESHAGIRI IYER, JJ.

- (11) *Material alteration—Negotiable Instruments Act, S. 87. Lakshammal v. Narasimharaghava Iyengar*, (1913) M.W.N. 833=14 M.L.T. 398=25 M.L.J. 572=21 Ind. Cas. 445. See Final Part, 1913, Col. 1021.

(12) *Varthamanam—Construction of document—Unconditional undertaking to pay—Document unstamped—Admissibility in evidence—Loan and execution of document simultaneous—Whether separate cause of action lies for money had and received—S. 91, Evidence Act. Muthu Sastrigal v. Viswanatha Pandara Sannadhi*, 14 M.L.T. 520=(1914) M.W.N. 58=26 M.L.J. 19=21 Ind. Cas. 864. See Final Part, 1913, Col. 1022.

(13) *Promissory note—Invalidity for want of stamp—Suit on original cause of action—When lies—Agreement to pay—When can be inferred. See ACCOUNTS, No. 3, 15 M.L.T. 243.*

Promissory Note—(Concluded).

(14) *Making over of pro-note without endorsement if constitutes valid transfer or gift—Transfer of chose-in-action. See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS), No. 9, 18 C.W.N. 494.*

(15) *Pro-note payable to 'so and so or order or bearer'—Pro-note void—Suit on original consideration. See ACT III OF 1905 (PAPER CURRENCY), No. 1, U.B.R. (1914), 1st Qr., p. 13.*

(16) *Agreement admitting liability and prescribing payment of pro-notes—Pro-notes materially altered—Suit upon pro-notes dismissed—Suit upon agreement if lies. See CEYLON CIV. PRO. ACT, No. 1, 18 C.W.N. 617.*

(17) *Pro-notes given in discharge of certain debt—Suit on—Subsequent suit on debt due—Cause of action whether different. See CIV. PRO. CODE (1908), No. 241, 12 A.L.J. 959.*

(18) *Pro-note executed for compounding a charge of grievous hurt—Legality. See CONTRACT, No. 4, 37 M. 385.*

(19) *Acknowledgment by one of two promisors when binding upon both—Series of endorsements—Effect. See LIMITATION ACT (1908), No. 61, (1914) M.W.N. 792.*

(20) *Promissory note—Two impressed sheets used for making up stamp duty payable—Instrument wholly written on one sheet—Not duly stamped—Inadmissibility in evidence. See STAMP ACT, No. 6, 15 M.L.T. 203.*

Prosecution.

(1) *Agreements to stifle prosecution in respect of an offence of a public nature—Validity—Compromise in respect of offences of a public nature but involving civil liability to an injured party—Validity. See AGREEMENT, No. 1, 17 O.C. 213.*

(2) *Prosecution when commences—Who is a prosecutor. See MALICIOUS PROSECUTION, No. 1, 20 C.L.J. 518.*

Prostitute.

Rights of sons of. See HINDU LAW (SUCCESSION), No. 5, (1914) M.W.N. 672.

Provincial Insolvency Act.

See ACT III OF 1907.

Provincial Small Cause Courts Act.

See ACT IX OF 1887.

Public Demands Recovery Act.

See BENGAL ACT I OF 1895.

Public Record.

Report made by kotwal in 1840 on reference by Political Agent—Public record of a public document—Admissibility in evidence. See EVIDENCE, No. 2, 12 A.L.J. 179.

Public Right.

Previous suit by two persons in respect of public right—Subsequent suit by nine persons—Whether barred. See CIV. PRO. CODE (1908), No. 23, 12 A.L.J. 643.

Public Road.

- (1) *Public road—Metalled and unmetalled parts—Right of public way.*

All the ground over which the public have a right of way, whether metalled or unmetalled is a public road. *The Municipal Board of Agra v. Sudarshan Das Shastri*, 12 A.L.J. 1187=37 A. 9.

RICHARDS, C.J., and TUDBALL, J.

- (2) *Suit for removal of obstruction to a—Proof of special damage necessary.* See *APPEAL (GENERAL)*, No. 6, 22 Ind. Cas. 916.

- (3) *Obstruction to Public Highway—Special damage to be proved.* See *BUILDING*, No. 1, 12 A.L.J. 1026.

- (4) *Public pathway—Adverse possession of a portion thereof—Proof of possession for 12 years—Onus on Government to prove possession within 60 years.* See *ADVERSE POSSESSION*, No. 9, 27 M.L.J. 299.

Punjab Civil Justice Administration Rules.

S. 8, cl. 7. See *MORTGAGE (FORECLOSURE)*, No. 1, 116 P.L.R. 1914.

Puo-Brahmins.

Custom — *Puo-Brahmin* — How far affects status of son. See *HINDU LAW (ADOPTION)*, No. 6, 27 M.L.J. 306.

Purdanashin Ladies.

See *PARDANASHIN LADIES*.

Purohitam.

Purohitam Office—Monopoly in respect of—Opposed to public policy. See *HINDU LAW (RELIGIOUS OFFICES)*, No. 1, 26 M.L.J. 482.

Putni.

- (1) *Putni, sale of, for arrears—Khas possession, suit for, by auction-purchaser—Bengal Tenancy Act (VIII of 1885), S. 167—Encumbrances, notices for annulment of—Mode of service when addressed to several persons—Non-joinder of party—Addition of party-defendant at hearing of appeal, effect on other defendants—Prejudice, absence of.*

In a suit for *khas* possession of certain mouzabs comprised in a certain *putni* taluk purchased by the plaintiffs at an auction-sale under a decree for rent obtained by the zemindar, the defendants, who with one N claimed to be *dur-putnidar* of the mouzabs in suit, having objected that N had not been joined as a party, the suit was dismissed by the subordinate Judge *inter alia* on the ground of non-joinder of N, but on the plaintiff's application to the High Court at the hearing of their appeal from the decision of the Subordinate Judge, N was ordered to be made a party-defendant to the suit which was remanded to the lower Court. N did not appeal against the decision of the High Court.

Held, that N was not at any time a necessary party to the suit as far as the other defendants were concerned, and they were not prejudiced by the fact that N was added as a

Putni—(Concluded).

defendant when the suit was in appeal, and the omission to make N an original defendant did not make the suit bad for non-joinder as against the other defendants who were the appellants before the Privy Council.

That, the plaintiffs having proved that the notices of annulment of incumbrances were served on the defendants in the manner prescribed for service of summons in the Civ. Pro. Code, the notices were duly served in accordance with Government Rules made in that behalf. *Anandagopal Gossain v. Nafar Chandra Pal Chowdhuri*, 18 C.W.N. 259=26 M.L.J. 86=21 Ind. Cas. 928 (P.C.).

LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI.

- (2) *Putni tenure—Sub-division—Rent receipts showing shares of tenants and rent.* *Abinash Chandra Chowdhury v. Purnananda Khan*, 18 C.L.J. 174=21 Ind. Cas. 420. See *Final Part*, 1913, Col. 1028.

- (3) *Putni tenure—Purchase at sale for arrears of rent—Notice to darpatnidar annulling darpatni—Darpatnidar a Hindu lady—Her refusal to give up darpatni—Suit by purchaser for possession and mesne profits—Lady's death during litigation—Substitution of her sons as defendants—Mesne profits—Son's liability to what extent limited to assets received from lady up to lady's death—Personal liability for subsequent mesne profits—Bengal Tenancy Act (VIII of 1885), S. 167. *Nafar Chandra Pal v. Kailini Kumar Lahiri*, 16 Ind. Cas. 205=18 C.W.N. 542. See *Final Part*, 1913, Col. 1029.*

- (4) *Sale of Putni mahal for rent—Purchase by executor of deceased durputnidar's estate in his personal capacity—Application for setting aside sale by executor as such and by purchaser in personal capacity—Ss. 311 and 313, Civ. Pro. Code.* See *CIV. PRO. CODE (1882)*, No. 22, 19 C.W.N. 152.

- (5) *Putni put up to sale in execution of rent-decree—Darosat talukdar making payment of decretal amount and averting sale—His right to recover from judgment-debtors.* See *CONTRACT ACT*, No. 56, 21 Ind. Cas. 102.

- (6) *Putnidar if a proprietor.* See *REGULATION III OF 1872 (SONTHAL PARGANAS SETTLEMENT)*, No. 11, 20 C.L.J. 112.

- (7) *Putni and mukurari—Mukurari created before Transfer of Property Act—Both interests kept alive and separate—Acquisition of both interests piecemeal at different times—Merger—Putni—Kabuliat—Construction—Land acquired for "culverts, embankments and roads"—Words whether illustrative or exhaustive.* See *TRANSFER OF PROPERTY ACT*, No. 6, 22 Ind. Cas. 966.

Railway.

- (1) *Negligence—Railway Company—Loss of goods by fire—Liability of the Railway Company—Liability of bailee—Contract Act*, Ss. 151, 152.

Railway—(Concluded).

When a person has entrusted goods to a Railway Company for carriage, and these goods are lost, damaged or destroyed, while in the possession and under the control of the Railway, the fact of the loss, damage or destruction is enough to cast upon the Company the burden of proving that that loss was not due to any negligence on its part. The standard of negligence is given in Ss. 151 and 152, Contract Act, but no general rule universally applicable can be laid down as a rule of law defining the amount and quality of the proof in every case which will discharge the Railway Company's *onus*.

- A Railway Company, when sued for loss of goods entrusted to it for carriage, may exonerate itself by proof of general care, in dealing with large quantities of similar goods, and proving that that amount of care is usually sufficient to prevent loss, damage or destruction (a).

A decree, however, ought not to be given against a Railway Company sued as bailee for loss, damage or destruction, of goods bailed to it, the moment it admits that it is unable to assign the *vera causa* of loss.

A Railway Company is as bailee primarily liable for the loss by fire of goods entrusted to it for conveyance; but it may exonerate itself in two ways. It may, while ignorant of the cause of the fire, show, if it can, that that could not possibly be attributable to itself, that, in other words, it was altogether external and beyond the Company's control. Secondly, the bailee while ignorant of the *vera causa* might point to the fact that he had taken such precautions against risk and dealt with the goods entrusted to him with such care, that, whatever the cause might be and although attributable to his own act, yet it must be presumed to have been of such an uncommon, or of such an unpreventable, kind that he ought not to be held responsible for it. **Hirji Khetsey & Co. v. B. B. & C. I. Ry Co.**, 16 Bom. L.R. 467.

BEAMAN, J.

Reference :—(a) 14 Bom. L.R. 165 = 37 Bom. 1, F.

(2) Attachment of a security deposit of a railway employee in the hands of the auditor—Lien of the Railway company on such deposit—Disbursing officer's duty on receipt of a prohibitory order—Result of disregarding such order. See ATTACHMENT, No. 1, 7 Bur. L.T. 238.

(3) Goods consigned to buyer by railway—Suit for balance of account—Cause of action—Jurisdiction. See CONTRACT ACT, No. 78, 24 Ind. Cas. 423.

(4) Gate at level-crossing left open—Evidence of negligence—Liability of Railway Company. See NEGLIGENCE, No. 1, 18 C.W.N. 325.

Railway Receipt.

(1) *Railway receipt—Document of title—Negotiability—Endorsee, can sue—Railway Company for loss of goods.*

A railway receipt is a mercantile document of title. The endorsee of the receipt has, therefore, sufficient interest in the goods covered

Railway Receipt—(Concluded).

by it to sue the Railway Company for their loss. **Dolatram Dwarakadas v. The Bombay-Baroda and Central India Ry. Co.**, 16 Bom. L.R. 525 = 38 B. 659.

BEAMAN and HAYWARD, JJ.

Reference :—15 Bom. L.R. 890, F.

(2) *Railway receipt—Assignment of—Assignee from original buyer—Right of such person—Stoppage in transit—Not protected from the exercise of the right by seller. See CONTRACT ACT, No. 80, 7 S.L.R. 163.*

Railways Act.

See ACT IX OF 1890.

Ratification.

Void contract whether can be ratified. See LIMITATION ACT (1908), No. 140, 10 N.L.R. 133.

Receiver.

(1) *Civ. Pro. Code (1882), S. 503, powers under—Receiver, whether can bring and defend suits—Suit against Receiver, without leave of the Court, whether maintainable.*

By an order of appointment a Receiver was given full powers under S. 503 of the Code of Civil Procedure.

Held, that the words of the authority must be construed to have conferred upon the Receiver the power of bringing and defending suits as regards the property of which he was appointed the Receiver.

A suit brought against a Receiver ought not to be dismissed on the ground that it was instituted against an officer of the Court without the leave of the Court. **Satya Kirpal Banerjee v. Satya Bhupal Banerjee**, 19 C.L.J. 191 = 18 C.W.N. 546 = 22 Ind. Cas. 623.

FLETCHER and CHATTERJEE, JJ.

Reference :—32 C. 27, R.

(2) *Suit by present Receivers against former Receivers—Maintainability—Practice.*

The present Receivers of an estate sued the former Receivers for a certain sum, alleging that the defendants had failed to realize it and hand over to plaintiffs as part of the estate, held that such a suit does not lie. **K. B. Dutt v. Shamal Dhone Dutt**, 41 C. 92 = 24 Ind. Cas. 768.

FLETCHER, J.

(3) *Contempt—Receiver—Obstruction of Receiver in discharge of duty—Stranger in possession not to obstruct—Receiver but to apply to Court for redress of grievance—Costs against persons obstructing Receiver.*

The right of a stranger in possession of property to continue to possession is not affected by an order of a Court appointing a Receiver; but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court to redress his grievance. If he interferes with the

Receiver—(Continued).

Receiver, he does so at his peril. The Court will not permit the Receiver appointed by its authority to be interfered with or dispossessed of the property, he is directed to receive, by any one, even though the order appointing him may be perfectly erroneous (a).

A person, who is guilty of a contempt of the Court's authority by obstructing a Receiver in the discharge of his duty, may be made to pay the costs as those of a hearing and not of a motion. **Roy Chowdhury v. Nolini Prokash Sen**, 22 Ind. Cas. 417.

IMAM, J.

References:—(a) 20 Beav. 332 (354); 24 L.J. Ch. 540=1 Jur. (N.S.) 529; 3 W.R. 381; 52 Eng. Rep. 630; 109 R. R. 442, F.

(4) *Appeal—Receiver—Remuneration—Order increasing remuneration, whether appealable—Civ. Pro. Code, 1903, O. XL, rr. 1, cl. (d), 2, O. XLIII, r. 1, cl. (s).*

A Court fixed the amount of remuneration to be paid to a Receiver. Subsequently, on the representation of the Receiver, the amount of the remuneration was raised :

Held, that the second order must be taken to have been made under O. XL, r. 2, and not under cl. (d) or r. 1 of the Order, and that, therefore, it was not appealable under O. XLII, r. 1, cl. (s). **Thomas Cunliff Tweedle v. Pooka Khatun**, 22 Ind. Cas. 352.

CARNDUFF and RICHARDSON, JJ.

(5) *Receiver—Valid discharge—Receipts granted by minor—Payment in excess of sanctioned amount of monthly expenses—Minor's benefit—Receiver borrowing money to release minor from police custody—Payment to certain person for minor—Receipt given by minor—Minor, if liable—Payee, if liable—Expenses incurred—Details of expenditure—Over charges in litigation—Receiver, if entitled—Receiver, if to be reimbursed for payment made to persons appointed without Court's leave—Excess deposit at the instance of Receiver—Liability of Receiver—Borrowing at high rate of interest on account of Receiver's interference—Person damnified, remedy of.*

Receipts granted by an infant for payment made to him by the Receiver in excess of the sanctioned amount of monthly expenses and which were not shown to be applied for his benefit, do not constitute a valid discharge, and neither the minor nor his representative is liable to be charged with the sums so advanced.

An amount borrowed at a high rate of interest by the Receiver and paid to a certain person as a bribe to the police to obtain a release of the minor from custody, for which a receipt was taken from him (the minor) and the money was credited in his (minor's) accounts, is, as regards the minor, an unauthorised expenditure and the Receiver is not entitled to set up a claim as to the amount against the payee.

Receiver—(Continued).

It is not sufficient for the Receiver merely to show that he paid certain sums as litigation expenses. The Receiver is bound to furnish details of expenditure.

A Receiver is not entitled to charges incurred for paying the salary of certain officers, not necessary for discharging the duties of the office, and appointed without the leave of the Court.

A Receiver is improperly putting forward a claim for a larger amount than is legitimately due to him, is liable, when his accounts are adjusted, for interest upon the excess deposited.

A applied for the discharge of the Receiver appointed to his estate. The Court directed that the estate would be released from the custody of the Receiver as soon as his dues were brought into Court. A endeavoured to raise money with a view to make a deposit. While negotiations were in progress, the Receiver wrote a letter to the person who was about to advance the money with a view to dissuade him from the transaction. A ultimately raised money on a high rate of interest and the deposit was made :

Held, that an enquiry as to the raising of loan at a high rate of interest due to the intervention of the Receiver, was foreign to the matter relating to the rendering of accounts by the Receiver, and if A had been damnified by reason of his improper conduct, a separate suit should be instituted for the determination of the right and liabilities of the parties. **Baroda Kant Sarkar v. Rashmani Dasi**, 20 C.L.J. 113.

MOOKERJEE and BEACHGROFT, JJ.

(6) *Surety of a Receiver—Liability, enforcement of—Civ. Pro. Code (1908), S. 145—Interest on balance improperly retained—Costs of proceeding in Court—Receiver's default—Surety's liability on the bond of a Receiver conditioned for the due discharge of his duties—Particular liability incurred by Receiver, determination of, test for—Surety's remedy.*

A surety of a Receiver is liable, to the extent of the amount secured by his recognizance, for the payment of interest on balances improperly retained by the Receiver, as also for the costs of proceedings in Court, necessarily or properly incurred in consequence of the Receiver's default such as the costs of a proceeding to take accounts, of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance (a).

The liability of a surety upon the bond of a Receiver conditioned for the due discharge of his duties is limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as Receiver, in other words, the surety is responsible only in respect of liability incurred by the Receiver in his capacity as Receiver (b).

Receiver—(Continued).

To determine whether a particular liability has been incurred by the Receiver in his capacity as Receiver, the test to be applied is, could the Receiver be made accountable in that respect in the account proceedings; if he could not, the surety is not liable, if he could be held liable in that proceeding as Receiver, the surety is liable. A surety of a Receiver, after satisfaction of the claim of the person to whom the latter was bound to pay, stands in his place to the extent of the payment made by him and is to be reimbursed from the sums ordered to be paid to the Receiver, without derogation of his right to sue the Receiver (c). **Rashmi Dasi v. Baroda^o Kant Sarkar and Shama Kant Chatterjee**, 20 C.L.J. 123.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 9 Ir. Eq. Rep. 285; 3 J. & L. 251, R. (b) 2 Ch. 120; 2 K.B. 649 R. (c) Cooper 61, 3 Ves. & B. 134; 2 Ch. 470; 5 Ir. Eq. 404, R.

(7) **Receiver—Mortgage decree—Civ. Pro. Code (1882), S. 503, Civ. Pro. Code (1908), O. XL, r. 1.**

Oldfield, J.—A simple mortgagee can be granted equitable relief by way of a receiver to collect rents and profits.

Sadasiva Iyer, J.—O. XL, r. 1 of Civ. Pro. Code (1908), gives the widest power to a Court to appoint a receiver of any property, whenever it appears to the Court to be just and convenient, unlike S. 503 of Civ. Pro. Code (1882) which gave power to the Court to appoint a receiver only when it was necessary for the realization of a property the subject of a suit or attachment. Where it is not shown that the personal remedy against the mortgagor is not barred, the Court is not competent to appoint a receiver of the rents and profits and it is also an arguable point whether a compromise decree for sale of the mortgaged properties can be followed by a supplemental personal decree for the balance of the decree amount. **Sri Rajah Inguirtil Venkata Rajagopala Suya Row Bahadur v. K. Baswi Reddy**, (1914) M.W.N. 771=16 M. L.T. 407.

OLDFIELD and SADASIVA IYER, JJ.

(8) **Receiver—Partition suit—No exclusive occupation by one party—Courses open to Court in appointing Receiver—Party to suit, if and when can be appointed Receiver.** **Suprasanna Roy v. Upendra Narain Roy**, 19 C.L.J. 638=18 C.W.N. 553=22 Ind. Cas. 601. See Final Part, 1913, Col. 1032.

(9) **Appointment of Receiver when justifiable—Object of appointment.** See CIV. PRO. CODE (1908), No. 435, 18 C.W.N. 337.

(10) **Suit by Receiver for possession of immoveable property—Maintainability—Rights and duties of Receiver—Omission of Receiver to obtain leave to sue—Effect.** See CIV. PRO. CODE (1908), No. 434, 13 C.W.N. 45.

(11) **Receiver appointed by the Court, interference with, while discharging his duty—**

Receiver—(Concluded).

Interference by one not a party to the suit if contempt of Court—Strangers to the suit, duty of, when affected by order appointing Receiver. See CONTEMPT OF COURT, No. 1, 18 C.W.N. 289.

(12) **Receiver appointed in partition or administration suit—Power to acknowledge debt—Effect of acknowledgment.** See HINDU LAW (JOINT FAMILY), No. 11, 16 M.L.T. 489.

(13) **What amounts to an act of waste by a Hindu widow—Receiver when may be appointed.** See HINDU LAW (WIDOW), No. 15, 16 M.L.T. 26.

(14) **Rent paid in advance to the owner of the premises—Such advance a condition precedent of letting the premises—Receiver subsequently appointed for the property—Right of Receiver to claim the rent again.** See LANDLORD AND TENANT, No. 20, 7 Bur. L.T. 139.

Record of Rights.

(1) **Publication of—Presumption.** See ACT VIII OF 1885 (BENGAL TENANCY), No. 56, 23 Ind. Cas. 416.

(2) **Burden of proof to show entry incorrect.** See ACT XI OF 1898 (C. P. TENANCY), No. 2, 23 Ind. Cas. 604.

(3) **Entry in—Presumption.** See ACT VIII OF 1885 (BENGAL TENANCY), No. 55, 23 Ind. Cas. 615.

Records.

Court's power to construct records disappearing from its custody. See CIV. PRO. CODE (1908), No. 93, 16 M.L.T. 399.

Register of Births and Deaths.

Kept by illiterate chowkidar—Entries written to his dictation—Corroboration. See EVIDENCE ACT, No. 81, 12 A.L.J. 945.

Registration.

(1) **Hindu law—Document merely declaring the divided status of family—Whether registrable—Civ. Pro. Code (1908), O. XXI, r. 103—Civ. Pro. Code (1882), S. 335—Art. 11, Limitation Act—Undivided share in joint family purchased in Court auction—Effect of symbolical delivery—Suit for partition and separate possession—Limitation.**

Plaintiff was the purchaser from one K of his interests in the suit property which he obtained by purchase in Court auction in execution of his decree in another suit. That suit was brought against one member of an undivided family for his one-third share in four items and for one item of self-acquisition. The plaintiff in that suit having purchased these items in Court auction on 9-9-1905 applied for delivery of possession of the same, and was referred to a regular suit on 7-9-1906. He sold his right to the present plaintiff on 11-12-1907. The present suit was brought on 12-10-1908 for possession of the plaintiff's 1/3 share in 4 items after partition, and for the whole of the 5th

Registration—(Continued).

item, those being the properties which were purchased by K in Court auction.

Held, per Spencer, J.—That the order of 7-9-1906 need not be set aside by a suit, and the Art. 11 of the Limitation Act and O. XXI, r. 103, Civ. Pro. Code, do not bar the defendants from setting up the plea of division in this suit.

Per Sadasiva Iyer, J.—Mere formal possession of an undivided share or of a mere equity of redemption in lands which are in the actual possession of others, will not constitute such a dispossession of any person other than the judgment-debtor as would oblige such a person to bring a suit within a year of the order passed in the auction-purchaser's favour under S. 335, Civ. Pro. Code (1892), at the risk of his being bound by the findings in that order if such a suit was not brought.

A document was composed, first, of lists of properties which were in possession of the different members of the undivided family before division and thus were available for division. At the end all the properties were clubbed together and the total value was stated as well as the value of each share. Then a note followed: "In the presence of the witnesses named hereunder we divided." Below this all the three members of the family signed and the signatures of the witnesses followed beneath.

Held, per Spencer, J.—That the document was a record or memorandum of the property subjected to a division which took place on the date on which it was written, and that, as it merely declared the divided status of the family, it did not require registration.

Per Sadasiva Aiyar, J. (contra).—The document clearly declares that, as regards certain immoveable properties, the parties to the document have no longer a joint interest therein with rights of survivorship. Its clear result according to its terms seems to be that no portion of the lands mentioned in it is thereafter jointly owned by all the parties to it. No doubt, it does not state which particular land was thereafter to be enjoyed separately by which particular co-parcener, or whether the entire land was taken by one or more co-parceners alone separately or in separate rights or as tenants in common, but it does extinguish the joint rights in immoveable property which formerly existed. The document therefore required registration. *Ayyakutti Mukundan v. Periaswami Koundan*, 15 M.L.T. 163 = 24 Ind. Cas. 771.

SADASIVA IYER and SPENCER, JJ.

References:—17 M.L.J. 228; 17 M.L.J. 469; 13 M. 281; 15 C.W.N. 375; 9 M.L.J. 175; 19 M.L.J. 228; 1 C.W.N. 343; 30 C. 710; 33 C. 487; 27 M. 67; 7 W.R. 87; 27 M. 262 (268), R.

(2) *Registration in fraud of Registration Law*
—Fictitious entry of property to give jurisdiction to registering officer in Calcutta to register a mortgage of properties in mofussil—Suit on mortgage in Original Side—

Registration—(Continued).

Jurisdiction—Decree if binds purchaser after mortgage and before decree—Amendment of description of parcels so as to bring document within Court's jurisdiction, if binds strangers—Rectification—Mutual mistake—Onus—Evidence of mistake—Admissibility—Concurrent finding of fact, based on no evidence.

When, in order to obtain registration at the office of the Sub-Registrar of a particular district of a conveyance relating to properties no part of which is situate within the district, the parties to the conveyance make a fictitious entry of an item of property purporting to be within that district, the entry is a fraud on the registration law and registration obtained by means thereof is invalid.

Such a fictitious entry in the conveyance cannot give jurisdiction to a Court, whose jurisdiction is limited to deeds concerning immoveable properties within that District, to entertain a suit to enforce such conveyance.

The inclusion of non-existing property purporting to be situate within the District would not, even apart from fraud, give the Sub-Registrar authority to register the document, nor jurisdiction to the Court and whose jurisdiction is limited to properties within that district to entertain a suit to enforce the document, and its decree would be invalid.

Where, in such a suit, the Court at the instance of the parties allowed the description of the property to be so amended as to correspond to property actually existing within its jurisdiction and then, holding that it had jurisdiction, passed a decree:

Held that the decision that it had jurisdiction if erroneous, could not extend the jurisdiction, of a Court of limited territorial jurisdiction, and neither the direction to amend nor the decree could bind strangers, who had acquired title in the property before the date of the amendment, nor render valid the registration—if they could establish that no portion of the property conveyed was within the jurisdiction of the Registering officer.

Quære:—Whether such amendment came within the scope of the suit which was in no respect a suit for rectification.

The proper description of houses in towns for the purpose of registration is by the street in which they are situated and the number which they bear in that street.

Where a stranger to a mortgage-deed passed in the Original Side of the High Court, who had previous thereto acquired a title in property actually intended to be conveyed (all of which was outside Calcutta) proved that there was no property in Calcutta bearing the street name and number given to the only item of Calcutta property included in the mortgage, and that the property in Calcutta which in fact answered the description of that property by metes and bounds given in the mortgage-deed did not belong to the mortgagor:

Registration—(Continued).

Held, that the *onus* of proving (as it was open to him to prove) that there was a clerical or other error in the description of the property and that in fact an existing property situated in Calcutta was intended by both parties to be mortgaged was on the mortgagee decree-holder.

That to prove this the mortgagee should have examined himself as also his mortgagor.

That as no evidence whatever was given to prove this case, it was not open to the Courts in India to come to the conclusion that the entry of the property was a mistake.

Evidence to show that the mortgagor had purported to mortgage with other mortgagees the same property under the same description and had been compelled by them to consent to rectification was irrelevant at the trial to prove that the entry in the document was a mistake.

That the principle of concurrent findings of fact did not apply to such a case as it was a case of no evidence, and it was open to the Privy Council to hold from the conduct of the mortgagee in not examining himself or his mortgagor and from other evidence in the case, that the entry was intentionally fictitious.

A decision that there is no evidence to support a finding is a decision of law. *Harindra Lal Roy Chowdhuri v. Srimati Hari Dasi Dabi*, 18 C.W.N. 817 = 19 C.L.J. 484 = 16 Bom L.R. 400 = (1914) M.W.N. 462 = 16 M.L.T. 6 = 12 A.L.J. 774 = 23 Ind. Cas. 637 = 27 M.L.J. 80 = 41 C. 972 (P.C.).

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(3) Sale in Berar—Document creating occupancy right—Registration whether necessary. See *BERAR LAND REVENUE CODE*, No. 1, 10 N.L.R., 78.

(4) Compromise evidencing release by a coparcener of his rights in family property—Admissibility in evidence without registration. See *COMPROMISE*, No. 8, 27 M.L.J. 396.

(5) Memorandum of an already completed oral gift—Registration whether necessary. See *CUSTOMS (PUNJAB—ALIENATION)*, No. 6, 92 P.L.R. 1914.

(6) Transfer of Dandidari right whether must be by registered instrument. See *DANDIDARI RIGHT*, No. 1, 18 C.W.N. 1194.

(7) Person residing at place of registration of a deed whether can be presumed to have knowledge of its terms. See *DEBTOR AND CREDITOR*, No. 2, 98 P.W.R. 1914.

(8) Unregistered kabuliya—Rent payable—Admissibility of oral evidence. See *EVIDENCE*, No. 4, 19 C.L.J. 428.

(9) Deed of exchange of property of or more than 100 rupees in value—Registration whether necessary. See *EXCHANGE*, No. 1, 74 P.W.R. 1914.

(10) Sale—Registration—Liability of identifying witness for false representation as to vendor. See *FRAUD*, No. 4, 22 Ind. Cas. 818.

Registration—(Concluded).

(11) Letter allowing father to alienate property does not require registration. See *HINDU LAW (ALIENATION)*, No. 9, 215 P.L.R. 1914.

(12) Grant to widow for maintenance—No writing necessary—Nor registration. See *HINDU LAW (MAINTENANCE)*, No. 5, 10 N.L.R. 111.

(13) Unregistered lease deed—Admissibility in evidence to prove nature of lessee's possession. See *LEASE*, No. 8, 15 M.L.T. 192.

(14) Registration when sufficient notice. See *MORTGAGE (GENERAL)*, No. 27, 216 P.L.R. 1914.

(15) Equitable mortgage—Transfer of—Registration unnecessary. See *MORTGAGE (EQUITABLE)*, No. 1, 15 M.L.T. 198.

(16) Document creating rights in immoveable property—Narration of accomplished fact—Registration. See *RES JUDICATA*, No. 4, 19 P.L.R. 1914.

(17) Creation of charge—Registration not compulsory. See *TRANSFER OF PROPERTY ACT*, No. 85, 23 Ind. Cas. 867.

(18) Mortgage of rights and interests of a grove-holder in a grove—Registration. See *TRANSFER OF PROPERTY ACT*, No. 55, 23 Ind. Cas. 968.

Registration Act (1877).

(1) Usufructuary mortgage—Mortgagee put in possession without registered document—Effect. See *MORTGAGE (GENERAL)*, No. 37, 12 A.L.J. 1133.

(2) *S. 17—Award dictated and signed by parties—Registration—Signing parties whether allowed to pick holes in award.*

A document signed by arbitrators as their award does not cease to be an award merely because the settlement was arrived at by the parties and was also signed by them.

Such documents did not require registration. Where the parties have themselves signed the award, they should not be allowed to pick holes in it (a). *Wazir Ali v. Mahbub Ali*, 134 P.L.R. 1914 = 22 Ind. Cas. 412 = 101 P.W.R. 1914.

JOHNSTONE and CHEVIS, JJ.

References:—(a) 71 P.R. 1906 = 111 P.L.R. 1907, D.; P.L.R. 1900, p. 459, Diss.; 22 A. 224 = A.W.N. (1900), p. 52; 84 P.R. 1907 = 184 P.L.R. 1908; 90 Ind. Cas. 868 = 321 P.L.R. 1913 = 211 P.W.R. 1913 = 81 P.R. 1913, R.

(3) *S. 17—Application in mutation proceedings—Matter compromised—Registration—Admission in evidence.*

There was a dispute between the parties as to the right to certain property. When the matter was before the Revenue Court the parties compromised it and put in a petition informing the Court of the compromise. In a subsequent case in the civil Court the petition was put in evidence. *Held* that the petition did not require to be stamped or registered as a transfer of interest in immoveable property and was

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admissible in evidence. *Jagrani Mierani v. Bisheshar Dube*, 12 A.L.J. 1316.

BANERJI, J.

Reference:—11 A.L.J. 765, R.

(4) S. 17—Application for mutation proceedings—Compromise by guardian without Courts' permission—Family settlement—Transfer of property worth over Rs. 100—Registration. See CIV. PRO. CODE (1908), No. 895, 12 A.L.J. 998.

(5) S. 17—Will of non-testamentary instrument—Test. See CONSTRUCTION OF DOCUMENTS, No. 1, 22 Ind. Cas. 661.

(6) S. 17, cl. (d) (v)—Amalnamah—*Stipulation that tenant should take pattah upon executing kabulyat within certain time—Intention that title of grantee should commence on his taking possession of land—Whether amalnamah compulsorily registrable—Agreement to lease—Document creating right to obtain another document. Elahi Baksh v. Hukum Baksh*, 20 Ind. Cas. 907=18 C.W.N. 38=19 C.L.J. 464. See Final Part, 1913, Col. 1086.

(7) S. 17 (e)—*Composition deed—Essential test of—Stamp Act, Art. 22—Trusts Act, S. 5.*

With the assent of his creditors to the extent of Rs. 1,22,000 out of the total number of creditors claiming Rs. 1,61,800, B executed a deed making over all his assets to certain trustees named. The creditors coming in under the deed agreed that, after all the goods and properties had been made over to the trustees, no other claim whatever with regard to the amounts due to them should remain outstanding against B, but the whole claim should be understood to be written off against him and B was to make use of the deed as a release passed by them on their behalf. It was also provided by the deed that the trustees were to manage the properties for the benefit of all the creditors interested, and the monies realized from time to time were to be distributed among such creditors in proportion to their claims. The deed was not registered. The properties covered by the deed, immoveable as well as moveable, were transferred to the trustees in due course. A question having arisen whether the above deed was a composition deed within the meaning of S. 17 (e), Registration Act.

Held, that the deed in question was a composition deed within the meaning of S. 17 (e), Registration Act.

The term 'composition deed' was not, either in ordinary parlance or in the understanding of lawyers, limited so as to exclude an assignment in trust for the benefit of creditors, the creditors being parties and releasing their claims.

The term "composition deed," as used in the Registration Act, is intended to apply to a transfer of immoveable property and not to a mere agreement to take fractional payment of

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money in settlement of claims. *Chandra-shankar Pranshankar v. Bai Magan*, 16 Bom. L. R. 296=38 B. 576=24 Ind. Cas. 780.

SCOTT, C.J., and BATCHELOR, J.

(8) Ss. 28, 32, 49—*Registration by an officer within whose jurisdiction property not situate—Fictitious property mentioned in deed—Fraud—Effect of.*

The endorsement on a document of the certificate of registration unless it is made by a Registrar whose power and jurisdiction have been properly invoked does not amount to registration in accordance with the Registration Act (a).

Where a document was executed at Bindra-ban but no part of the executant's property was situate there, and in order to give jurisdiction to the Registrar at Bindra-ban some fictitious property was mentioned in the document, as existing within his jurisdiction, *held* that a fraud was practised upon the Registrar and the registration was no registration in law. *Jagan-nath v. Ram Nath*, 12 A.L.J. 913.

TUDBALL, J.

References:—(a) 23 A. 233 (P.O.), F.; 11cA. 319, Not F.

(9) S. 32. See No. 8, *supra*.

(10) S. 47—*Execution and registration of a subsequent sale deed before the presentation for registration of the first deed—No undue delay—Transfer of Property Act, S. 41—Applicability of conflict with the Registration Act.*

M mortgaged his fixed rate holding to the appellant in 1900. On 1st June 1909, M sold his rights in the holding to the respondent. The sale deed was presented for registration on 18th June 1909 and was owing to obstruction on the part of the vendor actually registered much later. Before the presentation for registration of the above sale deed M, on 11th June 1909, sold the holding to the appellant and registered a sale deed on that very day. In a suit for redemption and possession by the respondent.

Held, that S. 47 of the Registration Act was applicable and the fact that the second sale deed was executed and registered before the presentation for registration of the first sale deed was no ground for postponing the first sale deed.

Held also that S. 41 of the Transfer of Property Act had no application to a case where the document had been presented for registration without undue delay on the part of the vendee. S. 41 of the Transfer of Property Act should not be read in such a way as to come into conflict with the Registration Act, S. 47. *Mathura Kalwar v. Ambika Dat*, 12 A.L.J. 993.

CHAMIER, J.

(11) S. 49. See No. 8, *supra*.

Registration Act (1877)—(Concluded).

(12) S. 50—*Priority—Unregistered document—Registered document—Notice of prior unregistered document—Possession not of vendor—Notice to purchaser—Inquiry, if not made by purchaser—Effect of omission.* *Magu Brahma v. Bholi Dass*, 20 Ind. Cas. 195=19 C.L.J. 352=18 C.W.N. 657. See Final Part, 1913, Col. 1038.

Registration Act (1908).

(1) Notification issued by Government exempting agricultural leases from registration—Effect of Registration Act subsequently passed. See ACT X OF 1897 (GENERAL CLAUSES), No. 4, 12 A.L.J. 792.

(2) Ss. 3, 17—Memorandum of arrangement between lessor and lessee if must be stamped and registered. See LEASE, No. 12, 19 C.W.N. 56.

(3) S. 17—*Petition for compromise—Pleading—Registration.*

A compromise petition presented to a Court with the prayer that it be acted on is a pleading, and does not require to be registered even if it leads to the disposal of an issue in the case. In order that such a petition may be regarded as a pleading, it is not necessary to show that it was actually acted upon in the trial of the suit. *Manickammal v. Rathnamal*, 22 Ind. Cas. 35.

MILLER and SPENCER, JJ.

References:—20 A. 171=25 I.A. 9=2 C.W.N. 129 (P.C.); 3 Ind. Cas. 701=6 M.L.T. 313=20 M.L.J. 20=33 M. 102, F.

(4) S. 17—*Sale of equity of redemption for less than Rs. 100 of a property mortgaged for Rs. 100 or more—Registration.* *Feroze-uddin v. Mehran*, 194 P.W.K. 1913=332 P.L.R. 1913=21 Ind. Cas. 563. See Final Part, 1913, Col. 1040.

(5) S. 17—*Deed of adoption reserving life estate to the widow—Registration.* See LIMITATION ACT (1908), No. 100, 16 Bom. L.R. 111.

(6) S. 17. See No. 2, *supra*.

(7) S. 17 (1) (b) (d)—*Lease—Right to take toddy and fruits from palmyra trees—Whether amounts to lease of immoveable property or creates an interest therein—No registration necessary.*

Where a document stated that the lessee 'had taken for lease for two years, . . . for enjoyment for toddy, for palmyra fruits, etc., palmyra trees' in a certain garden, that he had paid the amount of the lease for two years and that he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut.

Held, that the instrument in question was neither a lease of immoveable property within the meaning of S. 17 (d) of the Registration Act, nor did it create an interest of the value of Rs. 100 or upwards in immoveable property within the meaning of S. 17 (1) (b) of the Act (a) and did not require registration.

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The instrument in question only gives the right to take toddy and fruit for two years. *Natesa Gramani v. Thangavelu Gramani*, 15 M.L.T. 237=(1914) M.W.N. 327=23 Ind. Cas. 102.

WHITE, C.J., and OLDFIELD, J.

References:—(a) 6 M.H.C. 71; 20 M. 58=6 M.L.J. 281; 12 W.R. 366, D.; L.R. 1 C.P.D. 35=45 L.J.C.P. 153=33 L.T. 404=24 W.R. 175, R.

(8) S. 17, cl. 2 (1)—*Compromise—Agreement relating to matters not in dispute—Agreement not registered, whether admissible as to those matters—Decree, matters not embodied in.*

If the parties to a suit inform the Judge of the terms of a compromise and invite him to dispose of the suit accordingly, his order, if it refers to or narrates the terms of the compromise, is judicial evidence. In other words, it is necessary that these terms should be directly or indirectly embodied in the decree so as to be admissible in evidence without the registration of the compromise (a).

A compromise was filed in a suit for recording certain lands in village B as *ticcadars ba kasht*. The compromise related to the lands of several villages including the village J. The order of the Court was that the suit be decreed in the terms of the compromise and then came four directions which referred exclusively to B. The compromise was not registered. In a subsequent suit relating to lands in village J.

Held, that the compromise was not admissible in evidence. *Janardan Missir v. Janki Koer*, 22 Ind. Cas. 687.

COXE and CHATTERJEE, JJ.

References:—(a) 22 M. 508=26 I.A. 101=3 C.W.N. 485=9 M.L.J. 147, Rel.

(9) S. 17, Excep. 5—*Agreement for reconveyance of property—Not compulsorily registrable—Suit for specific performance of the agreement.*

On the 9th September 1903 the plaintiff passed in favour of the defendant a registered sale-deed of a house for Rs. 1,499. The same day, the defendant passed in favour of the plaintiff an unregistered agreement whereby he agreed to reconvey the property to plaintiff on repayment of purchase money. The plaintiff filed a suit to redeem the mortgage which, he alleged, was made out by reading the two documents together. The lower Courts held that the mortgage was not made out, inasmuch as the second deed being unregistered could not be looked at. Failing on that plea, the plaintiff urged that he should be allowed to treat the second deed as a separate contract and sue for specific performance of the same. The lower appellate Court having decided against him, the plaintiff appealed:

Held, that, having regard to the form of the second deed as a whole, it was an ordinary agreement to reconvey when called upon to do

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so; that as such it was exempted from registration under Excep. 5 to S. 17 of the Registration Act, 1908; and that the plaintiff was entitled to have specific performance of the same. **Sayad Mir Gazi Sayad Kutbudin v. Mia Ali Maulvi Abdul Kadir**, 16 Bom.L.R. 582=38 B. 708.

BEAMAN and HAYWARD, JJ.

(10) Ss. 17 (b), 49—*Assignment of a decree for sale of immoveable property—Whether compulsorily registrable—Objection to validity of assignment—Code of Civil Procedure (V. of 1908), O. XXI. r. 16.* **Mumtaz Ahmad v. Sri Ram**, 11 A.L.J. 815=35 A. 524=21 Ind. Cas. 462. See Final Part, 1913, Col. 1040.

(11) Ss. 17, 49—*Letter embodying agreement to transfer—Rectification of possession of immoveable property passed—Agreement to sell—No registration necessary.*

A letter written by A to the plaintiff embodying an agreement for the exchange of lands that fell to each other's share ran as follows:—

"We have already divided all the properties, money and debts which we had.....and each of us was enjoying the lands, etc., that fell to our respective shares.....while as it is not convenient for us to build houses unless some changes are made in house sites, and as it will not be comfortable owing to insufficiency of space to build dwelling houses on the house site that fell to my share...we...have made certain changes in the partition which was effected before...Therefore according to the said exchange we have taken possession of the respective lands. So we enjoy the same by paying Government kist. We shall execute a proper deed regarding this whenever you want."

Held, that the document created no interest in immoveable property but was merely evidence of an agreement to convey lands and was admissible in evidence without registration. **G. Ramabrahmam v. G. Kottayya**, 21 Ind. Cas. 777.

SADASIVA IYER and SPENCER, JJ.

References:—16 Ind. Cas. 587=(1912) M.W. N. 917=12 M.L.T. 262; 14 M. 55; 6 Ind. Cas. 346=15 C.W.N. 375=12 C.L.J. 25, F.

(12) Ss. 17 and 90 (d)—*"Term" of the lease—Period for which lessee protected if he fulfils the conditions—Transfer of Property Act, S. 107—Crown Grants Act (XV of 1895)—Lease by Government in the ordinary way of business—Application of.*

The "term" of a lease for purposes of registration must be understood to mean the period for which the lessee is protected against dispossession at the will and pleasure of his lessor, or in other words, the length of time for which the lessee is entitled to continue in possession, provided he himself fulfils all the stipulated conditions.

When under the terms of a lease the lessees were to remain in possession for 30 years provided they fulfilled certain conditions and the

Registration Act (1908)—(Continued).

lessor had a right of re-entry only on the breach of certain conditions, *held* that the lease was a lease for more than one year, and was compulsorily registrable (a).

Held further that leases of land entered into in the ordinary way of business by the Government are not *ejusdem generis* with "sanad," "inams" and other title-deeds mentioned in S. 90 (d) of the Registration Act, and are not exempted as such from registration under S. 17 of the Act; nor are they excluded by the Crown Grants Act from the operation of S. 107 of the Transfer of Property Act (b). **Munshi Lal v. Notified Area of Baraut**, 12 A.L.J. 219=36 A. 176=22 Ind. Cas. 933.

RYVES and PIGGOTT, JJ.

References:—(a) 8 A. 198, R.; 8 A. 465; 8 A.L.J. 609, D. (b) 3 A.L.J. 129 and 628, R.

(13) S. 28—*Power and jurisdiction to register—No part of the property situate within a Registrar's district—Registration invalid—Duly registered document.*

A Registrar has no jurisdiction to register a document dealing with property no portion of which is situate within his district, and a document thus registered is not a duly registered document within the meaning of S. 28 of the Registration Act.

Omission to comply with the provisions of S. 28 cannot be regarded as a mere defect in procedure. **Bansraj Singh v. Rajbans Bharti**, 12 A.L.J. 918=24 Ind. Cas. 451.

RICHARDS, C.J. and TUDBALL, J.

(14) S. 47—*Instrument endorsed by a Kanungo or Revenue Officer under S. 97 of the Agra Tenancy Act—Effect—Subsequent document registered under the Registration Act—Priority.* See ACT II OF 1901 (AGRA TENANCY), No. 16, 12 A.L.J. 1265.

(15) S. 48—*Oral sale—Validity—Unregistered sale deed—Admissibility in evidence to prove nature of possession of purchaser.* See TRANSFER OF PROPERTY ACT, No. 36, 16 M.L.T. 344.

(16) S. 49—*Registered sale deed of immoveable property—Unregistered letter—Inadmissible to show that it should operate as mortgage or not operate at all.*

Held, that an unregistered letter cannot be received as evidence to show that a registered sale deed was intended to operate only as a mortgage (a).

Held, further, that such an unregistered letter is inadmissible in evidence to show that no title passed to the defendants under the sale deed; for that would amount to using it as evidence of a transaction affecting immoveable property (b). **Yenkatachellapathi Garu v. Muthu Yenkatachallapathi (died)**, (1914) M. W.N. 178=26 M.L.J. 751=23 Ind. Cas. 409.

WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ.

References:—(a) 27 M. 348, F. (b) 25 M. 7, F.

Registration Act (1908)—(Continued).

(17) S. 49. See Nos. 10, 11, *supra*.

(18) S. 49 (c)—Unregistered lease—Admissibility in evidence to prove agreement to lease. See *LEASE*, No. 4, 15 M.L.T. 220.

(19) S. 50—Competition between an unregistered sale deed accompanied by delivery and a subsequent registered sale-deed. See *TRANSFER OF PROPERTY ACT*, No. 35, (1914) M. W.N. 55.

(20) S. 77—'Order of refusal'—Executant summoned twice—Failure to appear—Party presenting document requesting Sub-Registrar either to register or return document—Return of document with endorsement by Sub-Registrar—Whether amounts to 'order of refusal'—Suit under S. 77—Limitation Act not applicable—Principle of the Act—Applicability of—Court closed on the last day of limitation—Presentation after re opening—Bar of limitation—Whether saved.

The provisions of the Limitation Act are in applicable to a suit provided for by S. 77 of the Registration Act (a).

But, on general principles and apart from the Act, it is reasonable to hold that, when the plaintiff cannot, owing to the Court being closed, present his plaint on a particular day on which it ought to be presented, he should not be allowed to suffer if he presents it at the earliest opportunity thereafter (b). That principle has been recognised by the Legislature in S. 10 of the General Clauses Act, 1897.

The same principle is applicable also to a suit under S. 77 of the Registration Act (c).

Where, on the executant's failure to appear after being twice summoned, the plaintiff asked that the Sub-Registrar should register the instrument or return it to him, and the Sub-Registrar returned the document with an endorsement that it was returned at the request of the party presenting it.

Held that, there was in fact a refusal to register and that the endorsement was intended to be consequent on the refusal, and so may be taken to be an order refusing to register. *Subramania Pattar Karikar*, son of Sivarama Pattar Karikar v. *Edathil Madathil Kristna Iyer* (died), 15 M.L.T. 233=26 M.L.J. 307=23 Ind. Cas. 23.

MILLER and TYABJI, JJ.

References:—(a) 18 M. 99; 20 M. 249, R. (b) 21 M. 385; 23 M. 179; 23 M. 389; 23 M.L.J. 221, R. (c) 18 M. 99; 20 M. 249, *Expl*.

(21) S. 77—Document—Execution of document—*Pardanashin lady*, conveyance by—Document read over after execution and receipt of consideration—Inclusion of property not agreed to be sold objected to.

Two *pardanashin* illiterate women agreed to sell certain property to the plaintiff, who thereupon wrote out a *kobala* purporting to convey not only the property which the women had agreed to sell but also certain other properties.

Registration Act (1908)—(Concluded).

The brother of one of the women signed the *kobala* on their behalf without reading it himself or reading it over to the women. The consideration money was handed over by the plaintiff to the brother. The *kobala* was then read out. The women, who were behind the *parda*, at once protested saying that the *kobala* contained properties which they did not intend to sell. The document not having been registered, the plaintiff brought this suit under S. 77 of the Registration Act for the registration of the document:

Held, that there was no execution of the document and the suit was rightly dismissed. *Abdul Hakim v. Jamila Khatun*, 23 Ind. Cas. 10.

IMAM and CHAPMAN, JJ.

References:—28 B. 420=6 Bom. L.R. 126, R.

(22) S. 90 (d). See No. 12, *supra*.

Regulations.**Regulation (Ben.) I of 1793 (Bengal Permanent Settlement).**

S. 8 (4)—Resumption of *chaukidari* land. See *CHAUKIDARI CHAKRAN LANDS*, No. 1, 19 C.W.N. 65.

Regulation VIII of 1793 (Bengal Decennial Settlement).

S. 41—Redemption of *chaukidari* lands. See *CHAUKIDARI CHAKRAN LANDS*, No. 1, 19 C.W.N. 65.

Regulation I of 1801 (Bengal Land Rev. Assessment).

Ss. 8, 14—Regulation VIII of 1793, S. 5—Regulation I of 1793, S. 10—Petition for separation of a *taluk* from the estate in 1799 and 1801, if can be given effect to in 1906—Fresh application whether entertainable—Limitation—Order sought to be enforced, more than 100 years old—Laches, if any—Century of litigation between parties whether kept application pending—Board of Revenue, decision of, whether final—Civil Court, jurisdiction of. *Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur*, 18 C.L.J. 526=23 Ind. Cas. 345. See Final Part, 1913, Col. 1047.

Regulation XXV of 1801 (Madras Permanent Settlement).

(1) Ss. 4 and 12—Ghattuthumulu cess not a "revenue." See *GHATTUTHUMULU CESS*, No. 1, (1914) M.W.N. 373.

(2) S. 8—Permanent lease of *zemindari* not a transfer of proprietary right. See *MADRAS ACT I OF 1876 (MADRAS LAND REVENUE ASSESSMENT)*, No. 1, (1914) M.W.N. 610.

(3) S. 12. See No. 1, *supra*.

Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure).

(1) *Bai-bil-wafa*—Procedure in the Punjab when the Regulation was not in force—Applicability of the Regulation to shops.

Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure)—(Concluded).

Even when Reg. XVII of 1806 was not in force in the Punjab, in case of *bai bil-wafa*, the mortgagee could not, without any formalities, convert his mortgage into a completed sale, but was obliged either to bring a foreclosure suit, or at least to make some sort of reference to the Civil Court with a view to issue of notice to the mortgagor.

The Regulation XVII of 1806 does apply to shops. **Sarni Mal v. Murli Dhar**, 90 P.L.R. 1914=22 Ind. Cas. 680=107 P.W.R. 1914.

JOHNSTONE and CHEVIS, JJ.

(2) *Mortgage—Foreclosure—Excessive amount claimed in notice—Validity of notice—Duty of mortgagor.* **Barkat Rai v. Ali**, 91 P.R. 1913=341 P.L.R. 1913=223 P.W.R. 1913=21 Ind. Cas. 643. See Final Part, 1913, Col. 1048.

(3) Foreclosure condition to follow on non-payment of two years interest whether can take effect. See MORTGAGE (FORECLOSURE), No. 1, 116 P.L.R. 1914.

(4) S. 7—Mortgage—Conditional sale clause—Notice proceedings under the regulation—Defects—Invalidity—Failure to plead the proceedings in original Court—Plea not to be raised in appeal. See MORTGAGE (BY CONDITIONAL SALE), No. 1, 57 P.R. 1914.

(5) Ss. 7 and 8—Mortgage—Foreclosure—Notice, defects in—Misdescription of mortgaged property—Effect of non-payment of mortgage-money.

The notice issued under S. 7 of Reg. XVII of 1806 contained two errors—(1) that, instead of the property mortgaged being described as one-half of a certain land, it was described as the whole of it; and (2) that, instead of *bai katai hojawaji*, the words used were *mabligh kata hojawaji*.

Held, that the first error was fatal to the validity of the notice (a).

Without expressing any definite opinion as to the second defect, it was observed that the defect had been held to be fatal in an unpublished judgment (Civil Revision No. 557 of 1910). **Shambu Ram v. Jamita**, 43 P.L.R. 1914=85 P.W.R. 1914=23 Ind. Cas. 97.

RATTIGAN and BEADON, JJ.

References:—(a) 105 P.R. 1907, R.; 109 P.R. 1901, F.

(6) Ss. 7, 8—*Bai-bil-wafa—Mortgage—Income of shrine including rent of land and house property not land under the Regulation.* **Nazar Muhammad v. Ahsan-ul-haq**, 170 P.W.R. 1913=307 P.L.R. 1913=21 Ind. Cas. 231. See Final Part, 1913, Col. 1048.

(7) Ss. 7 and 8—Mortgage by conditional sale—Alteration in terms—Original sale clause whether can be enforced—Defective notice—Effect. See MORTGAGE (BY CONDITIONAL SALE), No. 2, 91 P.W.R. 1914.

(8) S. 8. See Nos. 5, 6 and 7 *supra*.

Regulation II of 1819 (Bengal Land Revenue Assessment).

Resumption of alleged lakheraj and settlement with person other than zamindar—Dispute between grantee and zamindar as to whether specified plots are zemindari or lakheraj—Onus. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.

Regulation VIII of 1819 (Bengal Putni Taluq).

(1) *Putnidar* if may deposit rent in Court in case of doubt as to who is entitled to receive it. See ACT VIII OF 1885 (BENGAL TENANCY), No. 39, 18 C.W.N. 916.

(2) Ss. 3, 5, 6—*Putni, part of—Alienation—Registration with zamindar—Part of putni if may be alienated without registration with zamindar—Bengal Tenancy Act (VIII of 1885), Ss. 12, 17, 195 (e)—Whether registration of transfer confers title without registration with zamindar—Bengal Tenancy Act, whether applies to alienation of part of putni.* **Azimooddin v. Mathura Mohan Saha**, 18 Ind. Cas. 712=18 C.W.N. 338. See Final Part, 1913, Col. 1049.

(3) Ss. 3, 11, 15—*Sale of putni—Durputnidar's interest if ipso facto cancelled—Possession taken and proclamation obtained, effect of.* **Srimati Krishna Promoda Dassi v. Dwarka Nath Sen**, 17 C.W.N. 1092=20 Ind. Cas. 654=19 C.L.J. 360. See Final Part, 1913, Col. 1049.

(4) S. 5. See No. 2, *supra*.

(5) Ss. 5, 6—*Transferee of portion of putni if may claim recognition by zamindar under Bengal Tenancy Act (VIII of 1885), Ss. 12, 17—S. 195 (c).*

A partial transferee of a *putni* taluk is not entitled to be recognized by the zamindar. It is a form of transfer which, under the terms of Ss. 5 and 6 of Reg. VIII of 1819, the zamindar is not bound to recognize, and under S. 195 (c) of the Bengal Tenancy Act the transferee cannot claim recognition by reason of Ss. 12 and 17 of the latter Act. **Rakhal Chandra Das v. Umapada Mishra**, 18 C.W.N. 629=22 Ind. Cas. 788.

FLETCHER and CHATTERJEE, JJ.

(6) S. 6. See Nos. 2 and 5, *supra*.

(7) Ss. 7, 11—*Landlord and tenant—Putni tenure—Sale under Reg. VIII of 1819—Possession taken by zamindar—Realization of rent by him—Sale set aside, subsequently—Suit for rent by dar-putnidar against raiyats for period between sale and its setting aside—Whether relationship of landlord and tenant between dar-putnidar and raiyats ceases.*

A *putni* taluq purported to have been sold in proceedings under the *Putni* Regulation of 1819. The zamindar took possession under S. 7 of the Regulation and realized rents from the defendant who was a tenant under the plaintiff the *dar-putnidar*. Subsequently the sale was set aside and *dar-putnidar* sued the tenant for rent of the period between the sale and its setting aside.

Regulation VIII of 1819 (Bengal Putni, Taluqs)—(Continued).

Held, (1) that, as the sale was not valid, the *darpatni* was not cancelled by it;

(2) that consequently the relationship of landlord and tenant did not cease between the parties; and,

(3) that the plaintiff was entitled to recover the rent sued for. **Nafar Chandra Ghosh v. Gadadhar Bhatta**, 22 Ind. Cas. 908.

FLETCHER and N.R. CHATTERJEE, JJ.

References:—13 M.L.A. 160=12 W.R. (P.C.) 43=3 B.L.R. (P.C.) 48=20 Eng. Rep. 511; 20 Ind. Cas. 654=17 C.W.N. 1092, *Rel. on*.

(8) S. 11. See Nos. 3 and 7, *supra*.

(9) S. 11 (1)—Sale of Putni taluk for rent—Suit by purchaser for possession—Limitation—Adverse possession. See ACT VIII OF 1835 (BENGAL TENANCY), No. 86, 19 C.W.N. 18.

(10) S. 11 (3)—*Ejectment, suit for*—Resident and hereditary cultivator—Engagement with Darpatnidar. **Sarbananda Nath Bhowmick v. Rana Gazi**, 18 C.L.J. 334=21 Ind. Cas. 530. See Final Part, 1913, Col. 1051.

(11) Ss. 11, 17—Priority—Landlord and mortgagee—Surplus sale proceeds in deposit with Collector—Sale of mortgaged property under Putni Regulation—Rent-decree for previous balances—First charge—Bengal Tenancy Act (VIII of 1885), Ss. 65, 195 (e)—Putni Regulation, Ss. 11, 17—Mortgage-security transformed into judgment debt—Purchaser in execution of rent decree, if can avoid—Mortgage security, how long subsists—Tenure, sale of, for its arrears, if can subsequently be sold—Decree for rent for previous balances, nature of—Landlord of Putni tenure, if can seek redress in Civil Court—Putni Regulation, S. 17, para. 5—Limitation, when applicable.

If a sale of a *putni* tenure takes place under the *Putni* Regulation, the landlord is entitled in the first place to appropriate sufficient portion of sale proceeds in deposit with the Collector, in satisfaction of his decree for rent for previous balances before a mortgagee can proceed to realise his dues.

The rent payable by a *putnidar* to his *zemin-dar*, which has been transformed into a judgment-debt, is a first charge on the tenure.

The *putni* sale has not the effect of destroying the character of the decree previously obtained as a rent-decree.

A purchaser in execution of a rent decree has the power to annul a mortgage incumbrance which has been transformed into a judgment-debt (a).

Until the satisfaction of a mortgage decree, the security subsists (b).

A mortgagee has a charge on the surplus sale proceeds of the mortgaged property, notwithstanding the fact that the mortgage-debt had been transformed into a judgment-debt.

Regulation VIII of 1819 (Bengal Putni Taluqs)—(Concluded).

A tenure, which has been lawfully sold for its own arrears, cannot again be put up to sale for the arrears due on account of a previous period (c).

A landlord cannot execute a decree for rent against a tenure which has passed into the hands of a person entitled to hold the same free, not only from incumbrances, but also from rent charge under a decree for arrears of any antecedent period. Such a decree is of a peculiar character. It is in one sense a money decree inasmuch as the landlord is not restricted to his remedies by sale of the defaulting tenure; he is also entitled to proceed personally against the judgment-debtor. But notwithstanding the circumstance, the Legislature has provided that if the decree is executed as a rent decree, the property will pass into the hands of the purchaser free from all incumbrances imposed thereon by any act of the defaulter.

Obiter: S. 65 of the Bengal Tenancy Act does not contradict S. 17 of the *Putni* Regulation (d).

The limitation of two months mentioned in the fifth paragraph of S. 17 of the *Putni* Regulation applies to a suit for compensation and not to a suit instituted by a mortgagee for declaration of his right to appropriate the surplus sale proceeds in satisfaction of his decree. **Basant Kumar v. Khulna Loan Company**, 20 C.L.J. 1.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 16 C.L.J. 156, *F.* (b) 2 C.L.J. 202 (215); 1 L.R. 274; (1902) A.C. 147; 15 L.R. Ir. 276, *R.* (c) 6 W.R. 112; 12 C. 597, *F.* (d) 37 C. 747, *Doubted*.

(12) S. 13—Sale of *putni*—Suit by vendor for back rents not assigned—*Putni* if may be sold free of *darpatni* in execution of decree made—Deposit of *patni* rent by *darpatnidar*—Priority of *darpatnidar*'s lien—Scope of the Regulation. See ACT VIII OF 1885 (BENGAL TENANCY), No. 42, 18 C.W.N. 747.

(13) S. 15. See No. 3, *supra*.

(14) S. 17. See No. 11, *supra*.

Regulation VII of 1822 (Bengal Land Revenue Settlement).

(1) Enhancement of rent—Consent of tenant. See BENGAL ACT I OF 1895 (PUBLIC DEMANDS RECOVERY), No. 1, 22 Ind. Cas. 626.

(2) Ss. 9 (2), 14 (1). See ACT VII OF 1868 (BENGAL LAND REVENUE SALES), No. 1, 20 C.L.J. 40.

(3) S. 14 (1). See No. 2, *supra*.

Regulation XI of 1823 (Bengal Alluvion and Diluvion).

(1) *Alluvion and diluvion*—Riparian owners in Fyzabad District—Custom of *dhar-dhura* (deep stream boundary)—*Iqarnamas* or declarations filed by riparian owners.

In the year 1866 at the time of the first Regular Settlement of Fyzabad District, an

Regulation XI of 1825 (Bengal Alluvion and Diluvion)—(Continued).

enquiry with respect to the rule of alluvion and diluvion was made, and it was found that the custom of *dhar-dhura* (deep stream boundary), by which the main channel of the Gogra was treated as the constant boundary between the villages abutting on the opposite sides of the river, prevailed generally in the locality. *Rubkars* or orders were issued that those landholders who accepted the custom should file *igrarnamas* or declarations acknowledging the custom, while those who disputed it should give proof of the rule of alluvion and diluvion which they set up. The *igrarnamas* were accordingly filed. They wound up with a declaration that the parties to them, of their own free will and accord, accepted the usage of *dhar-dhura* and that they and their successors-in-interest would in future act in accordance with it. But no entry relating to such custom was made in the Record of Rights prepared at the time.

Held, that the *igrarnamas* or declarations were not adequate proof of the custom laid down therein. **Janki Kunwar v. Narendra Bahadur Pal Singh**, 23 Ind. Cas. 224.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

References:—11 B.L.R. 265=18 W.R. 160 = L.R. I.A. Sup. Vol. 34 (P.C.), A.

- (2) S. 4—*Permanent tenure, land of, washed away—Abatement of rent—Re-formation in situ—Title to land whether landlord's or tenant's—Reg. XI of 1825, if applies—Right of landlord to enhance rents.*

Where the plaintiffs, owners of a *zemindari*, claimed to recover *khas* possession of certain diluviated lands on their re-formation *in situ* against the holders of a *putni* tenure within the *zemindari*, who claimed the lands as accretions to their tenure.

Held, (agreeing with the High Court) that the lands did not come within the provisions of S. 4 of Reg. XI of 1825 and could not be claimed by either party as accretions to their respective property.

Held, further (reversing the decision of the High Court) that the diluviated lands being part of a permanent, heritable, and transferable tenure, until it could be established that the holder of the tenure had abandoned his right to the submerged lands, the tenure remained intact; and that the tenure-holders, by claim-ign or accepting remission of rent in respect of lands washed away from time to time by the action of the river, did not abandon or agree to abandon their rights to such lands on their re-formation *in situ*.

Held, further, that the dismissal of the suit for *khas* possession would be no bar to any proceeding on the part of the plaintiffs, authorised by law to recover proper rent in respect of the re-formed lands (a). **Arun Chandra Singh v. Kamini Kumar**, 18 C.W.N. 369=

Regulation XI of 1825 (Bengal Alluvion and Diluvion)—(Concluded).

(1914) M.W.N. 175=15 M.L.T. 182=26 M.L. J. 251=19 C.L.J. 272=12 A.L.J. 243=22 Ind. Cas. 317=16 Bom. L.R. 323=41 C. 683 (P.C.).

LORD SHAW, SIR JOHN EDGE and MR. AMBER ALI.

References:—(a) 4 C. 894, *Overruled*; 18 A. 290, *Appr.*

Regulation IV of 1827 (Bombay Civil Courts).

Cl. 99—Vinchur Court—Decision—Appeal—Special appeal. See CIV. PRO. CODE (1908), No. 144, 16 Bom. L.R. 75.

Regulation XVI of 1827 (Collectors of Land Revenue).

See BOMBAY ACT II OF 1863 (SUMMARY SETTLEMENT), No. 1, 16 Bom. L.R. 164.

Regulation III of 1828 (The Bengal Land Revenue Assessment).

S. 4—*Possession, suit for—Collector, what decides—Grant for maintenance—Bafarzand—'Ba walad'—Reg. XXXVII of 1793, S. 15—Reg. XIV of 1825, S. 3. Secretary of State for India in Council v. Rashidul Huq*, 18 C. L.J. 81=21 Ind. Cas. 93. See Final Part, 1913, Col. 1055.

Regulation XIII of 1830 (Jurisdiction of Jagirdars, etc.).

Cl. 5—Vinchur Court—Decision—Appeal—Special appeal. See CIV. PRO. CODE (1908), No. 144, 16 Bom. L.R. 75.

Regulation III of 1872 (Sonthal Parganas Settlement).

(1) Ss. 5, 6. See SONTHAL PARGANAS, No. 1, 18 C.W.N. 994.

(2) S. 6. See No. 1, *supra*.

(3) Ss. 10, 11—R. 27 framed under S. 10—*Whether rule applicable to up-country—Goals resident within Sonthal Parganas—Hindu Law—Custom—R. 27, applicable only to suits before Settlement Officers. Maharaj Mamrik v. Sufal Manjhi*, 18 Ind. Cas. 115=18 C.W.N. 333. See Final Part, 1913, Col. 1055.

(4) S. 11. See No. 3, *supra*.

(5) Ss. 11, 24, 25 (1), 25-A—*Record of Rights—Entry in, effect of—Burden of proof—Fraud—Evidence Act, S. 44.*

The fact that the defendants have been recorded as *putnidars* of all the lands in the village implies a decision that they have no *durmukarrari* right in respect of any of the lands included in that village. The decision operates as a decree of Court under S. 11 of Reg. III of 1872. It is open to the plaintiffs to avoid the effect of such a decree by the method prescribed in S. 25-A of sub-S. 1 of S. 25 of the said Regulation.

The object of the procedure laid down in S. 24 of Reg. III of 1872 is to enable persons interested to bring forward, in the Settlement Court, within the prescribed period, any objection they may desire to make to any part of such record.

Regulation III of 1872 (Sonthal Parganas Settlement)—(Continued).

If the defendants rely upon the record of rights as conclusive under S. 25 of Reg. III of 1872, and urge that the entry therein operates as a decree under S. 11, they should prove that the requirements of the statute have been fulfilled. As soon as this has been accomplished, it becomes open to the plaintiffs to urge under S. 44, Evidence Act, that the entry which operates as a decree was obtained by fraud. It is not necessary that the plaintiffs should institute a separate suit to set aside the record of rights on the ground of fraud. **Mir Mozaffur Ali v. Kali Prasad**, 19 C.L.J. 29 = 18 C.W.N. 271 = 22 Ind. Cas. 789.

MOOKERJEE and BEACHCROFT, JJ.

Reference :—15 C. 765, F.

(6) Ss. 11, 25-A—*Defendant found by Settlement authorities as tenant—Suit to determine whether plaintiff or defendant is tenant, whether maintainable.* **Digambar Das v. Jatindrabala Das**, 19 Ind. Cas. 874 = 19 C.L.J. 232. See Final Part, 1913, Col. 1056.

(7) S. 24. See No. 5, *supra*.

(f) S. 25 (1). See No. 5, *supra*.

(9) Ss. 25 (1), 25-A—*Jurisdiction—Civil Court—'Proprietor'—Maurasi mokarrari lessee—Decision of Settlement Officer, final.*

A person who holds derivative title under a zemindar cannot be classed as a proprietor within the meaning of that word as used in the expression "zemindars and other proprietors" in S. 25-A of the Sonthal Parganas Settlement Regulation.

Section 25-A of the Regulation is strictly limited to suits where only the rights of zemindars and other proprietors as between themselves are in controversy. The decision of a Settlement Officer that a certain person is an owner by purchase of a *mourasi mokarrari* tenure, is conclusive under S. 25, sub-S. (1) of the Sonthal Parganas Settlement Regulation, till it has been set aside by some method known to law at the instance of any person prejudicially affected thereby. **Sib Narayan Mukerji v. S.P. Chatterjee**, 20 C.L.J. 220.

MOOKERJEE and BEACHCROFT, JJ.

(10) Ss. 25, 25-A—*Suit, maintainability of—'Zemindars or other proprietors'—Shikmi ghatwali khorposh, share of, owner of, if a proprietor—Rent payable to ghatwal—No land revenue payable—Plaintiff's remedy.*

No suit lies in the Civil Court regarding any matter decided by a Settlement Officer except in cases specially provided for in S. 25 A of the Sonthal Parganas Settlement Regulation. In order that a case may fall within the provisions of that section it must be shown by the plaintiff that he is 'zemindar or other proprietor.'

The plaintiff claimed a share of a Shikmi Ghatwali Khorposh grant. Rent in respect of this was payable to the ghatwal and no land

Regulation III of 1872 (Sonthal Parganas Settlement)—(Concluded).

revenue was payable direct to the Government and the land was not free from the Government revenue;

Held, that such an interest did not come within the description of a right of "a zemindar or other proprietor" in S. 25-A of the Sonthal Parganas Settlement Regulation. **Nemo Deo v. Parbati Kumari and Jaholi Deo v. Parbati Kumari**, 20 C.L.J. 103.

FLETCHER and RICHARDSON, JJ.

(11) Ss. 25, 25-A—*Suit, maintainability of—'Zemindar or other proprietor'—Patnidar, if proprietor.*

A patnidar is not a 'proprietor' within the meaning of S. 25-A of the Sonthal Parganas Settlement Regulation.

Held, that a suit for a declaration by a patnidar to the extent of one-third share that the defendants, who were putnidars to the extent of the remaining two-thirds of the property, had fraudulently caused certain land to be recorded as their *laksheraj* in the record of rights prepared under the Sonthal Parganas Settlement Regulation, was not maintainable in the Civil Court under S. 25-A of that Regulation. **Digambar Das v. Harendra Narayan Pandey**, 20 C.L.J. 112.

COXE and D. CHATTERJEE, JJ.

(12) S. 25-A. See Nos. 5, 6, 9, 10 and 11, *supra*.

Regulation I of 1886 (Assam Land and Revenue).

(1) S. 70—*Sale—Adverse possession, whether incumbrance.*

Adverse possession is an incumbrance in connection with a sale under S. 70 of the Assam Land and Revenue Regulation. **Aptar Ali v. Brojendra Kishore Roy Chowdhry**, 23 Ind. Cas. 119.

CARNDUFF and RICHARDSON, JJ.

References :—26 C. 194 (195) = 3 C.W.N. 108, *Rel.*; 22 C. 244 (251), *R.*

(2) Ss. 70, 71—*Revenue sale—Owner of share of a mouza, purchase by—Purchase, effect of—Incumbrance—Adverse possession.*

An owner of shares in certain specified villages in a mahal sold for revenue under S. 70 of the Assam Land and Revenue Regulation, though not a defaulting proprietor, purchases the estate subject to encumbrances.

Adverse possession is an incumbrance within the meaning of S. 70 of the Assam Land and Revenue Regulation. **Musuzah Bibi v. Brojendra Kishore Roy Chowdhry**, 20 C.L.J. 210.

CARNDUFF and RICHARDSON, JJ.

* References :—22 C. 244 (251); 26 C. 194 (198), *R.*

(3) S. 71. See No. 2, *supra*.

Regulation II of 1886 (Sonthal Parganas).

(1) S. 2. See BENGAL ACT XXXVII OF 1865 (SONTHAL PARGANAS), No. 1, 19 C.L.J. 294.

(2) S. 3—*Sonthal Parganas—Suit for enhancement of rent—Jurisdiction of Civil Court.*

There is no law in the Sonthal Parganas under which a suit for enhancement of rent is maintainable in a Civil Court. **Kumar Kalidas Pandey v. Babu Krishna Dhan Ghose**, 24 Ind. Cas. 1.

COXE and IMAM, JJ.

Regulation V of 1893 (Sonthal Parganas Justice).

(1) S. 9. See SONTHAL PARGANAS, No. 1, 18 C.W.N. 994.

(2) S. 27—*Civ. Pro. Code (1908), S. 115—High Courts Act (24 and 25 Vict. C. 104), S. 15—Superintendence of High Court—Sonthal Parganas Act (XXXVII of 1865), S. 2—Proviso—Suit valued at more than Rs. 1,000—Mortgage decree—Execution—Adjournment of sale by Sub-Judge—Order, if revisable by High Court.*

The petitioner obtained a decree for more than Rs. 1,000, for sale on a mortgage and the property was advertised for sale. The landlord objected to the description of the property as being *mokurrari maurasi* and he alleged that it was a tenancy at will. Ultimately the petitioner obtained a rule from the High Court, which with the consent of the parties was made absolute, and the landlord was discharged from the record and the property was ordered to be sold as tenancy-at-will. The case went back to the Sub-Judge of Deoghur. The landlord also applied to the executive authorities for a further enquiry which was ordered to be held by the Sub-Divisional Officer who was also the Sub-Judge who adjourned the sale. The petitioner obtained a rule for the immediate sale of the mortgaged property :

Held, that (1), as the subject-matter of the suit exceeded one thousand rupees, it was governed by the general laws and regulations ;

(2) the High Court's general powers of superintendence under the Charter are in no way restricted by the Sonthal Parganas Regulations and Rules (a) ;

(3) the order of the Sub-Judge adjourning the sale can be examined by the High Court, though not under S. 115 of the Civ. Pro. Code, yet under S. 15 of the Charter, and that the Sub-Judge should be directed to proceed with the sale at once (b). **Sardari Sha v. Hukum Chand**, 22 Ind. Cas. 848.

COXE and CHATTERJEE, JJ.

References :—(a) 18 C. 133, F. (b) 1 A. 101, Cited.

(3) S. 27. See BENGAL ACT XXXVII OF 1865 (SONTHAL PARGANAS), Nos. 1 and 2, 19 C.L.J. 294 and 18 C.W.N. 662.

Regulation I of 1896 (Upper Burma Civil Courts).

Ss. 25, 26—*Civ. Pro. Code—O. III, r. 2—Use of Special Powers of Attorney to evade the provisions of law relating to the appointments of Pleaders and Advocates.*

Where respondent, ex-petition writer and ex-apprentice clerk, made a business of appearing for parties under cover of special powers-of-attorney and thus practically performed the functions of an Advocate and thereby evaded the provisions of the law relating to the appointment of Advocates and Pleaders.

Held that he made himself liable to punishment under S. 26 of the Upper Burma Civil Courts Regulation.

Held further that it would be absurd if the provisions of O. III, r. 2, Civ. Pro. Code, should enable an unqualified person to practice as an Advocate in spite of the provisions of S. 25, and the following sections of the Upper Burma Civil Courts Regulation. **Nga Nyun v. Nga Po O**, 7 Bur. L.T. 206 = 25 Ind. Cas. 163.

SHAW, J.C.

Reference :—14 C. 556, F.

Regulation VII of 1901 (N.W.F.P. Law and Justice).

Ss. 84, 85—*Suit tried under Provl. S. C. Courts Act—Revision—Court-fees. See COURT FEES ACT, No. 19, 3 P.W.R. 1914 (N.W.F.P.).*

Relationship.

Entries in books of Hardwar priests—Joint ownership of an open plot of land—Evidentiary value as to—Oral evidence of persons as to relationship having no means of knowledge—Effect. See EVIDENCE, No. 5, 171 P.L.R. 1914.

Relief against forfeiture.

Relief against penalties and forfeitures in compromise decrees. See COMPROMISE, No. 1, (1914) M.W.N. 92.

(2) Sub-lessee whether entitled to relief. See TRANSFER OF PROPERTY ACT, No. 102, 12 A.L.J. 1085.

Religious Endowments.

(1) *Ancient deeds—Endowment, deeds of—Construction—Terms ambiguous—External evidence, if admissible.*

Where, in the deeds, the properties were described as *debutter* but were given to the grantee who was to enjoy them from generation to generation in performance of the *sheba* of the Goddess :

Held, that the deeds being ambiguous and ancient ones, the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed. **Kulada Prosad Deghoria v. Kali Das Naik**, 20 C.L.J. 312 = 24 Ind. Cas. 899.

MOOKERJEE and BEACHROFT, JJ.

References :—3 W.R. 142 ; 8 W.R. 42 ; 27 C. 242 (252) ; 15 C.W.N. 126, R.

Religious Endowments—(Continued).

(2) *Religious endowment—Hindu temple—Ilaiwaniyars—Right of worship—Right to enter the temple up to garbhagraham—Exclusion from such right—Burden of proof—Precedence of other castes.*

Plaintiffs, as representatives of the Ilaiwaniyar community, brought a suit for a declaration that they are entitled to stand for purposes of worship in what may be called the outer mantapam, i.e., the hall between the Flag Staff and the Garbhagraham, and for an injunction against their being ejected therefrom.

Held that, taking it as indisputable that the plaintiffs belong to the Sudra caste, they are *prima facie* entitled to worship from the Mahamantapam, one of the halls west of the bull near the Dwajastamba and east of the Garbhagraham (a).

Provided a person proves that he has the status of one of the main castes (or it may be, an intermediate Anuloma status between two of the main castes), it would be for those who wish to exclude him from the usual position in the temple assigned to a man of his caste status by the Agamas, to prove that, by special custom of that temple, even a person of that caste is excluded (b).

Held that the plaintiffs' claim ought to be allowed subject to a declaration that Brahmans, Pillais and Mudaliars are entitled to take precedence over the plaintiffs by standing in front of persons belonging to the plaintiffs' caste in the covered portions of the temple between the Dwajastambam and the Garbhagraham where it is intended that the worshippers shall stand. **Gopala Muppanar v. Dharmakartha Subramania Iyer**, 27 M.L.J. 253 = (1914) M.W.N. 822.

SADASIVA IYER and TYABJI, JJ.

References:—(a) 31 M. 236; 13 M. 293 and 14 Travancore L.R. 56, R.

(3) *Religious trusts—Alienation—Test—Bona fide enquiry—Repair of a temple.*

There is no difference between the rights of an alienee from the manager of a joint Hindu family and the alienee from the trustee of a religious trust. The alienation will be upheld provided *bona fide* enquiries as to the necessity for the repairs of the temple were made by the alienee and he was satisfied on such enquiries as to the necessity for raising money for such repairs by such alienation. **Kuttayakath Yalia Yarma Yalla Rajah Averal v. Erimhal Karuwante Yalappil Aylsoumma**, 16 M.L.T. 503 = (1914) M.W.N. 909.

SADASIVA IYER and HANNAY, JJ.

References:—27 M. 465, Diss.; 4 I.A. 52, Appl.

(4) *Mahant of a Math or Sangat, right to acquire property by—Subsequent treatment of the property, effect of—Endowment, sufficient evidence of.*

A Mahant of a math or sangat though required to observe celibacy is not disqualified

Religious Endowments—(Concluded).

from acquiring property for his own personal benefit if he has funds of his own.

The evidence afforded by the subsequent treatment of the property for several generations by the parties concerned may in certain cases be legitimately used for determining the nature of the interest sought to be created.

Where there was no sufficient evidence to establish that the particular property in dispute was purchased from the income of the sangat or was dedicated to it by the founder of the sangat after his purchase, and the succession to the property had not been consistent with its being endowed property, *held*, that the land in dispute did not form part of the endowed property. **Rajman v. Brahm Surat**, 17 O.C. 336.

KANHAIYA LAL, J.C.

(5) *Building used for stabling temple coaches and horses—Exemption from tax. See MADRAS ACT IV OF 1884 (DISTRICT MUNICIPALITIES), No. 2, 16 M.L.T. 98.*

(6) *Temple—Erection by priest on site purchased out of funds raised by subscription—Public temple—Rights of priest—Suit by worshipper—Maintainability. See CIV. PRO. CODE (1908), No. 124, 7 S.L.R. 129.*

(7) *Suit to remove mutwali of mosque—Compromise by which plaintiff agrees to withdraw suit for consideration whether lawful. See CIV. PRO. CODE (1908), No. 125, 18 C.W. N. 1264.*

(8) *Inam granted by Government to a person doing service in temple—Right of temple authorities to prevent its alienation—Servant removed from service—Right of his successor to recover the inam. See INAM, No. 2, 27 M.L.J. 57.*

(9) *Inam granted to Vritigars of temple for reciting Vedas—Inam granted by Zamindar and confirmed by Government—Right of temple trustees to resume—Trustees' power to dismiss Vritikars—Minority, sex or ignorance of the Vedas whether disqualifications for performing service—Service performed by proxies—Onus on Dharmakartas to prove disqualification. See INAM, No. 3, 27 M.L.J. 179.*

(10) *What amounts to dedication to a temple. See LIMITATION ACT (1908), No. 125, 27 M.L.J. 195.*

(11) *Devaswom—Suit by one trustee to eject tenant—When sustainable. See TRUST, No. 5, 16 M.L.T. 250.*

(12) *Worshippers' right to sue for possession of mosque properties. See WORSHIPPERS, No. 1, 16 M.L.T. 165.*

Religious Endowments Act.

See ACT XX OF 1863.

Religious Offices.

(1) *Hindu Law—Alienation of religious office—Custom—Hereditary, devolution of religious office by—Disqualification, personal, permanent or temporary, effect of—Pujamirasi meaning of—Civ. Pro. Code (1908),*

Religious Offices—(Continued).

O. XXIII, ¶ 3—Razinama—Lawful agreement—Plaintiff, representing public—Compromise by such plaintiff, whether binding on public—Contract Act, S. 16—Undue influence—Pressing necessity of borrower.

Per Sadasiva Iyer, J.—The mere fact that a man is obliged to part with his properties for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract by which he parts with his rights is affected by undue influence within the meaning of S. 16 of the Contract Act.

A *pujah miras* involves the duty of touching, bathing and adorning etc., the idols, in a temple, the making of offerings to the idols, the reciting of *mantrams*, and the doing of other similar services.

While sex is no disqualification for a woman to hold the office of a management of a religious trust, whether Hindu or Mussalman, a disqualification to inherit by reason of sex exists in the case of the office of temple *pujari* or *acharya purusha* or other priestly office in a temple or a mosque. Just as an outcaste cannot inherit a religious office by reason of his permanent disqualification, women also cannot.

It is settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of *archaka* in a *saivite* temple which has been established according to both Vedic and Tantric rites.

Temporary disqualifications, such as minority or curable insanity, death pollutions and birth pollutions and so on, are not obstacles to obtain a right to a religious office by heredity. But permanent personal disqualifications (*e.g.*, conversion to another religion, or female sex), do prevent the acquisition of the right to hold a religious office, notwithstanding that the condition of being the next heir to the previous holder of the office is fulfilled.

A religious office in a Hindu temple can be held by a right of heredity but mere heredity alone cannot form a complete qualification entitling the heir to become the owner of such an office, that is to say, though the office is hereditary, it cannot be acquired through mere heredity.

A personally disqualified heir (*e.g.*, a woman who is permanently disqualified to do the duties of an office) cannot inherit the office and at the same time perform the duties of the office through a male proxy.

A permanent personal disqualification to perform the duties of a religious office is also a disqualification to inherit the right to enjoy the emoluments attached to the office.

As the duties of the *archaka* office are more important than the *rights* of the office-holder, that is, as the *rights* of the deity to have the office performed are entitled to much more consideration than the so-called hereditary right of any particular person to hold the office, a dispute involving the right to

Religious Offices—(Continued).

such an office, when it has once been brought before a Court for adjudication, cannot be settled lawfully by a mere *razinama* between the parties.

The alienation of a religious office by which the alienors obtain a pecuniary benefit cannot be upheld, even if a custom is set up sanctioning such an alienation. Such a custom, even if established by practice, would be illegal.

In a case in which a plaintiff is allowed to represent the public, a judgment by consent will not bind the public even if the consent was not purchased, and *a fortiori* if such consent was purchased.

In this case a *razinama* was held to be unlawful, because

(1) it was really an alienation of a portion of a religious office;

(2) the alienation was made in favour of persons permanently disqualified to hold the office;

(3) there can be no lawful compromise of a dispute in respect of a religious office, the proper performance of the duties of which concern not merely the parties to the compromise but principally affects the religious trust itself and the Hindu public for whose benefit the religious trust exists.

Per Tyabji, J.—It is not in every case opposed to public policy to provide that a religious office should devolve hereditarily even on persons not themselves qualified to discharge the duties of the office. The question must, in each case, be decided with reference to the particular facts of that case, including the nature of the functions to be performed by the office-holder according to the directions of the founder, the remuneration provided for the performance of those functions, and similar other matters.

Where the functions of an office are of such a nature that they can be performed equally well by any one of a large body of persons, and where the emoluments, provided for the performance of those functions, are far in excess of the necessary usual fees to be paid to the person who is engaged to perform them the heir of the last office-holder should not be deprived of the office. But where the functions of the office are such that they require peculiar qualifications, intellectual or moral, for performing them, and accordingly a large income has been set apart by the founder for remuneration of the office-holder, the heir of the last office-holder should be superseded in favour of another, sufficiently competent. *Sundarambal Ammal v. Yogavanagurukkal*, 26 M.L.J. 315 = 23 Ind. Cas. 72 = (1914) M.W.N. 286.

SADASIVA IYER and TYABJI, JJ.

(2) *Religious office—Hereditary right—Recognition by Courts—Certain offices in the Madura Meenakshi Temple.*

Religious Offices—(Concluded).

The office of *athikaraparapathyam* in the Madura Meenakshi Temple is a hereditary office and the Stanikars have no right to appoint anybody they choose from time to time removing their nominee at their pleasure. Courts should always hesitate to recognise hereditary rights in temple offices.

It is loose expression to say 'It is a matter of common knowledge that the old temple offices are by custom hereditary.' **Ananthanarayana Iyer v. Athimuthu Iyer**, (1914) M.W.N. 385 = 25 Ind. Cas. 74.

WALLIS and SADASIVA IYER, JJ.

- (3) *Whether woman can hold religious offices and get the duties performed by proxy—Custom—Legality.*

Woman can hold religious office and get the duties performed by proxy. A custom to that effect is not illegal. **Ramasundaram Pillay v. Savundaratha Ammal**, 16 M.L.T. 423 = (1914) M.W.N. 919.

AYLING and HANNAY, JJ.

References:—3 M. 95; 8 M.L.T. 325; 21 M.L.J. 490; 18 C.W.N. 1029; 20 C.L.J. 183, R.; 26 M.L.J. 316, *Dist.*

- (4) *Transferability and partibility of.* See CUSTOM (GENERAL), No. 1, 20 C.L.J. 188.

Relinquishment.

Deed of relinquishment by some reversioners in favour of others—Validity and effect. See CUSTOMS (PUNJAB—ALIENATION), No. 13, 184 P.L.R. 1914.

Remand.

- (1) *Civ. Pro. Code—Appellate Court's power of remand—Such power wider now than under old Code—Remand by consent, legality of.*

The power of remand possessed by an appellate Court under the new Civ. Pro. Code, is much wider than under the old Code.

The power of the Court to pass an order of remand by consent of parties is even more extensive than is allowed by the Code (a). **Muthusami Odayan v. Kolandavelu Odayan**, (1914) M.W.N. 90 = 22 Ind. Cas. 41.

SADASIVA IYER and SPENCER, JJ.

Reference:—(a) 28 M. 437, *F.*

- (2) *Equitable set off—Order made before remand if binds Court at final hearing.* See AWARD, No. 2, 18 C.W.N. 426.

(3) *Remand—Questions forming essential parts of the order—Questionability in appeal.* See CIV. PRO. CODE (1908), No. 138, 10 N.L.R. 28.

(4) *Remand to District Judge—Transfer by District Judge to Sub-Judge—Irregularity—Effect.* See CIV. PRO. CODE (1908), No. 60, (1914) M.W.N. 317.

(5) *Trial on issues—Remand order—Direction to call for particular kind of evidence—Power of appellate Court.* See CIV. PRO. CODE (1908), No. 453, 22 Ind. Cas. 128.

Remand—(Concluded).

(6) *Remand by High Court—Decree of District Judge—District Judge after remand sending case down for re-trial by Sub-Judge—Trial by Sub-Judge with consent of parties—Irregular assumption of jurisdiction—Effect.* See CIV. PRO. CODE (1908), No. 57, 19 C.L.J. 408.

(7) *Order of—Appeal when lies.* See CIV. PRO. CODE (1908), No. 451, 162 P.L.R. 1914.

(8) *Case remanded by High Court to District Judge—District Judge's power to transfer the case to Subordinate Judge.* See CIV. PRO. CODE (1908), No. 58, 12 A.L.J. 1094.

(9) *Jurisdiction to entertain suit after remand—Suit originally tried by District Judge—Tried by Sub-Judge after remand with consent of parties—Effect.* See LANDLORD AND TENANT, No. 37, 19 C.W.N. 143.

Rent.

(1) See LANDLORD AND TENANT.

(2) See LEASE.

(3) *Suit for rent—Registered lease—Limitation.* See LIMITATION ACT (1908), No. 106, (1914) M.W.N. 323.

Rent Act (Bengal).

See BEN. ACT X OF 1859.

See N.W.P. ACT XI OF 1881.

See OUDH ACT XXII OF 1886.

Rent Recovery Act.

See BEN. ACT VIII OF 1865.

See MAD. ACT VIII OF 1865.

Representative.

(1) *Death of one party who had no interest in suit—Legal representative of such party whether should be impleaded.* See CIV. PRO. CODE (1908), No. 370, 22 Ind. Cas. 929.

(2) *Purchaser under a mortgage decree—Whether purchaser representative of mortgagor.* See ESTOPPEL, No. 3, 12 A.L.J. 123.

Residuary Estate.

Revenue sale—Residuary estate—Burden of proof. See REVENUE SALE, No. 1, 20 C.L.J. 310.

Res Judicata.

(1) *Benamidar—Ostensible owner, suit by—Judgment, whether bars a subsequent suit by the real owner—Issues, decision upon—Finding on each issue, whether operates as res judicata—Non-applicable decision in previous litigation, whether a bar—Mutuality, doctrine of, where applicable—Mixed question of fact and law, decision on—Erroneous decision, if can be re-opened.*

Where a suit is prosecuted by one person for the benefit of another who is the real party in interest, the latter is bound by the judgment; and it makes no difference that there are nominal parties on the record or that the action is prosecuted or defended by a nominal party (a).

Where a statute authorizes a defendant to set up in the same answer as many defences as

Res Judicata—(Continued).

he has, if a judgment is entered in his favour, which contains no provision that it shall be without prejudice or any other limitation or restriction, the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant (b).

Judgment in a previous suit may operate as *res judicata* notwithstanding the fact that no appeal was allowed by law against the decision (c).

In applying the doctrine of *res judicata* the principle of mutuality can be invoked only with reference to decision upon points not necessary for the determination of the previous litigation (d).

A decision upon a mixed question of fact and law in a previous litigation does operate as *res judicata* in a subsequent suit. And a decision upon a pure question of law, even though erroneous, may, under certain circumstances, operate as *res judicata* (e). **Rambehari Sarkar v. Surendra Nath Ghose**, 19 C.L.J. 34 = 21 Ind. Cas. 979.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 20 W.R. 123 = 11 B.L.R. App. 37; 1 Ind. Jur. N.S. 282; 10 C. 697, F.; 1 A. & E. 3 = 40 R.R. 226; 174 U.S. 408; 14 Howard 52, R.; 4 C.W.N. 283; 32 C. 357 = 1 C.L.J. 23; 14 C.W.N. 774, D. (b) 24 C. 900, F.; 17 A. 174; 11 Bom. L.R. 366; 35 B. 38, Not F.; 3 Sawyer 634 = 9 Fed. Cas. 592; 32 Colorado 342 = 76 Pacific 372, R. (c) 25 C. 571, F. (d) 11 App. Cas. 541 (553), Expl. (e) 11 C.L.J. 461; 1 C.W.N. 687, R.

(2) *Second appeal only against one of two decrees in cross-appeals disposed of by one judgment, when maintainable.*

Where a second appeal was preferred only against one of the two decrees made in cross-appeals disposed of by a single judgment, and the matter at issue in the second appeal was not directly and substantially at issue in the appeal left intact:

Held, that there had been no final decision of the question raised in the second appeal so as to operate as *res judicata* against the hearing of that appeal. **Lallu Ram v. Raj Bahadur**, 21 Ind. Cas. 264.

SABONADIÈRE, A.J.C.

References:—5 O.C. 384; 5 O.C. 146; 7 Ind. Cas. 166 = 33 A. 51 = 7 A.L.J. 861; 13 Ind. Cas. 984 = 15 O.C. 22; 19 Ind. Cas. 76 = 35 A. 187 = 11 A.L.J. 214, D.

(3) *Civ. Pro. Code, 1882, S. 13 (= Civ. Pro. Code, 1909, S. 11)—Res judicata—Prior suit for redemption against prior mortgagee and for possession against mortgagors—Decree for redemption against former and for possession against latter—Payment of mortgage amount to prior mortgagee—Subsequent suit for possession alone against former defendants—Bar of suit.*

The father of the present plaintiffs together with his co-mortgagees M and H brought a

Res Judicata—(Continued).

former suit for a redemption against the prior mortgagee J. (whose rights have now devolved upon D by virtue of a partition), but so far as regards the original mortgagors or their heirs who were also impleaded as defendants along with the prior mortgagee, the suit was one for the possession of the mortgaged land pure and simple. As the result of the said suit in 1893, the Court passed a decree for redemption, on payment of a sum of Rs. 403 to the prior mortgagee D, now defendant No. 8, and a decree for possession against the mortgagors who were in possession of the property and contested suit. The decree of 1893 was never executed. The present plaintiffs now brought the present suit for possession of the same land against the same defendants.

Held, that, so far as the mortgagors are concerned, the present suit, based as it is on exactly the same cause of action as the suit of 1893, was barred by the rule of *res judicata* under S. 13, Civ. Pro. Code (1882).

Although *qua* the prior mortgagee, the prior suit was one for redemption of the prior mortgage, *qua* the mortgagors, it was one for possession of the land, and the decree of the Divisional Court was binding on the mortgagors as well as on the prior mortgagee. **Rom Das v. Mehar Dad**, 12 P.R. 1914 = 124 P.L.R. 1914 = 22 Ind. Cas. 896.

SHAH DIN and SCOTT-SMITH, JJ.

(4) *Estoppel—Registration—Document creating rights in immovable property—Narration of accomplished fact—Withdrawal of suit without permission to bring fresh suit—Custom—Re-marriage—Widow—Forfeiture of right in her husband's land.*

The question in this case was whether Sant Singh was son of Kala Singh or his *pichhlag* (step-son).

Ram Singh had five sons. His holding was divided on his death *chundawad* Kala Singh and his brothers Attar Singh, Lehna Singh and Kharak Singh got one-half and Kahan Singh the other half.

Sant Singh sued, after the death of Kala Singh, his brothers Attar Singh, Lehna Singh and Kharak Singh for possession of land. The defence was that Sant Singh was *pichhlag*. Sant Singh withdrew his suit obtaining permission to sue again. Then he brought another suit against Attar Singh and Kahan Singh. Lehna Singh and Kharak Singh had died meanwhile. In 1881 he withdrew this suit also but without permission to sue again and the suit was dismissed. In this case also the defence was that he being *pichhlag* had no right. In 1902 Attar Singh brought a suit for a declaration against Sant Singh and the question was whether Sant Singh was son of Kala Singh. This suit was decreed.

In December 1903, shortly before his death, Attar Singh executed a document professing to recognize Sant Singh as the son of Kala Singh. In 1904, Kesaf Singh, son of Kahan Singh, on

Res Judicata—(Continued).

his own behalf, and his mother on behalf of his two minor brothers, acknowledged Sant Singh to be the son of Kala Singh and entitled to fourth share in the joint land.

Recently, a daughter-in-law of Attar Singh married Sant Singh, and the plaintiffs, sons of Kahan Singh, sued for possession of the land alleging that she had lost her right by reason of re-marriage and Sant Singh not being the son of Kala Singh had no right at all in the land. The suit was decreed but on appeal it was dismissed on the ground that the plaintiffs were estopped from contesting the right of Sant Singh. In 1909, Kesar Singh appeared to have been present before the Naib Tahsildar and gave his assent to mutation in favour of Sant Singh.

Held, that Sant Singh and not the plaintiffs were estopped by previous transactions.

(1) That the document of 1904 required registration, for it contained not merely an expression of an accomplished fact such as does not require registration but was a document formally declaring Sant Singh's rights in immoveable property. Under S. 49 of the Registration Act, it was inadmissible in evidence.

(2) That the plaintiffs being representatives of Attar Singh, the matter was *res judicata* by reason of the former suits which were withdrawn and decided against Sant Singh.

(3) That no reliance could be placed on the document of 1903, for its execution may have been obtained when Attar Singh was on death-bed.

That the daughter-in-law by her re-marriage lost whatever rights she had in the land, according to general custom, and no special custom to the contrary was proved. **Kesar Singh v. Sant Singh**, 19 P.L.R. 1914.

JOHNSTONE and CHEVIS, JJ.

(5) *Question, decided against a pro forma defendant when not res judicata.*

Held, that a question decided in a previous suit against defendants, some of whom were simply *pro forma*, is not *res judicata* in a subsequent suit (relating wholly or partly to the same subject-matter) brought by the *pro forma* defendants on the strength of their own title, against the real or chief defendants and the plaintiff in the previous suit; particularly where the former plaintiff is also *pro forma* defendant in the subsequent suit.

N purchased an entire village. K, the pre-emptor agreed to give R. $\frac{1}{3}$ of the village in consideration of his paying a share of the expenses for the litigation and a share of the pre-emption money. After obtaining the decree for pre-emption, K, sold $\frac{2}{3}$ th of the village to M. in order to pay the pre-emptive price of the property. R. sued K. and M. to get the $\frac{1}{3}$ rd. K. contested the claim on the ground that R. had failed to pay his share of the price as agreed, and consequently K, had to sell $\frac{2}{3}$ th of the village to M. for paying the pre-emptive price

Res Judicata—(Continued).

into the Court. Eventually R. got the decree for $\frac{1}{3}$ on the condition of his paying to K. a certain sum of money. Then M. sued K. and R. to get his $\frac{2}{3}$ th of the village. K. again contested this suit and also contended *inter alia* that (1) the decree in favour of R. was in respect of the land claimed by M., and that (2) it was finally decided in the previous suit that R. and not M. was entitled to this land, and thus the claim of M. was barred by the rule of *res judicata*. The first Court accepting this contention dismissed the claim of M. But the Chief Court decreed the claim on the ground that the rule of *res judicata* was not applicable in such a case. **Mir Khan v. Rahman**, 17 P.W.R. 1914=35 P.L.R. 1914=23 Ind. Cas. 381.

REID, C.J. and BEADON, J.

(6) *Civ. Pro. Code (1908), S. 11—Whole body of Pana suing whole body of another Pana—Difficulty in identifying predecessors of each and all parties in subsequent suit immaterial—Presumption of former suit being inter partes—Limitation—Paper possession of banjar land in execution—Sufficient possession.*

Plaintiffs, all the proprietors of *Pana K.* of a village, sued defendants, all the proprietors of *Pana L.* of the same village, for possession of a particular piece of *banjar* land, and got a decree as against the defendants generally. Before the appellate Court only five of the defendants appeared, and the case was remanded with the remark that the only matter then in dispute was the land in possession of the said five defendants-appellants, and directing the first Court to ascertain and report what plots of land were in possession of those five defendants and since how long. On the report, however, the Court of appeal confirmed the decree of the Court below. Plaintiffs actually executed this decree and obtained 'possession' of the land in dispute.

Subsequently, all the proprietors of *Pana K.* again sued all the proprietors of *Pana L.* for possession of the same piece of land.

Held, that (1) the title to the land in dispute was *res judicata*;

(2) the previous suit was not limited by the action of the appellate Courts to the plots in the lands of the five defendants-appellants; and

(3) notwithstanding the difficulty that might exist about identifying the parties in the former case as the predecessors in title of each and all of the parties of the subsequent suit, the doctrine of *res judicata* did apply, for in both cases the body of proprietors was involved, and, in the absence of evidence to the contrary it could be safely and properly presumed that the earlier case was *inter partes*;

(4) inasmuch as plaintiffs got possession of the *banjar* land in dispute in execution of the decree in the former suit, it was for the defendants to show that they ousted plaintiffs more than 12 years before suit.

Res Judicata.—(Continued).

In cases of disputes over *banjar* land, 'paper' possession by means of decree and its execution is sufficient possession (a). *Pirithi v. Ratti Ram*, 19 P.W.R. 1914=18 P.L.R. 1914=21 Ind. Cas. 972.

JOHNSTONE and BEADON, JJ.

References:—(a) 103 P.R. 1884; 16 C. 580 (F.B.); 22 B. 667; 19 A. 499=A.W.N. (1897). 127; 27 M. 262 (269, 270); 53 P.R. 1907=120 P.W.R. 1907, R.; 140 P.R. 1907=187 P.W.R. 1907; 17 C. 137=16 I.A. 148, D.

(7) *Decision as to quantity of land by Revenue officer—Landlord and tenant.*

B was a seputnidar for life and after the termination of his interest, the defendants came into occupation as the superior landlords. The defendants instituted a suit for rent in a Revenue Court against the plaintiffs in respect of the holding of A. In the plaint of that suit, the defendants did not include the disputed land. The plaintiffs thereupon contended that although they did not dispute the amount of rent payable by them as purchasers of the holding of A, yet they were entitled to the land now in dispute as included in that holding. The Court investigated into the matter and came to the conclusion that the disputed land was part of the holding of A. The suit was accordingly decreed and the decree was subsequently satisfied by the plaintiffs. It was not proved that, from that date, the defendants accepted rent from the plaintiffs in respect of the disputed lands:

Held, that the relationship of landlord and tenant was not constituted between the parties by the acceptance of the decretal amount.

Held also, that the decision of the Revenue Court was not conclusive and it was open to the defendant to assail that finding in as proceeding properly framed and instituted in the Civil Court for the determination of the area and boundaries of the holding. The course was not needed in the present case as the plaintiffs were not in possession. *Mukunda Lal Chuckerbutty v. Kali Prosonno Chatterjee*, 19 C.L.J. 244=23 Ind. Cas. 592.

MOOKERJEE and BEACHROFT, JJ.

References:—15 B.L.R. 238; 24 W.R. 154, R.

(8) *Cause of action different—Former suit on title—Subsequent suit to compel acceptance of karar.*

Where a former suit between the plaintiff and the defendant established the plaintiff's rights as *poojari* in a temple, but *held*, that she could not maintain a suit for a share in the offerings in the temple without offering a *karar* to the defendant, a subsequent suit by the plaintiff to compel the defendant to accept a *karar* and to give her a share in the offerings is not barred by the rule of *res judicata*.

Res Judicata.—(Continued).

Sri Sukrutendra Swamulayaru v. Poojarl Rindimma, 21 Ind. Cas. 984.

SADASIVA IYER and SPENCER, JJ.

References:—31 M. 385; 17 Ind. Cas. 445=12 M.L.T. 500=(1913) M.W.N. 1=23 M.L.J. 548, D.

(9) *Civ. Pro. Code* (1908), S. 11—*Res judicata*—"Persons litigating under the same title"—*Reversioner allowed to recover his moiety on proof of absence of legal necessity for sale by Hindu widow—Fresh suit on the other moiety falling in—Decision on the issue of legal necessity is res judicata.*

Where the plaintiff, having sued the defendant to recover possession as reversioner of a property alienated by a Hindu widow, obtained a decree in respect of a moiety of the property upon a finding that the sale was not for legal necessity, but the suit was dismissed as regards the other moiety on the ground that it had not passed to the plaintiff, and afterwards this moiety too having passed to the plaintiff, he again sued the defendant for recovery of this moiety:

Held—that the decision in the previous suit that the sale was not for legal necessity was *res judicata* in the present suit, as the parties were litigating under the same title in both suits, viz., the plaintiff as the owner of the reversioner and the defendant as purchaser from the widow. *Surya Kanta Ray Chowdhury v. Fani Bhushan Banerjee*, 18 C.W.N. 888.

JENKINS, C.J., and WOODROFFE, J.

(10) *Suit on prior mortgage—Subsequent suit on puisne mortgage—Want of legal necessity for the puisne mortgage not set up in the first suit—Dispute between co-defendants—Plea of want of legal necessity—Res judicata.*

A mortgage was made in favour of the plaintiff by a Hindu widow in possession of the property in 1898. The rate of interest fixed was 37½ per cent. There was an earlier mortgage on the same property of the year 1896. After the mortgage of 1898 the defendants purchased the property from the donees of the widow. The mortgagee of 1896 brought a suit upon his mortgage making the plaintiff and the defendants parties to the suit. The defence of the plaintiff was that he having paid off a prior mortgage had a prior right to that of the mortgagee of 1896. The present suit was brought upon the mortgage of 1898.

Held, that, as the dispute in the suit on the prior mortgage was between the prior mortgagee on the one hand and defendants to that suit generally, on the other, the question as to want of legal necessity for the puisne mortgage could not and did not arise between the co-defendants in the former suit, and there was no bar to that plea being taken in the present suit. *Chittar Mal v. Ram Narain*, 12 A.L.J. 603.

RICHARDS, C.J. and BANERJI, J.

Res Judicata—(Continued).

(11) *Res judicata—Inconsistent pleas raised in two suits—Titles under which two suits brought, different—Parties—Redemption suit—Integrity of mortgage broken—Suit against some of the mortgagees—Maintainability.*

Where a plaintiff's suit is based on the strength of a title which is not the same as the title on the strength of which he litigated in a previous suit, the decision in that suit is not *res judicata* in the subsequent suit and he is not debarred from raising pleas inconsistent with the pleas raised in the previous suit.

Held, also that in a suit for redemption of a mortgage all the mortgagees or their representatives interested in the mortgage are necessary parties and the absence of any one of them is fatal to the suit. A mortgagor must redeem the property in the hands of all the mortgagees or their representatives, and he cannot be allowed to claim his part of the property from some of the mortgagees only.

The effect of the breaking up of the integrity of a mortgage is that each mortgagor may redeem his share of the mortgaged property, but he cannot compel some of the mortgagees to give up from their shares what belongs to him (a). *Said-ud-din Khan v. Hira Lal*, 12 A.L.J. 619=24 Ind. Cas. 25.

BANERJI, J.

Reference:—(a) 11 A.L.J. R. 749, *Dist.*

(12) *Res judicata—Benamidar, suit against—Defendant pleading that he is a benamidar—Decree against him as a real owner—Real owner is bound—Subsequent suit by real owner.*

A decree against a benamidar is binding on the real owner only when the litigation is carried on with the full knowledge and authority of the latter and he abstains from coming forward.

A decree passed against a benamidar on the express finding that he is not a benamidar but the real owner is not binding on the real owner. Where the defendant in a case protests that he is a benamidar and does not want to carry on litigation brought against her, though not in her capacity as a benamidar, but wants the real owners to be brought on the record, and the plaintiff in that case not only fails to take advantage of the information* but joins issue with the defendant, the decree passed does not bind the real owner, and a subsequent suit brought by him with respect to the matter involved in the previous suit is not barred by *res judicata*. *Mata Prasad v. Ram Charan Sahu*, 12 A.L.J. 701=36 A. 446.

RAFIQ and PIGGOTT, JJ.

References:—3 A. 812; 18 A. 69; 21 A. 380; 30 A. 30; 10 C. 697 (705), R.

(13) *Res judicata—Ex parte decree—Decree based upon compromise—Final decision—Decree against Hindu widow declaring plaintiffs reversioners—Subsequent transfer—Right of transferee to deny their right.*

Res Judicata—(Continued).

S, a Hindu widow in possession of her husband's property leased that property to certain persons. The plaintiffs brought a suit for cancellation of the lease and declaration of their right as reversioners, making both the lessor and the lessees parties. S did not put in an appearance and the suit was compromised between the lessees and the reversioners and as against S a decree *ex parte* was passed declaring that the plaintiffs were the next reversioners to the estate. Subsequently S executed a mortgage in favour of the defendant and the present suit against the mortgagee and S for cancellation of the mortgage was brought by the plaintiffs on the ground that there was no legal necessity for the mortgage. The defendants denied the right of the plaintiffs as next reversioners.

Held, that the *ex parte* decree against S in the first suit was binding upon her and she could not set up a plea that they were not the next reversioners.

Held, also that the mortgagee being a transferee from S after the *ex parte* decree referred to above was passed against her was bound by the adjudications contained in that decree.

A decree based upon a compromise or made *ex parte* is as much binding upon the parties as a decree obtained after contest. *Ganga Bishan v. Mehar Ilahi Khan*, 12 A.L.J. 1011.

SUNDAR LAL, J.

References:—1 Ch. 37, F.; 10 P.D. 116; 24 B. 77; 2 C.W.N. 174, R.

(14) *Estoppel—Inconsistent positions, litigants if should be permitted to take up—Mortgage by Hindu widow, suit on, for foreclosure—Reversioner joined as transferee, dismissed from suit on setting up title adverse to widow—Decree for foreclosure against widow—Suit by decreeholder to eject reversioner—Adverse title set up in defence—Suit decreed—Death of widow, suit by reversioner after, to recover, if lies.* *Bhagarathi Das v. Baleshu Bagerti*, 17 C.W.N. 877=19 Ind. Cas. 686=19 C.L.J. 155=41 C. 69. See Final Part, 1913, Col. 1069.

(15) *Previous decision based on more than one finding—Principle applicable.* *Modukari Venkataraju v. Masina Ramanamma*, (1913) M.W.N. 775=21 Ind. Cas. 258. See Final Part, 1913, Col. 1070.

(16) *On-defendant—First suit dismissed—Appealability thereof—Competence of first and second Courts—Negligence of guardian whether an answer to plea of res judicata.* *S. Ranganatham Chetty alias Narasimulu Chetty v. S. Lakshmu Ammal*, (1913) M.W.N. 690=14 M.L.T. 189=25 M.L.J. 379=21 Ind. Cas. 15. See Final Part, 1913, Col. 1070.

(17) *Not applicable where previous contentions are reversed—No estoppel—Value of improvements pendente lite.* *Yelusami Naicker v. Bommachi Naicker*, 14 M.L.T. 229=(1913) M.W.N. 776=25 M.L.J. 324=21 Ind. Cas. 219. See Final Part, 1913, Col. 1071.

Res Judicata—(Continued).

(18) Suit against registered company dismissed after company's liquidation—Effect—*Res judicata*. See ACT VI OF 1882 (COMPANIES), No. 20, 24 Ind. Cas. 99.

(19) *Res judicata*—Applicability of the principle—Matters substantially in issue. See MADRAS ACT XXVIII OF 1860 (SURVEYS AND BOUNDARIES), No. 1, 27 M.L.J. 529.

(20) Suit for ejectment of tenant from year to year—Dismissed as the tenant held under lease—Suit in Civil Court to set aside lease—*Res judicata*. See ACT II OF 1901 (AGRA TENANCY), No. 14, 12 A.L.J. 1252.

(21) Assignee of decree applying for execution—Notice to judgment-debtor—No objection by judgment-debtor—Subsequent application for execution—Judgment-debtor not entitled to object. See CIV. PRO. CODE (1908), No. 317, 12 A.L.J. 206.

(22) Plea of *res judicata* whether may be taken for first time in second appeal. See CIV. PRO. CODE (1908), No. 21, 22 Ind. Cas. 12.

(23) Suit dismissed for default—Decision whether operates as *res judicata*. See CIV. PRO. CODE (1908), No. 24, 12 A.L.J. 911.

(24) Plaintiffs not represented in former suit as minors—One of the plaintiffs a *pro forma* party to the former suit—Second suit not barred as *res judicata*. * See CIV. PRO. CODE (1908), No. 27, 16 Bom. L.R. 616.

(25) Dismissal of previous suit for default of plaintiff and in defendant's absence—Decree whether *res judicata*. See CIV. PRO. CODE (1908), No. 28, 24 Ind. Cas. 17.

(26) Rule of *res judicata*, whether applicable to all stages of suit—Landlord and tenant—Suit for rent—Defence of eviction and consequent suspension of rent—Previous suit by tenant against landlord for possession of land as included within tenancy—Dismissal of suit. See CIV. PRO. CODE (1908), No. 38, 24 Ind. Cas. 243.

(27) Suit to set aside decree as fraudulent—Prior decree whether *res judicata*. See FRAUD, No. 3, 18 C.W.N. 691.

(28) Guardian—Guilty of gross negligence—Decree against minor—Not binding on minor—Not *res judicata*—Decree in favour of widow as representing estate—Suit by reversioner against widow—Not *res judicata*. See GUARDIAN AND MINOR, No. 3, 27 M.L.J. 486.

(29) Decision in previous suit against existence of custom for want of evidence—Effect on subsequent suit involving issue of same custom. See HINDU LAW (EXCLUSION FROM INHERITANCE), No. 1, 22 Ind. Cas. 138.

(30) Contract of indemnity—Breach of contract—Suit by third person against promisor and promisee—Decree against promisee whether binds promisor—Co-defendants—Applicability of doctrine of *res judicata*—Equitable estoppel. See INDEMNITY, No. 1, 37 M. 270.

(31) Lease for certain period—Before expiry of period new lease executed—Condition to

Res Judicata—(Concluded).

enhance rent on completion of certain repairs, etc.—Suit for ejectment—Decision that rent could not be enhanced under second lease as no repairs had been made—Second suit for ejectment—Question whether tenant held in continuation of first lease or as trespasser—Decision in first suit not *res judicata*. See LEASE, No. 11, 257 P.L.R. 1914.

(32) Hindu widow representing the whole estate and putting forward all pleas open to a reversioner—Decision in such suit—Effect—Subsequent suit by the reversioners—*Res judicata*. See LIMITATION ACT (1871), No. 1, (1914) M.W.N. 903.

(33) Plea of *Khanadamad*—Not pressed in prior suit—Effect. See LIMITATION ACT (1908), No. 130, 29 P.R. 1914.

(34) Rent suit—Basis of title a *thika*—Suit dismissed for want of proof—Subsequent suit for posterior period. See TRANSFER OF PROPERTY ACT, No. 90, 22 Ind. Cas. 7.

Restitution.

(1) Restitution of money paid to a surety—Order for restitution is tantamount to a decree. See CIV. PRO. CODE (1882), No. 23, 27 M.L.J. 112.

(2) Possession taken by plaintiff after decree otherwise than by execution—Decree set aside on appeal—Whether decree-holder entitled to restitution. See CIV. PRO. CODE (1908), No. 206, 21 Ind. Cas. 84.

(3) Inherent power of Court to order restitution. See CIV. PRO. CODE (1908), No. 220, 24 Ind. Cas. 384.

(4) Execution sale—Reversal of decree—Defendant purchaser—Sale to be set aside—Sale of mortgaged property—Fund representing mortgaged property—Mortgage-decree—Appropriate remedy—Inherent powers of Court. See EXECUTION SALE, No. 5, 20 C.L.J. 469.

Restitution of Conjugal Rights.

(1) *Conjugal rights—Restitution—Mahomedan marriage.*

Before a Mahomedan husband can succeed in a suit for restitution of conjugal rights, he must establish that there was a valid marriage, in other words, that the requirements of a valid marriage had been complied with. *Hanu Shetkh v. Jurro Sheikh*, 19 C.L.J. 216=23 Ind. Cas. 921.

JENKINS, C.J., and MOOKERJEE, J.

(2) *Hindu law—Conjugal rights—Suit by wife for restitution of—Ill-health of wife—Parent's refusal at one time to give custody of wife to husband—No defence.*

Neither the ill-health of a wife nor the fact that at one time her parents refused to give custody of the wife to her husband is a ground for the refusal of the husband to give her, his protection, and afford her the shelter of his house. The husband is bound to give her protection, notwithstanding that the wife may not

Restitution of Conjugal Rights—(Continued).

be able to afford him all the rights of a husband. **Kuppammal**, minor, by her next friend **Thayasundarachari v. Kuppachari**, 26 M.L.J. 363 = 24 Ind. Cas. 380.

BAKEWELL, J.

(3) *Hindu law—Restitution of conjugal rights—Legal cruelty, what amounts to—Personal health of the wife endangered—When desertion by a Hindu wife justified.*

Where a Hindu husband starved his wife, did not give her proper clothing, shut her up every time he went out of the house, turned her out more than once from his house and frequently used personal violence towards her, *Held*, that the facts constituted legal cruelty, inasmuch as they were of such a character as to endanger the personal health if not the safety of the wife.

Cruelty in a degree which rendered it unsafe for the wife to return to her husband justified desertion by the wife under the Hindu law and was a good defence to a suit for restitution of conjugal rights. **Bhawani Prasad v. Subhagi**, 12 A.L.J. 995.

RAFIQ, J.

(4) *Mahomedan Law—Restitution of conjugal rights—Court's power to make conditional decree—Legal cruelty—No conditional decree where its terms not sufficient to secure personal safety—No decree for restitution of conjugal rights if personal safety cannot be safe-guarded.*

In a suit for restitution of conjugal rights brought by a Mahomedan husband, it was found that plaintiff had been trying to force his wife to sign deeds disposing of her property and on her refusing to do so he had been beating and abusing her. It was also found that having become tired of such treatment the wife left his house and sought protection with her father. The husband followed her there and had to be bound down by a Criminal Court to keep the peace. The Lower Appellate Court granted a decree for restitution of conjugal rights subject to the condition that the husband would not remove her from her father's house and would not interfere with her father living with her if so desired by her.

Held, that the husband was disentitled by reason of legal cruelty to a decree for restitution of conjugal rights even with the condition. **Khurshedi Begum v. Khurshaid Ali**, 12 A.L.J. 1065.

SUNDAR LAL, J.

References :—11 M.I.A. 551 (610); 29 A. 222; (1893) A.W.N. 77; Bom. P.J. (1875) 247, R.

(5) Suit for—Marriage ceremony admitted—Coercion and non-consent pleaded—Right to begin. See ACT IV OF 1869 (DIVORCE), No. 3, 23 Ind. Cas. 242.

(6) Husband and wife—Desertion for more than a year—Dissolution of the marriage tie—Effect of a subsequent suit for. See BUDDHIST LAW (MARRIAGE), No. 1, 7 Bur. L. T. 197.

Restitution of Conjugal Rights—(Concluded).

(7) Suit for—Proof of marriage—Presumption—Minor wife—Execution against parents. See CIV. PRO. CODE (1909), No. 324, 23 Ind. Cas. 828.

(8) Suit for—Marriage consummated—Non-payment of dowry whether good defence. See MAHOMEDAN LAW (DIVORCE), No. 3, S.L.R. 138.

Revenue.

All patta land liable—Liability as between mortgagor and mortgagee. See ACT II OF 1864 (MADRAS REVENUE RECOVERY), No. 2, 16 M.L.T. 226.

Revenue Court.

Refusal of, to correct village papers—Suit for declaration of right—Cause of action. See LIMITATION ACT (1908), No. 110, 12 A.L.J. 810.

Revenue Records.

(1) Entry in revenue records behind owner's back does not affect title. See ACT V OF 1879 (BOMBAY LAND REVENUE CODE), No. 1, 7 S.L.R. 169.

(2) Entry in—Recorded owner not in possession—Title—Burden of proof—Boundary dispute—Decision of Revenue Officers when not binding on parties. See ADVERSE POSSESSION, No. 12, 240 P.L.R. 1914.

(3) Erroneous entry in—Refusal of Settlement Officer to correct the entry—Declaratory suit—Limitation. See DECLARATORY SUIT, No. 2, 22 Ind. Cas. 608.

Revenue Recovery Act.

See MAD. ACT II OF 1864.

Revenue Reports.

Court whether can take judicial notice of—Admissibility of, in evidence. See EVIDENCE, No. 8, 20 C.L.J. 516.

Revenue Sale.

(1) *Burden of proof—Revenue sale—Residuary estate.*

There was a certain taluk in the register of the Revenue authorities. From time to time, separate accounts were opened with the different share-holders of that taluk in respect of specified portions thereof, and ultimately a residuary taluq which still bore the original Tauji number was left in the hands of the person who defaulted in the payment of the Government revenue, the result being that the residuary estate was sold up and purchased by the plaintiff. The plaintiff brought a suit for possession.

Held, that it lay on the plaintiff to prove that the land formed part of the residuary taluq. **Mohamed Faiz Chowdhury v. Kashi Nath Ghosh**, 20 C.L.J. 810.

GHOSH AND PRATT, JJ.

(2) Sale of entire estate—Persons holding portions of estate for over 12 years adversely to the then owners if may maintain possession

Revenue Sale—(Concluded).

against purchaser—Limitation when commences. See ACT XI OF 1959 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.

(3) Suit to set aside Revenue sale—Compromise that defendant should execute Kobala within 3 months—Suit for declaration of title after more than 3 years—Maintainability—Limitation. See CIV. PRO. CODE (1908), No. 72, 23 Ind. Cas. 240.

Revenue Sale Laws Act.

See BEN. ACT XI OF 1859.

Review.

(1) Court hearing insufficiently stamped application for review if acts without jurisdiction—Grant of review—Appeal. See CIV. PRO. CODE (1908), No. 468, 21 Ind. Cas. 943.

(2) Jurisdiction to hear review application not taken away by presentation of appeal. See CIV. PRO. CODE (1908), No. 465, 16 Bom. L. R. 189.

(3) Application for review when maintainable and when not. See CIV. PRO. CODE (1908), No. 464, 12 A.L.J. 382.

(4) Appeal from order granting review when lies. See CIV. PRO. CODE (1908), No. 157, 22 Ind. Cas. 773.

(5) Jurisdiction—Application for review entertained by Judge who passed decree, but disposed of by his successor—Grounds for review. See CIV. PRO. CODE (1908), No. 467, 23 Ind. Cas. 394.

(6) Order granting review of judgment—Appeal. See CIV. PRO. CODE (1908), No. 462, 41 C. 746.

(7) Dismissal of application for admission of second appeal—Order whether can be reviewed on ground of new and important evidence. See CIV. PRO. CODE (1908), No. 444, 41 C. 809.

(8) Inherent power of Court to grant review where review is forbidden by law. See CIV. PRO. CODE (1908), No. 80, 20 C.L.J. 433.

(9) Appeal as to costs—Limitation—Time occupied in review whether can be deducted. See COSTS, No. 2, 26 M.L.J. 356.

Revision.

(1) Revision—Ex parte decrees—Order setting aside—Condition to pay costs—Acceptance of the amount of costs without protest by plaintiff—Acquiescence in later proceedings—Petition for revision presented one year from date of order—Delay—Revisional jurisdiction not to be exercised—Punjab Courts Act, 1884, S. 70 (1) (a).

An *ex parte* decree passed against the respondent on the 6th December 1909 was, in consequence of an application put in by him to set aside the decree on the 5th December 1910, set aside on the 6th December 1910 conditional on the respondent paying to the petitioner Rs. 25 by way of costs. On the 7th December 1910, the respondent paid the amount of costs and

Revision—(Continued).

filed a written statement in answer to the petitioner's claim, and the petitioner received the amount of costs without protest and put in on 8th December 1910 his replication to the respondent's plea. After the case was made over for trial to another Court, the petitioner moved, on the 6th February 1911, the Chief Court for revision of the order setting aside the *ex parte* decree. Held, that the petitioner's conduct, after the date of the order complained against, showed that he did not consider himself materially prejudiced by the order, and that the Court should not exercise its revisional jurisdiction in his favour. **Punna Lal v. Seth Cowasji**, 25 P.R. 1914 = 157 P.L.R. 1914 = 23 Ind. Cas. 919.

JOHNSTONE and SHAH DIN, JJ.

References:—125 P.R. 1892; 34 A. 592; 22 C. 981; 9 C.W.N. 584 and 25 A. 283, R.

(2) Interference in revision—Powers of High Court—Moral as opposed to legal justice—Errors of procedure or technical defects—Interference—Practice.

The High Court as a Court of revision has no power to consider justice apart from such justice as the law recognises. The High Court cannot refuse to interfere on the ground that moral, as opposed to legal, justice is a ground for refusing to interfere in revision. But mere errors of procedure or technical defects not affecting the legal justice of a case will not be encouraged by a Court of revision. **Mattai Reddy alias Ramasami Reddy v. Thanappa Reddy**, 37 M. 385.

SUNDARA AYYAR, J.

(3) High Court—Power of revision.

Even though a petitioner has a remedy by suit, the High Court has certainly jurisdiction to revise the order of the lower Court in a case of rateable distribution.

Where a more efficacious remedy can be had by a regular suit and where the result of interference by the High Court will affect the rights of parties not before the Court *eo nomine* the High Court will not be justified in interfering in revision.

Where there has been an error of law and not of procedure, it is not open to the High Court to interfere in revision. **Somasundaram Chetti v. Tirunarayana Pillai**, (1914) M.W. N. 738.

SPENCER and SESHAGIRI IYER, JJ.

(4) Practice—Calling of opposite side as witness—No ground for revision. **Rangasamy Iyengar, in re**, (1913) M.W.N. 998 = 21 Ind. Cas. 781. See Final Part, 1913, Col. 1078.

(5) Suit under Dekkhan Agriculturists' Relief Act—Appeal—Revision—Jurisdiction. See ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), No. 2, 16 Bom. L.R. 756.

(6) Review of evidence—Interference with finding of fact. See ACT IX OF 1897 (PROVINCIAL SMALL CAUSE COURTS), No. 7, 12 A.L.J. 271.

Revision—(Continued).

(7) Finding of fact on meagre evidence—Revision. See ACT IX OF 1987 (PROVINCIAL SMALL CAUSE COURTS), No. 9, 70 P.W.R. 1914.

(8) Question whether succession certificate is necessary—Revision. See ACT VII OF 1889 (SUCCESSION CERTIFICATE), No. 4, 73 P.W.R. 1914.

(9) Ward of Court—Court's power to restrain unsuitable marriage—Appeal—Revision. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 22, 20 C.L.J. 91.

(10) Court's power in revision to investigate facts. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 33, 20 C.L.J. 213.

(11) Sub-divisional Officer exercising jurisdiction under Sonthal Parganas Act—Revision to whom lies. See ACT XXXVII OF 1865 (SONTHAL PARGANAS), No. 3, 19 C.L.J. 292.

(12) Circumstances warranting the exercise of the revisional jurisdiction of the High Court. See ACT VIII OF 1885 (BENGAL TENANCY), No. 78, 18 C.W.N. 1016.

(13) Order dismissing pre-emption suit for non-payment of purchase money within time appealable as decree—Revision against such order not entertainable by second Appellate Court. See ACT XVIII OF 1876 (ODDH LAWS), No. 7, 24 Ind. Cas. 109.

(14) Powers of Chief Court under amending Act I of 1912. See ACT XVIII OF 1884 (PUNJAB COURTS), No. 19, 44 P.L.R. 1914.

(15) Financial Commissioner, Punjab—Powers of revision. See ACT XVI OF 1887 (PUNJAB TENANCY), Nos. 17 and 5, 1 P.R. 1914 (Rev.) and 4 P.R. 1914 (Rev.).

(16) Document—Material alteration—Suit based on—Dismissal of suit—Revision. See ALTERATION, No. 1, 28 P.W.R. 1914.

(17) Award—Decree—Not appealable—Whether revision lies. See AWARD, No. 9, (1914) M.W.N. 865.

(18) Decision erroneous in law—Whether revision lies. See CIV. PRO. CODE (1908), No. 350, (1914) M.W.N. 147.

(19) Inherent jurisdiction wrongly exercised—Interference in revision—Arbitration proceedings—Setting aside of reference during pendency of proceedings. See CIV. PRO. CODE (1908), No. 202, 12 A.L.J. 529.

(20) Arbitration without intervention of Court during pending litigation—Filing of award—Appeal—Jurisdiction of Appellate Court—Decision right or wrong—Revision by High Court. See CIV. PRO. CODE (1908), No. 154, 22 Ind. Cas. 690.

(21) Order under O. XLI, r. 11 (1), Civ. Pro. Code—Order passed under mistake of fact—Appeal—Revision. See CIV. PRO. CODE (1908), No. 443, 191 P.L.R. 1904.

(22) Order rejecting the plaint—Revision. See CIV. PRO. CODE (1908), No. 271, 80 P.R. 1914.

Revision—(Concluded).

(23) Remedy by regular suit open to parties—Ordinary practice of the High Court—Special circumstances when revision allowed. See CIV. PRO. CODE (1908), No. 199, 12 A.L.J. 899.

(24) Occurrence of mere errors of fact or law—Perverse decision—Interference in revision—Test of perversity. See CIV. PRO. CODE (1908), No. 179, 16 M.L.T. 156.

(25) Whether revision lies against an interlocutory order. See CIV. PRO. CODE (1908), No. 180, 23 Ind. Cas. 564.

(26) Revision application treated as appeal. See CIV. PRO. CODE (1908), No. 73, 18 C.W.N. 1266.

(27) Ill-advised grant of permission to withdraw with liberty to bring a fresh suit—Material irregularity—Revision. See CIV. PRO. CODE (1908), No. 382, 16 M.L.T. 253.

(28) High Court when will interfere with interlocutory orders. See CIV. PRO. CODE (1908), No. 197, 20 C.L.J. 426.

(29) Judgment of the Full Bench of the Presidency Small Cause Court on question of limitation—High Court's power of revision. See CIV. PRO. CODE (1908), No. 182, 16 M.L.T. 438.

(30) Order amending decree—Revision petition presented against such order more than eight months from date of order—Delay not excusable. See CIV. PRO. CODE (1909), No. 181, 24 Ind. Cas. 56.

(31) Erroneous decision not affecting the jurisdiction of the Court—Revision. See CONTRIBUTION, No. 3, 20 C.L.J. 196.

(32) Revision in a suit tried under the Provincial Small Cause Courts Act whether revision under S. 84, Reg. VII of 1901 or under S. 25, Provincial Small Cause Courts Act—Court-fee. See COURT FEES ACT, No. 19, 3 P.W.R. 1914 (N.W.F.P.).

(33) Order setting aside *ex-parte* decree—Revision whether lies. See EX-PARTE DECREE, No. 2, 16 M.L.T. 101.

(34) Self-contradictory decrees of lower Court—Proper order—Order passed more than 3 years ago—High Court when can interfere. See HIGH COURT, No. 1, 19 C.L.J. 9.

(35) Error of law committed but substantial justice done—Interference in revision. See LIMITATION ACT (1908), No. 61 (1914) M.W.N. 792.

(36) Calculation of time spent in obtaining copies—Extension of time—Discretion of Court—Revision. See LIMITATION ACT (1908), No. 32, 10 N.L.R. 139.

(37) High Court—Power to treat second appeal as Civil Revision petition. See LIMITATION ACT (1908), No. 101, 7 L.B.R. 138.

(38) Order allowing withdrawal of suit with liberty to bring fresh suit—Irregularity—High Court's power of interference. See WITHDRAWAL OF SUIT, No. 3, 41 C. 692.

Revival of Right.

(1) Right barred under old statute — New statute cannot revive. See **LIMITATION ACT** (1908), No. 45, (1914) M.W.N. 875.

(2) Right of suit barred under earlier Act—Not revived by later Act. See **LIMITATION ACT** (1871), No. 1, (1914) M.W.N. 903.

Right of Suit.

(1) *Person not a party to a contract though entitled to benefit thereunder—No privity of contract—Right of suit.*

In this case the plaintiff claimed to have a contract contained in a hypothecation bond enforced to which he was not a party, but which was entered into between his debtor and the defendants.

The bond ran as follows:—"The hypothecation bond executed on the 27th August 1907 to the defendants. The sum received on the hypothecation to you of the following properties belonging to me.....A sum of Rs. 450 is kept with you in order to be paid to and get a receipt from.....the plaintiff on account of the balance due to him in respect of the purchase of yarn."

Held, that the person who acquired a right to enforce a contract of such a nature was the promisee, and not the plaintiff, who was a stranger to the contract, though he was entitled to a benefit under the contract. **A. R. Iswaram Pillai v. S. Taregan**, 26 M.L.J. 127 = 23 Ind. Cas. 951.

AYLING and TYABJI, JJ.

References:—32 A. 410 = 14 C.W.N. 865; 17 C.N. 413; 17 C.W.N. 1143, R.

(2) *Venue of suit—Plaintiff's option—Causes for transfer—Preponderance of convenience.*

Though S. 20 of the old Civ. Pro. Code, requiring that a Court must be satisfied that justice is more likely to be done by the suit being instituted in some other Court before it requires the plaintiff to do so, is dropped in the New Code, very strong reasons must be shown under the new as required in the old Code for depriving a plaintiff of the right to bring his suit in any Court which the law allows. **Muthia Chetty v. Arunachallam Chetty**, 7 Bur. L.T. 1. = 23 Ind. Cas. 345 = 7 L.B.R. 129.

TWOMEY and PARLETT, JJ.

(3) Is a vested right. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 102, 18 C.W.N. 804.

(4) Objection as to right to sue as sole plaintiff not by interested but by uninterested defendants — Effect. See **ACT I OF 1869 (ODDH ESTATES)**, No. 1, 22 Ind. Cas. 129.

(5) Sale in execution—Judgment-debtor having no saleable interest—Suit for return of purchase-money. See **EXECUTION SALE**, No. 4, 12 A.L.J. 908.

Riparian Rights.

(1) Riparian rights—Stream—Bed of—Right to construct dam across. See **EASEMENTS**, No. 3, 15 M.L.T. 247.

Riparian Rights—(Concluded).

(2) Custom of *dhar-dhura*—*Iqarnams* filed by riparian owners—Effect. See **REGULATION XI OF 1825 (BENGAL)**, No. 1, 23 Ind. Cas. 224.

(3) Rights in a natural stream of owners of lands through which it flows—Damming it up—Reasonable use of flowing water without diminishing the quantity or impairing the quality. See **WATER**, No. 5, 7 Bur. L.T. 282.

River.

(1) *Ownership in bed of natural streams in South Canara—Burden of proof.* **U.C. Krishna Batta v. The Secretary of State for India in Council**, 25 M.L.J. 161 = 21 Ind. Cas. 720. See Final Part, 1913, Col. 1080.

(2) Tidal navigable river—Grant of exclusive fishery right in—Shifting of river from its bed.—Effect—Right to 'follow the river'—Encroachment by river—Whether fishery rights extended. See **JALKAR**, No. 2, 18 C.W.N. 1217.

(3) River shifting course—Exercise of fishery right in new channel—Suit for possession of *dobas* — Limitation. See **LIMITATION ACT** (1877), No. 21, 23 Ind. Cas. 136.

(4) Drift wood—Salvage rules framed by Government—Whether *ultra vires*—Ownership of river—What it implies—Rights of the Crown — Salvage — Illegal levy — Damages. See **SALVAGE**, No. 1, 15 M.L.T. 121.

(5) Attributes of a natural stream — Rights of upper and lower land owners—Right of lower owner to obstruct the flow by a dam—Easements Act, S. 7, Ills. (h) and (i). See **WATER**, No. 4, 16 M.L.T. 597.

Riwaj-i-am.

(1) Entry of custom in evidentiary value. See **CUSTOMS (PUNJAB—ADOPTION)**, No. 1, 133 P.L.R. 1914.

(2) Not supported by instances—Evidentiary value. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 10, 221 P.L.R. 1914.

Rules.

Power to make regulations given by statute — Whether regulations can abridge right conferred by the statute — Scope of power given to rule-making authority. See **SMALL CAUSE COURT RULES (PRESIDENCY)**, No. 1, (1914) M.W.N. 216.

Rules for the Civil Courts (N.W.P.).

Rules for the Civil Courts, Chap. IV, rr. 5 and 8—Grove or garden or land occupied by houses—Ancestral land—Sale in execution of decree by Collector—Code of Civil Procedure, 1908, S. 69—Jurisdiction. **Fatmatul Kubra v. Achehi Begam**, 11 A.L.J. 1009 = 21 Ind. Cas. 831 = 36 A. 33. See Final Part, 1913, Col. 1081.

Rumours.

Opinion based on—Admissibility—Amount of damages. See **DEFAMATION**, No. 1, 7 Bur. L.T. 155.

Sale.

- (1) *Document—Construction—Sale or mortgage—Deed of sale with power to re-purchase within certain time—Transfer of Property Act, S. 58.*

A document was described in its earlier portion as a deed of sale out and out. There was no mention of interest; the amount was prescribed not as principal but as consideration. The transferee was allowed to have his name registered after expunction of the name of the transferor; the transferee and after him his sons and grandsons in succession were to continue peacefully to enjoy the property, and neither the transferor nor his heirs were to have any claim to or concern in the property at any time. This deed was executed for the purpose of being able to get a sum of money to be paid to one A, to whom the property was mortgaged under a *kat* mortgage.

At the end of the document, there were two clauses to the following effect: "If the transferor can pay the consideration money within one year, transferee shall be bound to release the property and (2) the deed of *haba* sale out and out is executed." The original *kat kobala* to A, and other documents of title in respect of the property were made over by the executant to the transferee:

Held, that the document was not one of mortgage, but a sale-deed out and out with a condition of re-purchase. **Azizar Rahman v. Rabatannessa**, 21 Ind. Cas. 13.

SHARFUDDIN and RICHARDSON, JJ.

References:—6 C.L.J. 208=11 C.W.N. 400; 12 A. 387=17 I.A. 98, R.

- (2) *Sale—Immoveable property—Consideration, non-payment of—Transfer, whether operative—Gift—Test, to be applied—Intention of the parties.*

Where there was an ostensible sale of immoveable property for no consideration, and the transfer was, in essence, never intended to take effect, the transferee could not claim an enforceable title either by purchase or by gift.

The test to be applied in a case of this description is, was the transaction intended to transfer title. If it was intended to be operative, the mere fact that the payment of consideration was postponed would not affect the validity of the transaction; on the other hand, if the operation of the transaction was intended to be postponed till the consideration money had been paid, the transfer would become complete and operative only upon such payment. **Kashidas Gossain v. Chaithru Patras Uraon**, 19 C.L.J. 239=23 Ind. Cas. 813.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—33 C. 773, D.

- (3) *Notice—Purchaser aware of a previous mortgage by his vendor and his father—Sufficient notice to purchaser of father's interest in the property—Amendment of claim—When not to be allowed.*

Sale—(Continued).

Where the purchaser of a land from X became aware, before the sale, of a previous mortgage of the same land by X and his father together, and where X's father was living in a house on the land, *held*, he was put upon his enquiry as to X's father's interest in the land and could not be deemed to have purchased anything except X's interest in the property, though the land stood in X's name in the Revenue Register and he had the landholder's certificate in his name.

Where the suit, originally brought for possession of land purchased from X but in the occupation jointly of X and his father, was afterwards sought to be amended into one for a declaration for a charge to the extent of the amount paid out of the purchase money towards the redemption of a previous mortgage on the same land executed by X and his father jointly:

Held, such an amendment cannot be allowed as it would alter the nature of the suit. **Mahamed Ebrahim Saib Khateeb v. Moun Ba Gyaw**, 7 Bur. L.T. 69=24 Ind. Cas. 482.

ORMOND and PARLETT, JJ.

- (4) *Agreement for purchase and sale of immoveable property—Condition for return of earnest money, on non-approval of title by purchaser's solicitor—Non-approval must be reasonable and not mala fide—Title, approval or rejection, condition as to, in agreement of sale—Solicitor's costs.*

Where an agreement for purchase and sale contained a condition for the return of the earnest money on the vendor's title not being approved by the purchaser's solicitor, and the solicitor disapproved of the title on the ground amongst others that one of the former owners had mortgaged the property pending a partition suit at which the property was sold by auction under directions of Court and purchased by the present vendor's predecessor in title for value and the vendor was unable to furnish any information regarding the mortgage but urged that it was inoperative and that his title being derived from a purchaser without notice was not open to objection:

Held—that it cannot be said that the solicitor was unreasonable in refusing to accept the title, inasmuch as he cannot be expected to go into any question of evidence as to whether the purchase was without notice or not; and further, there being nothing to show that he acted in bad faith or was unreasonable in advising his client to reject the title, the intending purchaser was entitled to get back from the vendor the earnest money and his solicitor's costs for investigation of title as was stipulated for in the contract. **W. P. Abro v. Promotho Nath Mukerjee**, 18 C.W.N. 568.

CHAUDHURI, J.

- (5) *Sale—Imperfect title—Voidable by third parties—Vendee put in possession—Possession disturbed by third party obtaining*

Sale—(Continued).

decree for possession—Suit for refund of purchase money—Institution within one year from date of dispossession—No bar of limitation—Guarantee for good title—Knowledge of defect of title immaterial—S. 55 (2), Transfer of Property Act.

A died leaving behind him his widow K and his mother G. K took possession of A's properties as his heir and obtained from G a release of her claims in 1892. In 1900, K executed a release of her rights in favour of the father of defendants 1 and 2 and of the 3rd defendant making reference to the release which she obtained from G. The father of defendants 1 and 2 and the 3rd defendant sold, on the day they obtained a release from K, the properties to the plaintiffs who were also put in possession of the same. K died in 1904. In 1910, G brought a suit to recover possession of the properties on the ground that her release of 1892 related only to her right to maintenance, and obtained a decree in execution of which plaintiffs were in 1911 disturbed from possession of the properties. Within a year from the disturbance of their possession, plaintiffs sued to recover the amount paid by them to the father of defendants 1 and 2 and the 3rd defendant on the ground of failure of consideration for the sale in their favour.

Held that the plaintiff's suit was maintainable and was not barred.

In India, there is statutory guarantee for good title unless the same is excluded by contract of parties (*vide* S. 55, cl. 2, Transfer of Property Act). The question of the knowledge of the purchaser does not affect the right to be indemnified under the Indian Statute Law (a).

In cases where from the inception the vendor had no title to convey and the vendee had not been put in possession of the property, the starting point of limitation will be the date of sale (b).

In cases where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale, the cause of action arises only when it is found that there is no good title, or in other words, the cause of action will arise only when the vendee's right to continue in possession is disturbed (c).

In cases, where, though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties, the cause of action will arise only on the disturbance of possession (d).

Held that, in the present case, the cause of action arose only when, under the decree obtained by G, the possession of the plaintiff was disturbed (e). **Subbaraya Reddier v. Rajagopala Reddier**, 15 M.L.T. 240 = (1914) M.W.N. 376 = 23 Ind. Cas. 570.

SESHAGIRI IYER, J.

References :—(a) (1894) 1 Ch. 11, R. (b) 14 M.L.T. 524, R. (c) 19 C. 123; 11 A. 47, R. (d) 37 B. 538, R. (e) 25 B. 593; 26 B. 519; 40 C. 187, D.; 17 M.L.J. 149; 25 M. 396; 18 M. 173, F.

Sale—(Continued).

(6) *Burden of proof—Decree-holder alleging invalidity of sale of attached land—Effect of invalidity—Charge on land to the extent of the amount advanced.*

Where the defendant purchased, without any registered conveyance, the attached land from appellants' judgment-debtor for Rs. 1,000 and was in uninterrupted possession of the same till the date of attachment, and where the question of the validity of the sale depended upon the decision of the question as to whether the transaction was entered into before or after the 1st January 1905 (the date when the Transfer of Property Act was extended to Burma).

Held, that the onus of proof lay on the appellant to show that the sale was invalid as being entered into subsequent to the 1st January, 1905.

Held also that, if the sale was found to be invalid, the purchaser was entitled to a charge on the property for the amount paid by him in advance as purchase-money, and for interest on that amount. **Maung Po Maung v. Maung Kaing**, 7 Bur. L.T. 86 = 24 Ind. Cas. 57 = 7 L.B.R. 262.

ORMOND, J.

References :—4 Bur. L.T. 115, Diss; 28 B. 466, Appr.

(7) *Vendor and purchaser—Consideration and title, whether stranger to transaction can question—Evidence Act, S. 13—Thak map.*

All that was said in **Achal Ram v. Kazim Husain Khan** (a), was that the question, whether the whole or a part of the consideration of a transaction that was admitted by the parties to it had passed, was no concern of a stranger to it. The decision is not and could not be an authority for holding that a defendant cannot question the title of the plaintiff in a suit for recovery of possession, if the plaintiff's alleged vendor supports him.

The entries in a *thak* map and its explanatory field book are evidence under S. 13 of the Evidence Act, both against proprietors as well as against tenants, because they could not have been compiled at all and unless the possession of the persons holding the plots shown in them had then been asserted (b). **Dowlat Rai v. Khub Lal Singh**, 22 Ind. Cas. 545.

COXE and CHATTERJEE, JJ.

References :—(a) 27 A. 271 (P.C.), Expl. (b) 30 C. 291 = 5 Bom. L.R. 1 = 7 C.W.N. 193 = 30 I.A. 44 (P.C.), F.; 18 C. 224 = 17 I.A. 145, D.

(8) *Mortgage or sale—Burden of proof—Usufructuary mortgage after simple mortgage—No mutation of name.*

Where the plaintiff mortgaged his land to defendant No. 1 by way of simple mortgage and when the latter pressed for payment, he mortgaged the same land to the latter's brother, defendant No. 2, by usufructuary mortgage, but

Sale—(Continued).

consistently opposed any transfer of names in Revenue Register, and the defendant No. 2 did not apply for the mutation till about two years after the transaction, the onus lies in the first instance on the defendants to prove sale. **Maung Shwe Min v. Maung San Nyun**, 22 Ind. Cas. 806.

ROBINSON, J.

References:—2 Ind. Cas. 535=5 L.B.R. 40, F.

- (9) *Vendor and purchaser—Sale of devised property by executor along with some other beneficial owners—Sale-deed indicating vendors as absolute owners of property—All title and right of vendors purported to be sold—Interpretation of sale-deed—Language to be interpreted in natural sense.*

It would be entirely contrary to settled principles of law as well as most unjust to *bona fide* purchasers, if the Court were to allow the plain legal interpretation of a conveyance to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. It is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense.

An executor under a will as well as his two brothers and two unmarried sisters possessed beneficial interest in the devised property. To pay off a valid mortgage on the property, the three brothers as co-vendors sold it to a *bona fide* purchaser for value as if they were absolutely entitled to it and the sale-deed purported to convey "all the estate, right, title, interest, claim and demand whatsoever of the vendors." One of the two sisters (both of whom had not taken any part in the sale) claimed that she was not bound by it:

Held, that, even in the absence of direct evidence that the conveyance was by the executor in his capacity as executor, it was not the intention of the parties that only the beneficial interest of the three vendors should be conveyed, inasmuch as the deed purported to convey all the title and right that the vendors possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor. **Bijraj Nopani v. Sreemutty Pura Sundary Dasee**, 27 M.L.J. 93=24 Ind. Cas. 296=18 C.W.N. 1913=20 C.L.J. 368=(1914) M.W.N. 679=16 M.L.T. 338=16 Bom. L.R. 796=12 A.L.J. 1185=42 C. 56 (P.C.).

LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

- (10) *Burden of proof—Registered sale-deed—Vendee suing for possession after long delay and after vendor's death—Consideration—Proof by vendee.*

On the 17th March 1908, plaintiff instituted a suit for possession of land and house of which he claimed to be the vendee under a sale-deed executed on the 26th and registered on the 28th

Sale—(Continued).

September 1900. In or about 1904 the vendor died, and the defendant, who was his widow, was entered as owner of the land in his place without any attempt on the part of the plaintiff to contest the mutation order.

Held that, under the circumstances of the case, the onus of proving consideration for the sale was rightly placed on the plaintiff by the lower Courts, notwithstanding the registration of the sale-deed. **Bhagwan Das v. Mussammat Ram Bai**, 58 P.R. 1914=236 P.L.R. 1914=152 P.W.R. 1914.

KENSINGTON, C.J., and BEADON, J.

Reference:—68 P.R. 1909, R.

- (11) *Second appeal—Contract for sale of moveable property—Time is of the essence of contract—Finding of fact—Conclusive in second appeal—Breach of contract—Default of purchaser—Forfeiture of earnest money—Right of seller to retain the same—Expenses for registration and execution of document—Tender through post—Invalidity.*

Where, in a suit for enforcement of contract for sale of immoveable property, the lower appellate Court, after a consideration of the evidence and the circumstances, found that both parties intended time to be of the essence of the contract.

Held, that on second appeal the finding cannot be interfered with by the High Court.

A mere offer by postal letter to tender expenses of the execution and registration of the sale-deed is not a legal tender.

Where a contract for sale fails owing to the default of the purchaser, the seller is entitled to retain the earnest money (a). **Mulpuri Veerayya v. Sanaya Yarpu Sivayya**, 27 M. L.J. 482.

SADASIVA AIYAR and NAPIER, JJ.

Reference:—(a) 24 M.L.J. 488 (F.B.), R.

- (12) *Vendor and purchaser—Vendor, if can confer on transferee better title than he himself possesses—Cause of action, if can be prolonged by transfer of title—Limitation Act (1908), Sch. I, Arts. 136, 142, 144—"Vendor," meaning of, in Art. 136.*

A vendor cannot confer upon his transferee a better title than he himself possesses. Consequently a purchaser at a private sale, when the vendor was out of possession at the date of sale, is in no better position than his vendor, and has to bring his suit within the same period as would be allowed to his vendor (a).

A cause of action is not prolonged by mere transfer of title (b).

Where there have been transfers by successive vendors, who have all been out of possession, Art. 136 of Sch. I of the Limitation Act, 1908, may well be construed so as to include in the term "vendor" the first in the series of vendors who was entitled to sue for possession,

Sale—(Continued).

In 1898 G conveyed his property to K and J but continued in possession. In 1900 K and J, who had never obtained possession, conveyed it to I who also never obtained possession. In 1909 I conveyed the property to the plaintiff who brought this suit in 1910 against the defendant who had no title.

Held, that neither Art. 142 nor 144 of the Limitation Act, 1908, applied but that Art. 186 was applicable and that the suit was barred by limitation. **Abbas Dhall v. Masabdi Karikar**, 24 Ind. Cas. 216.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 8 W.R. 176, *Rel.* (b) 7 M. I.A. 823 at p. 853=19 Eng. Rep. 331=4 W.R. (P.C.) 37=1 Suth. P.C.J. 367=1 Sar. P.C.J. 642, *F.*

(12) *Vendor and purchaser—Agreement for purchase and sale of immoveable property—Condition for return of earnest money, on non-approval of title by purchaser's solicitor—Non-approval must be reasonable and not mala fide—Title, approval or rejection, condition as to, in agreement of sale.*

Where an agreement for purchase and sale contained a condition for the return of the earnest money on the vendor's title not being approved by the purchaser's solicitor, and the solicitor disapproved of the title, on the ground amongst others that one of the former owners had mortgaged the property pending a partition suit at which the property was sold by auction under directions of Court and purchased by the present vendor's predecessor-in-title for value, and the vendor was unable to furnish any information regarding the mortgage, but urged that it was inoperative and that his title, being derived from a purchaser without notice, was not open to objection:

Held, that it cannot be said that the solicitor was unreasonable in refusing to accept the title, inasmuch as he cannot be expected to go into any question of evidence as to whether the purchase was without notice or not; and, further, there being nothing to show that he acted in bad faith or was unreasonable in advising his client to reject the title, the intending purchaser was entitled to get back from the vendor the earnest money and his solicitor's costs for investigation of title as was stipulated for in the contract. **W.P. Abro v. Promotho Nath Mukerjee**, 24 Ind. Cas. 452.

CHAUDHURI, J.

(14) *Vendor and purchaser—Title—Vendee's title, if can be affected by belief of vendor—Vendee's title good if vendor had good title.*

This title of a vendee cannot, in any way, be affected by what was believed by his vendor to be the real source of his own title. The title of the vendee is good if it is established that his vendor had a good title at the time when the conveyance was executed, it being immaterial from what source that title had been

Sale—(Continued).

derived. **Bibhn Behary Bhattacharya v. Panchanan Bhattacharya**, 24 Ind. Cas. 262.

MOOKERJEE and BEACHCROFT, JJ.

(15) *Document—Construction of—Sale or agreement to sell—Admissibility in evidence for want of registration. Pichikala Mangamma v. Pamu Ramamma*, (1913) M.W.N. 917=12 M.L.T. 262=16 Ind. Cas. 587=37 M. 486. See Final Part, 1912, Col. 993.

(16) *Suit for goods sold and delivered—Relationship whether one of seller and buyer or of principal and agent—Meaning of the word "agent"—Surety partially discharged—Liability of surety—Form of decree. Suryaprakasaraaya Mudaliar v. Matheson's Coffee Works*, 14 M.L.T. 249=21 Ind. Cas. 322. See Final Part, 1913, Col. 1085.

(17) *Vendor found entitled only to mortgages rights—Eviction of vendee—Suit for damages and refund of purchase money—Cause of action—Covenant for title—Continuing breach—Failure of consideration—Limitation Act, 1877, S. 23, Sch. II, Arts. 97, 115, 116, 120—Transfer of Property Act, S. 55 (2). Ramanatha Aiyar v. Ozhaloor Pathiriserri Raman Namkudripad*, 14 M.L.T. 524=21 Ind. Cas. 740=(1913) M.W.N. 1029. See Final Part, 1913, Col. 1088.

(18) *Property within the limits of Calcutta Municipality—Arrears of consolidated rate if a charge on premises in the hands of purchaser—Duty of purchaser to ascertain arrears due from Municipal authorities. See ACT III OF 1899 (CALCUTTA MUNICIPAL), No. 1, 19 C.W.N. 37.*

(19) *Contest between verbal sale and registered deed of sale—Sale and agreement to sell—Mixed question of law and fact—Second appeal. See CIV. PRO. CODE (1908), No. 145, 22 Ind. Cas. 802.*

(20) *Vendee in consideration of sale undertaking by deed to deliver certain things at once and to pay balance by instalments—Default in respect of both promises—Single contract—One cause of action—Separate contract after deed in respect of delivery of things—Different causes of action—Plaintiff not bound to sue for specific things. See CIV. PRO. CODE (1908), No. 247, 183 P.L.R. 1914.*

(21) *Benami purchase—Kobala from benamidar if necessary to complete title of real purchaser. See CIV. PRO. CODE (1908), No. 28, 24 Ind. Cas. 17.*

(22) *Contract of sale—Right of heir to enforce terms of sale. See CONTRACT, No. 3, 18 C.W.N. 1185.*

(23) *Object of purchase communicated to vendor—Defeat of object—Silence on part of vendor—Misrepresentation—Rescission of contract. See CONTRACT, No. 8, 24 Ind. Cas. 193.*

(24) *Sale—Delivery of grain according to 'office terms' in Karauchi—Time for sampling goods—Due date, a Sunday—Delivery when to be completed. See CONTRACT ACT, No. 37, 7 S.L.R. 141.*

Sale—(Continued).

(25) Right of stoppage in transit—Right of Commission Agent—Right of assignee of Railway receipt—Right of sub-buyer or pledgee. See CONTRACT ACT, No. 80, 7 S.L.R. 163.

(26) Vendee's previous contract with third person—No notice of this to tender of goods—Damages for breach of warranty. See CONTRACT ACT, No. 72, 23 Ind. Cas. 949.

(27) Goods consigned to buyer by Railway—Suit for balance of account—Cause of action—Jurisdiction. See CONTRACT ACT, No. 78, 24 Ind. Cas. 423.

(28) Breach of contract to buy goods—Re-sale—Procedure to be followed—Seller obtaining higher price by selling later than date of breach—Duty of seller. See CONTRACT ACT, No. 85, 7 L.B.R. 252.

(29) Difference between seller and Commission Agent—Failure to deliver goods according to order—Buyer's right not to accept. See CONTRACT ACT, No. 87, 7 L.B.R. 110.

(30) Sale or mortgage—Extrinsic evidence to show real nature of transaction—Real nature how to be ascertained—Sale clothed as mortgage—Pre-emptor can show it to be sale—Barred debt, whether sufficient consideration for a sale—Market-value—Value of previous sales. See EVIDENCE ACT, No. 63, 21 Ind. Cas. 69.

(31) Sale—Fraud and misrepresentation—Identifying witness—Liability of broker and identifier for false representation. See FRAUD, No. 4, 22 Ind. Cas. 818.

(32) Agreement to sell joint family property by one brother with the other brother's consent—Whether binding. See HINDU LAW (JOINT FAMILY), No. 2, 12 A.L.J. 52.

(33) Agreement to sell whether gives any title to property. See HINDU LAW (WIDOW), No. 7, 22 Ind. Cas. 669.

(34) Transaction whether sale or mortgage—Test. See HINDU LAW (WIDOW), No. 19, (1914) M.W.N. 735.

(35) Sale—Hire-purchase agreement—Conditions not fulfilled—Effect. See HIRE-PURCHASE AGREEMENT, No. 1, 7 S.L.R. 103.

(36) Registered conveyance executed after Transfer of Property Act came into force—Breach of covenant for title—Suit for compensation and possession—Limitation. See LIMITATION ACT (1908), No. 107, 16 M.L.T. 397.

(37) Transaction whether sale or mortgage. See MORTGAGE (BY CONDITIONAL SALE), Nos. 4 and 5, 16 Bom. L.R. 769 and 774.

(38) Transaction whether a mortgage by conditional sale or sale with an agreement to reconvey—Evidence of surrounding circumstances—Admissibility. See MORTGAGE (BY CONDITIONAL SALE), No. 6, (1914) M.W.N. 906.

(39) Transaction whether sale or mortgage—Burden of proof—Suit to redeem—Limitation. See MORTGAGE (REDEMPTION), No. 23, 24 Ind. Cas. 310.

Sale—(Concluded).

(40) Perpetual lease—Plenary proprietary rights transferred—Nominal malikana reserved—Deed whether one of sale—Right to pre-emption. See PRE-EMPTION, No. 17, 187 P.L.R. 1914.

(41) Execution and registration of subsequent sale-deed before presentation for registration of the first deed—No undue delay—Priority. See REGISTRATION ACT (1877), No. 10, 12 A.L.J. 993.

(42) Registered sale-deed—Unregistered letter inadmissible to show that it should operate as mortgage or not operate at all. See REGISTRATION ACT (1908), No. 16, (1914) M.W.N. 178.

(43) Agreement for reconveyance of property is not compulsorily registrable—Suit for specific performance. See REGISTRATION ACT (1908), No. 9, 16 Bom. L.R. 582.

(44) Agreement to sell whole house—Promisor only part-owner—Effect—Agreement not mentioning amount to be paid—Duty of Court. See SPECIFIC PERFORMANCE, No. 2, 71 P.L.R. 1914.

(45) Sale deed executed but not registered owing to vendee's allowing registration period to expire—Suit by vendee to compel execution and registration of another sale-deed. See SPECIFIC PERFORMANCE, No. 9, 22 Ind. Cas. 941.

(46) Covenant in sale deed—Construction. See TRANSFER OF PROPERTY ACT, No. 41, (1914) M.W.N. 57.

(47) Sale deed under Rs. 100—Registration—No option—Competition between unregistered sale deed accompanied by delivery and a subsequent registered sale deed. See TRANSFER OF PROPERTY ACT, No. 35, (1914) M.W.N. 55.

(48) Unpaid vendor's lien—Property sold pre-empted—Pre-emptor paying money which vendee was bound to pay—Effect. See TRANSFER OF PROPERTY ACT, No. 44, 12 A.L.J. 921.

(49) Unpaid vendor's lien—Liability of vendee or his transferee—Personal remedy against vendee barred—Whether remedy against property subsists—Limitation. See TRANSFER OF PROPERTY ACT, No. 45, 12 A.L.J. 1034.

(50) Transfer of Property Act, S. 54—Immoveable property below Rs. 100 in value—Oral sale—Vendee already in possession—Effect—Unregistered sale deed—Admissibility in evidence to prove nature of possession of purchaser—Establishment of title by adverse possession—Whether a transaction affecting immoveable property—S. 48, Registration Act. See TRANSFER OF PROPERTY ACT, No. 36, 16 M.L.T. 344.

Sale Certificate.

(1) Sale certificate—Construction—Sale certificate, terms of—Evidence to contradict, if admissible—Ambiguous terms—Terms needing explanation.

If a question arises as to the meaning of a sale certificate, in other words, if there is a

Sale Certificate—(Concluded).

controversy as to the property which has passed, the Court is entitled to determine the question with reference to the whole proceeding. But the vital point to determine is, not merely what the decree-holder intended to put up to sale but also what the bidders understood was offered for sale. In other words, the test is, what did the Court intend to sell and what did the purchaser understand he bought. What was actually offered for sale and bid for is thus a mixed question of fact and law, to be determined upon a construction of the sale proceedings in the case (a).

Evidence cannot be given to contradict the terms of a sale certificate, though evidence may be admissible to interpret the terms of a sale certificate where they are ambiguous and stand in need of explanation (b). **Barhamdeo Singh v. Ram Narain Singh**, 19 C.L.J. 182=22 Ind. Cas. 280.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 27 M. 131; L.R. 31 I.A. 1; 7 W.R. 245; 10 M. 241 (248); L.R. 14 I.A. 84, R. (b) 22 W.R. 181, R.

(2) *Sale certificate—Construction—Boundary—Area.* **Gossain Das Kundu v. Mritunjoy Agnan Sardar**, 18 C.L.J. 541=22 Ind. Cas. 26. See Final Part, 1913, Col. 1091.

(3) *Evidentiary value of.* See ACT VIII OF 1895 (BENGAL TENANCY), No. 68, 24 Ind. Cas. 283.

(4) *Whether creates title.* See CIV. PRO. CODE (1908), No. 80, 20 C.L.J. 433.

(5) *If may be amended by inserting property not included in the schedule of attached properties.* See EXECUTION SALE, No. 1, 18 C.W.N. 313.

(6) *Amendment of—Powers of Court.* See LIMITATION ACT (1908), No. 128, 19 C.L.J. 209.

Sale Proclamation.

(1) *Sale proclamation—Upset price—Value of lease-hold interest—Annual net income—Material irregularity—Sale to be set aside.*

Where the upset price fixed in a proclamation of sale of the lease-hold interest of the judgment-debtor in lands held by him as a lessee for twelve years had reference only to the annual net income which the lands yielded to him, and was not based on the value of his lease-hold interest, and such interest was sold for an inadequate price, it must be presumed that this material irregularity was the cause of the inadequacy in price and the sale must be set aside. **Chockalinga Serrai v. R. Srinivasa Aiyar**, 21 Ind. Cas. 592.

SADASIVA IYER and SPENCER, JJ.

References:—20 A. 412=25 I.A. 146=2 C.W.N. 550; 19 Ind. Cas. 296=25 M.L.J. 140=17 C.W.N. 637=(1913) M.W.N. 847=11 A.L.J. 517=17 C.L.J. 578=15 Bom. L.R. 515=14 M.L.T. 87=40 C. 685, R.

Sale Proclamation—(Concluded).

(2) *Particulars of valuation—Duty of Court to enquire into valuation in case of dispute—Court inserting the figures of both parties—Material irregularity.* See CIV. PRO. CODE (1908), No. 87, 7 Bur. L.T. 64.

(3) *Settlement of terms—Notice to judgment-debtors—Failure to appear and object—Effect—Subsequent objections to sale proclamation on ground of misdescription—Res judicata—Appeal.* See EXECUTION SALE, No. 3, 22 Ind. Cas. 780.

Sales of Under-tenures Act.

See BEN. ACT VIII OF 1865

Salvage.

Drift wood—Salvage Rules framed by Government—Whether ultra vires—Ownership of river—What it implies—Rights of the Crown—Salvage—Illegal levy—Damages.

Plaintiff was the owner of certain drift timber which floated down the Godavari and was salvaged at Rajahmundry and taken to the Government depot there. Under the rules in G.O., No. 586, Revenue, dated 3-11-1896, a certain sum was due to the salvors of the timber and this was collected from the plaintiff by the Government. Plaintiff sued to recover this amount with damages from the Secretary of State. *Held*, that the drift wood salvage rules cannot be supported on any ground and must be treated as *ultra vires*.

There is no authority for holding that the Crown possesses full proprietary right in the drift wood. It is not a natural incident of proprietary right in the river itself, any more than the right to an article dropped or lost in a plot of land is incidental to the ownership of land.

There is also no reason to suppose that the royal prerogative is more extensive in India than in England or applies in this respect beyond the shores of the sea or tidal waters. Moreover the Godavari at Rajahmundry is no tidal. **Mandavilli Subba Row v. Gudaia Lakshmayya**, 15 M.L.T. 121=23 Ind. Cas. 371.

AYLING and OLDFIELD, JJ.

Reference:—24 O. 504, D.

Sanction to Prosecute.

(1) *Penal Code, Ss. 182, 211—Application in Judge's Court—False information—Prosecution sanctioned by Judge—Legality of.*

The appellant was an insolvent against whom proceedings were pending before a District Judge. He made a petition to the Court alleging that the respondent had misappropriated certain things belonging to him and prayed that the respondent's house might be searched by the police. The District Judge forwarded the petition to the Magistrate with the result that the respondent was arrested and his house was searched. Eventually the Magistrate discharged the respondent. The latter applied to the District Judge for sanction to prosecute the appellant under Ss. 182 and 211, Penal Code.

Sanction to Prosecute—(Continued).

Held, that the District Judge was a public servant before whom false information was given and he was competent to grant sanction to prosecute under S. 182, Penal Code.

Held further, that, with regard to S. 211, Penal Code, the Court of the District Judge before whom insolvency proceedings were pending was not the Court in which criminal proceedings were instituted, and it could not be said that the offence of causing criminal proceedings to be instituted without just and lawful grounds was committed in relation to a proceeding pending in the Court of the District Judge. **Mahommed Fakiruddin v. Bhikhi Ram**, 12 A.L.J. 278 = 36 A. 212 = 15 Cr. L.J. 360 = 23 Ind. Cas. 728.

RYVES and PIGGOTT, JJ.

(2) *Crim. Pro. Code*, S. 195, cl. (6)—*Sanction granted to prosecute—Extension of time for instituting complaint—Power of the High Court—S. 148, Civ. Pro. Code.*

The High Court has power to extend the time for the institution of a complaint on sanction, even if the six months mentioned in S. 195, cl. (6) have expired. **The Secretary of State for India in Council through the Collector of Tinnevely v. Sankarapandian Pillai**, (1914) M.W.N. 347 = 15 Cr.L.J. 350 = 23 Ind. Cas. 727.

SADASIVA IYER and TYABJI, JJ.

References:—26 M. 190; 26 M. 480, F.; 12 C.L.J. 382, Not F.

(3) *Crim. Pro. Code*, S. 195—*Sanction to prosecute—Letters Patent, cl. 10, proceeding under—Attorney proceeded against making affidavit—Alleged false statements—Public Prosecutor applying for sanction—What Bench to give sanction—Discretion to be free and untrammelled—Court to see that no abuse of criminal justice takes place—Attorney, if can make affidavit in answer to rule against him under Court's disciplinary powers—Liability for false statement in affidavit.*

A proceeding under cl. 10 of the Letters Patent against the opposite party was heard by the present Bench. The application failed, but the Court thought that there were matters in the case which called for further inquiry with a view to possible criminal proceedings. The papers were placed before the Public Prosecutor, who applied under S. 195 of the *Crim. Pro. Code* for sanction to prosecute the opposite party for offences alleged to have been committed by him under Ss. 193 and 196 of the Penal Code, in or in relation to the proceeding under cl. 10 of the Letters Patent.

Held, that the Bench was neither prosecuting nor trying an accused, that it was merely considering whether the bar to the cognizance of the alleged offences should be removed by according the required sanction, and that under S. 195 of the *Crim. Pro. Code*, it was this Bench alone that could give the required sanction.

Sanction to Prosecute—(Continued).

S. 195 is expressed in the widest terms and vests in the Court an absolute and unqualified discretion. Not one jot or one tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court, nor can this discretion vested by the section in the Court be crystallised or restricted by any series of cases, and it remains free and untrammelled to be fairly exercised according to the exigencies of each case.

An application for sanction is not to be conducted on the same lines as the criminal trial which may be its sequel.

When a tribunal is invested by an Act or by rules with a discretion, without any indication in the Act or the rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicate the particular grooves in which the discretion should run (a).

When exercising discretion, the Court will be astute to see that there should be no abuse of the administration of criminal justice. Therefore, no one should be permitted to use a penal law merely to satisfy his own private ends or personal spite.

An attorney can make an affidavit by way of answer to a Rule issued against him under the Court's disciplinary jurisdiction, and for a false statement in the affidavit, he is criminally liable. **Mr. Hume, Public Prosecutor v. Poresh Chunder Ghose**, 15 Cr.L.J. 49 = 22 Ind. Cas. 321 = 41 C. 446.

JENKINS, C.J., STEPHEN and CHAUDHURI, JJ.

References:—(a) 29 Ch. D. 50 (58); 54 L. J. Ch. 762; 52 L.T. 395; 33 W.R. 470; (1897) P. 89 at p. 95; 66 L.J.P. 57; 76 L.T. 330; 45 W. R. 583, *Rel.*

(4) *Code of Criminal Procedure*, S. 195—*Sanction to prosecute—Sanction in appeal—Further appeal to third Court not allowed.*

It is not intended that the question of granting or withholding sanction to prosecute should, after its decision by two Courts, be carried to a third Court. Where a Munsif refused sanction to prosecute, and the District Judge before whom the matter was taken up under S. 195 (6), *Crim. Pro. Code*, granted the sanction, *held*, the High Court should not interfere. **Baran Barai v. Mata Prasad**, 12 A.L.J. 821 = 36 A. 469.

RAFIQ and PIGGOTT, JJ.

References:—6 A.L.J. 11, F.; 30 M. 382, Not F.

(5) *Crim. Pro. Code*, Ss. 4 & (b), 195, 476—*Complaint—No sanction—Revision.*

A Judge passed an order to the following effect: "I complain that R filed two false and forged bonds in the Court of Small Causes, &c." He sent the papers to the District Magistrate for taking action. *Held* that the order of the

Sanction to Prosecute—(Continued).

Judge was a complaint within the meaning of S. 4 (b) of the Crim. Pro. Code and was not a sanction given by him under Ss. 195 or 476. **Raja Ram v. King-Emperor**, 12 A.L.J. 981.

* KNOX, J.

- (6) *Crim. Pro. Code, S. 476—Order for prosecution—Failure to make preliminary inquiry—Illegality—Action under S. 476—No necessity to take action immediately after close of trial—Time for such action—S. 115, Civ. Pro. Code (1908).*

Where a lower Court, without making any preliminary inquiry to decide whether there were *prima facie* reasons to suppose that the accused committed perjury, passed an order directing his prosecution for perjury under S. 476, Crim. Pro. Code.

Held that the failure to make the preliminary inquiry was a material irregularity which was one for correction under S. 115, Civ. Pro. Code (1908).

There is no legal necessity to proceed under S. 476, Crim. Pro. Code, immediately after the trial or proceedings, and the section does not limit the time within which action should be taken (a). **Jethmal v. Wadhmal**, 7 S.L.R. 187=15 Cr. L.J. 541=24 Ind. Cas. 949.

HAYWARD, J.C., and BOYD, A.J.C.

References:—(a) 34 C. 351; 31 M. 140; 32 B. 184; 32 M. 49; 37 C. 642, R.

- (7) *Oaths Act (X of 1873), S. 13—Omission to record deposition as on solemn oath or affirmation—Presidency Court of Small Causes, enquiry by Registrar, as to proper service of summons, if judicial proceedings—Sanction to prosecute for false personation in service of summons—Crim. Pro. Code, S. 195.*

Before the Registrar of the Presidency Court of Small Causes at Calcutta, whose duty is to enquire into the proper service of summons and to take evidence in this behalf, it transpired that the petitioner in this case by false representation had returned the summons as properly served, and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the petitioner under S. 205, Penal Code, which was granted by the said Registrar under S. 195 of the Crim. Pro. Code, and upon a Rule being obtained to question the propriety of the sanction.

Held—that the proceedings before the Registrar were judicial proceedings and he was a judicial officer, that the sanction given by him to prosecute was properly given, and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by S. 13 of the Oaths Act. **Bal Chand v. Tarak Nath Sadhu**, 18 C.W.N. 1323.

CHAUDHURI, J.

References:—14 B.L.R. 294 (F.B.); 16 Bom. 359, R.

Sanction to Prosecute—(Concluded).

(8) *Practice of Calcutta High Court in sanction cases—Sanction at first granted on verbal application—Effect—Subsequent written application for sanction—Jurisdiction to order sanction thereon—Application to revoke sanction granted by Judge on the original side of the High Court must be made to an appellate Bench—S. 195, Crim. Pro. Code. Thaddeus v. Janaki Nath Saha*, 40 C. 428=14 Cr.L.J. 572=21 Ind. Cas. 172. See Final Part, 1913, Col. 1092.

(9) Application asking a Munsif to take criminal action himself against a person—No sanction asked for prosecution—Refusal by Munsif—Appeal. See APPEAL (GENERAL), No. 7, 12 A.L.J. 684.

Sarbarakar in Orissa.

Sarbarakar (in Orissa), status of, if that of tenure holder—Dalbehara jagire, resumption and settlement of—Effect—Lands reserved to Dalbeheras at resumption, tenure in. **Kripasindhu Roy Pitam v. Mohant Parmanand Das Goswami**, 18 C.W.N. 74=22 Ind. Cas. 359. See Final Part, 1913, Col. 1093.

Scheduled Districts Act.

See ACT XII OF 1874.

Scribe.

Mortgage attested by one witness—Signature of scribe as writer and not as witness—Validity of mortgage. See TRANSFER OF PROPERTY ACT, No. 56, 24 Ind. Cas. 375.

Security.

(1) Extent of security how to be determined—Appeal. See ACT VIII OF 1890 (GUARDIANS AND WARDS), No. 6, 24 Ind. Cas. 202.

(2) Security deposit by an employee of a Bank—Rights of employee in liquidation proceedings. See COMPANY, No. 4, 16 Bom. L. R. 733.

Service Inams.

(1) *Service inam—Alienation of—Void—S. 43, Transfer of Property Act—Non-applicability of. Batchu Ramayya v. Dhara Satchi*, 14 M.L.T. 430=(1913) M.W.N. 999=25 M.L.J. 635=21 Ind. Cas. 600. See Final Part, 1913, Col. 1094.

(2) Alienation of, in favour of a relation incapable of doing service invalid—Adverse possession of right to income. See INAM, No. 4, (1914) M.W.N. 745.

Service Tenure.

(1) Nankargrant—Right of grantor to put an end to the tenure. See GRANT, No. 4, 23 Ind. Cas. 300.

(2) Grant burdened with service—Omission of words of inheritance—Grant whether hereditary—Services not required—Land if can be assessed. See GRANT, No. 2, 19 C.L.J. 241.

(3) Incidents of service tenure—Alienability—Family custom—Effect. See BOMBAY ACT II OF 1863 (SUMMARY SETTLEMENT), No. 1, 16 Bom. L.R. 103.

Service Tenure—(Concluded).

(5) **Service grant—Resumption—Grant for public or private services.** See GRANT, No. 7, (1914) M.W.N. 936.

Set-off.

(1) **Set-off when may be allowed.** See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 15, 16 Bom. L.R. 746.

(2) **Suit for arrears of rent—Plea of counter-claim or equitable set-off whether can be allowed.** See ACT XXII OF 1886 (ODH RENT), No. 8, 21 Ind. Cas. 201.

(3) **Execution proceedings—Party not allowed in second appeal to contest order setting-off decrees—Practice.** See APPEAL (SECOND APPEAL), No. 9, 23 Ind. Cas. 923.

(4) **Equitable set-off, plea of, when may be allowed.** See AWARD, No. 2, 18 C.W.N. 426.

(5) **Set-off whether and when can be claimed by garnishee—Payment of Court-fee whether necessary.** See CIV. PRO. CODE (1932), No. 27, 16 Bom. L.R. 520.

(6) **Right of equitable set-off when exists—Time-barred debt whether can be claimed by way of equitable set-off—Liability of co-heirs.** See CONTRIBUTION, No. 1, 21 Ind. Cas. 716.

(7) **Scope of doctrine of set-off—Set-off when may be allowed.** See INSOLVENCY, No. 1, 95 P.L.R. 1914.

Settlement.

Temporary settlement—Permanent lease—Omission to make entry in Settlement Records, effect of—Contractual obligation.

The mere omission of the Settlement Authorities to make an entry in the Settlement Records in respect of the tenure and under-tenure cannot affect the rights of the parties.

The effect of re-settlement by Government with the original temporary settlement-holders is to keep alive the contractual obligation of the subordinate holders as amongst themselves. Their rights and obligations are mutual. **Mohendra Nath Bhaswari v. Syam Lal Banerjee**, 19 C.L.J. 308=18 C.W. N. 907=23 Ind. Cas. 16.

MOOKERJEE and BEACHCROFT, JJ.

Settlement Deed.

Grant for maintenance—Construction. See GRANT, No. 1, 15 M.L.T. 361.

Settlement Records.

(1) **Evidentiary value of old and modern Settlement Records.** See ACT I OF 1894 (LAND ACQUISITION), No. 7, 31 P.W.R. 1914.

(2) **Settlement Khasra whether a public record.** See ACT XI OF 1898 (O.P. TENANCY), No. 2, 23 Ind. Cas. 604.

Shah Jog Hundi.

(1) **Hundi Shah Jog—Payment to the Shah—Fraudulent Hundi—Duty of Shah to trace the drawer—Payment of Hundi not as Shah but as indorsee for collection of the Hundi—Custom of Marwari merchants.**

Shah Jog Hundi—(Concluded).

On the 10th June 1912, the plaintiff received in Bombay a letter from R at Harpalpur advising despatch of railway receipt for 300 bags of linseed stated to have been consigned by R from Ranipur, and asking the plaintiff to sell the goods and meantime to accept and pay on presentment two Shah Jog Hundies for Rs. 3,000 each. The same day one of those Hundies was presented by defendant No. 1 for payment; and the other, by one G. No payment was made. The railway receipt was received on the 11th. The plaintiff delivered it to K and received Rs. 5,600 from him. The plaintiff then paid the amount of the Hundi to defendant No. 1 in full and to G he paid the balance of what he had received from K. The goods, however, never arrived and the plaintiff took back the receipt and refunded the amount to K. Subsequent inquiries showed that both the Hundies and the railway receipt were fabricated. This came to the knowledge of the plaintiff by the end of August; but it was not till the 25th of September that the plaintiff gave notice to the defendant No. 1, to refund. The plaintiff sued to recover the money paid by him from defendant No. 1, placing reliance on the custom that the Shah who obtained payment of the Shah Jog Hundi was, in the event of the Hundi turning out to be fraudulent, bound to refund the amount of the Hundi with interest, unless he produced the actual drawer or the person who committed the fraud.

Held, (1) that the plaintiff would have no equity to recover back the amount from the defendant No. 1 who was paid not as a Shah but as the indorsee for collection of a Hundi purporting to have been drawn against the security of a railway receipt;

(2) that, assuming that there might be liability imposed on the first defendant by reason of the payment to refund or to trace the Hundi to its source, that would only be the case provided notice was given within a reasonable time of the discovery of the forgery;

(3) that the Hundi had been 'traced to its source' within the meaning of the Marwari Association Rules before the first defendant had received intimation of the fraud. **R.D. Sethna v. Jwalaprasad Gayaprasad**, 16 Bom. L.R. 972.

SCOTT, C.J. and DAVAR, J.

(2) **Payment of forged Hundi—Rights of person who makes payment.** See BILL OF EXCHANGE, No. 1, 16 Bom. L.R. 434.

Shahnas.

Shahnas delivering attached property without permission—Remedy. See CIV. PRO. CODE (1908), No. 193, 23 Ind. Cas. 907.

Shamilat.

Mianas built by non-proprietor on shamilat—Right of proprietor to eject. See EJECTMENT, No. 4, 1 P.W.R. 1914 (N.W.F.P.)

•Shares.

(1) Agreement not to pay price of shares in cash—When valid—What is payment in cash—Contract to purchase shares—Its effect if not rescinded before winding up—Fraud, etc., in purchasing shares when can be pleaded. See ACT VI OF 1882 (COMPANIES), No. 4, 102 P. W.R. 1914.

(2) Suit for declaration of shares in joint property—Necessary parties—Death of one shareholder—Heirs not brought on record in time—Abatement of suit. See CIV. PRO. CODE, (1908), No. 373, 15 P.L.R. 1914.

Shebait.

(1) *Limitation Act* (1877), Sch. II, Art. 124—*Shebait's right to take a share of surplus income from offerings—Hindu widow succeeding to shebaitship—Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself—Suit by widow to set aside decree and sale as fraudulent—Dismissal of suit as barred under S. 244, Civ. Pro. Code (1882), if legal—Suit by reversioner for declaration of his right to surplus income—Limitation—Appropriation of income if amounts to dispossession of office, or is act of ordinary trespass only—Res judicata.*

One of several co-shebaita of a temple who was entitled to receive a $3\frac{1}{2}$ as. share of the daily surplus income from the offerings to the temple having died, his widow succeeded to the shebaitship. A creditor of the widow G, obtained a decree against her and caused the $3\frac{1}{2}$ as. share of the surplus daily offerings to be put up for sale, and himself purchased it, and from 1892 onwards went on appropriating the same. The widow's suit to set aside the sale on the ground that both the decree and the sale were fraudulent was dismissed in the view that her remedy was by application under S. 244 of Act XIV of 1882 and not by a suit. The widow died in 1900, and the plaintiff, her husband's reversionary heir, brought this suit in 1910 for a declaration that he was entitled to receive the said $3\frac{1}{2}$ as. share of the surplus income. The office of the shebait was a hereditary one which could not be held by any one who was not a Brahmin Panda, and the purchaser was not a Brahmin Panda but a man of inferior caste who was not competent to hold the shebait's office or to provide for the performance of the duties of that office:

Held, that the appropriation from time to time by the purchaser of the income derivable from the $3\frac{1}{2}$ as. share did not deprive G, or the plaintiff of the possession of the office of the shebait, although that income was receivable by them in right of the shebaitship, and Art. 124 of the Limitation Act, had no application to the case.

By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the purchaser acquired no title and no right to a share of that income. On each occasion upon which he appropriated

Shebait—(Continued).

the share of the surplus income, he committed a fresh actionable wrong in respect of which a suit could be brought against the shebait.

The right to the office of the shebait, did not arise from or depend upon the receipt of a share of the surplus daily income from the offerings, although the right to receive it was attacked to and dependent on the possession of the right to the shebaitship.

Held, also, that the defendant's further plea that the suit was barred by *res judicata* was untenable.

S. 244 of Act XIV of 1882 did not apply to a suit to set aside a decree and sale thereunder on the ground that they had been obtained by fraud. *Bhalaaji Thakur v. Jharula Das*, 18 C.W.N. 1029 = 27 M.L.J. 100 = 24 Ind. Cas. 501 (P.C.).

LORD MOULTON, LORD PARKER, SIR JOHN EDGE and MR. AMER ALI.

(2) *Civ. Pro. Code*, 1882, s. 244—*Suit to set aside a decree and order for sale in execution thereof on the ground of fraud—Shebait—Res judicata—Shebait's right as such to surplus offerings—Succession of Hindu widow to Shebaitship—Alienation by widow of surplus offerings—Suit to declare alienation invalid and not binding on those entitled to succeed the widow as shebait—Receipt of surplus offerings by a person incapable of becoming shebait, effect of—Limitation—Limitation Act, 1908, S. 1, Art. 124.*

S. 244 of the Civ. Pro. Code, 1882, does not apply to a suit brought to set aside a decree and the order of sale made in execution thereof on the ground that they had been obtained by fraud.

On the death of a *Shebait* of a temple, who was entitled to receive as such *Shebait* a certain share of the daily surplus income from the offerings to the temple, his widow succeeded to his *Shebaitship* and accordingly became entitled to receive the said share of the surplus income. One J obtained a money-decree on a mortgage granted by the widow, and in execution of that decree the said share was sold and purchased by J, who obtained, on February 8, 1892, a certificate of sale wherein the property purchased by him was described as belonging "to the judgment-debtor." The widow and the next reversioner then brought a suit against J to set aside the sale. That suit was withdrawn with liberty to bring a fresh suit. Subsequently the widow alone brought a fresh suit which was dismissed on the ground that it was barred by S. 244 of the Code of Civil Procedure, 1882. The widow died in 1900, and on January 25, 1910, the said next reversioner brought the suit against the said J, for a declaration that he was entitled to receive the said share of the surplus income. The High Court upheld J's plea that the next reversioner was bound by the decree made against the widow in 1895 and therefore his suit was barred by the

Shebait—(Continued).

rule of *res judicata*, and that his suit was also barred by limitation by reason of art. 124 of the Limitation Act, 1908, which applied.

Held, reversing the High Court, that the contention that the claim in respect of the said share of the income was *res judicata* was untenable.

Held, also, that the said J. was not competent to perform, or to provide for the performance of, the sacred *pūja* to the Deity at the temple, and consequently was incapable of acquiring or holding the office of *shebait* which in this case was hereditary, that J. had not taken possession of the *shebaitship* and the suit was therefore not a suit for possession of an hereditary office; and that the said art. 124 did not apply.

Held, further, that the receipt by J. of the the said share of the income and appropriation thereof to his own use did not constitute him the *shebait* for the time being or affect in any way the title to that office; that by adversely taking and appropriating to his own use the share of the surplus income, J. acquired no title and no right to the said share, that on each occasion upon which J. received and wrongfully appropriated to his own use the said share of the income to which the *shebait* was entitled, J. committed a fresh actionable wrong in respect of which a suit could be brought against him by the *shebait*; and that the next reversioner's claim must be decreed. **Jalandhar Thakur v. Jharula Das**, 16 M.L.T. 210 = (1914) M.W.N. 636 = 12 A.L.J. 1176 = 16 Bom. L.R. 845 = 20 C.L.J. 360 (P.C.).

LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Reference:—39 C. 887, *Reversed*.

(3) *Bengal Tenancy Act* (VIII of 1885), Ss. 30, 188—*Enhancement, suit for*—Co-shebaits—Joint landlords—Hindu Law—Widow, whether forfeits rights as shebait, if *unchaste*.

The possession and management of dedicated property belongs to the *shebait*; and this carries with it the right to bring whatever suits are necessary for the protection of the property, for the right of suit is vested in the *shebait* and not in the idol. Therefore, where there are more *shebaits* than one, the *shebaits* are joint landlords, and consequently one *co-shebait* is not entitled to bring a suit for enhancement making the other *co-shebaits* defendants (a).

A Hindu widow, after she becomes a *shebait*, does not forfeit her rights as such *shebait* as soon as she lapses from the path of virtue and honour. **Abdul Saifur Mandal v. Uma Kanta Pandit**, 24 Ind. Cas. 266 = 19 C.W.N. 260.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 8 Ind. Cas. 842 = 38 C. 270 (P.C.) = 15 C.W.N. 74 = 9 M.L.T. 1 = 13 C.L.J. 51 = 8 A.L.J. 1 = 13 Bom. L.R. 1 = 21 M.L.J. 92 = (1911) 2 M.W.N. 119, *F*.

Shebait—(Continued).

(4) Execution against endowed property—Decree against *shebait* if binding on succeeding *shebait*—Death of judgment-debtor pending execution—Objection of succeeding *shebait* as private property—Applicability of S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 85, 20 C.L.J. 485.

Shikmi Ghatwali Khorposh.

Owner of share of, if a proprietor. See REGULATION III OF 1872 (SONTHAL PARGANAS SETTLEMENT), No. 10, 20 C.L.J. 103.

Shikmi Taluk Tenure.

Creation of—Revival of old taluk or creation of new taluk. See TRANSFER OF PROPERTY ACT, No. 98, 23 Ind. Cas. 612.

Shipment.

Meaning of the term 'shipment'—Late delivery—Breach of contract—Measure of damages—Burden of proof. See CONTRACT, No. 2, 20 C.L.J. 133.

Shipping Company.

Shipping Company—Carriage by inland waters—Receipt for goods—Mate's receipt—Negotiable Instrument—Transfer of Property Act, S. 137—Document of title—Circular and stranger—Obligation.

The duty of a shipping Company, whose vessels ply in inland waters, arising from a document which charges the Company with receipt of certain goods from a shipper, under a bargain to convey them by its ship to a certain place for a stipulated freight on certain conditions, is to deliver the goods to the shipper or to his nominee at the place of delivery; and although such a document is called a mate's receipt to which certain terms which are more suitable to bills of lading are appended, it is a simple ordinary receipt for goods, and is not a negotiable document within the meaning of S. 137 of the Transfer of Property Act, nor is it a document of title and the goods do not pass upon the transfer of it.

A clause in a circular issued by a shipping Company in the course of its business, intimating that the Company shall not part with the goods shipped unless receipts thereof (which were called Mate's receipts) are given up, or otherwise unless a guarantee be obtained, does not constitute an obligation upon which a person (who is neither the shipper nor his nominee) as an outside party is entitled to found an action against the Company. **Natcheappa Chetty v. The Irrawaddy Flotilla Co., Ltd.**, (1914) M.W.N. 163 = 12 A.L.J. 211 = 18 C.W.N. 457 = 22 Ind. Cas. 311 = 15 M.L.T. 193 = 19 C.L.J. 265 = 7 Bur. L.T. 40 = 16 Bom. L.R. 298 = 41 C. 670 (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

Shivajama Tenure.

Land tenure—Shivajama—Grant by Government—Conditional assessment and Civil Court's jurisdiction.

Shivaijama Tenure—(Concluded).

Civil Courts have no jurisdiction to take cognizance of questions relating to the rate of assessment to be levied on a grant of land.

Where a Tahsildar made a grant of land to the plaintiff on Shivaijama tenure, on the condition that "until it has been decided what alignment for the railway will be selected, no patta can be granted" "and should these lands not be required for railway purposes, pattas will issue as soon as alignment has been decided upon."

Held, per Sadasiva Iyer, J.—That the grant was temporary, that the railway alignment had been decided upon and that since the alignment was made, the remaining extent of the land was granted on the usual ryotwari tenure.

The power to make grant of a larger right involves and includes the power to make a conditional grant of the lesser right at first and the larger right on the happening of a certain event; and when the event has happened, the conditional grant of the larger right vests the larger right in the grantee from the date of the happening of the event.

The Government are under no statutory obligation to issue any patta to a ryotwari landholder for his holding.

The grant of a declaratory relief is a matter of discretion with the Courts.

Seshagiri Iyer, J.—It is impossible to construe the grant as a promise to make a permanent grant on certain contingencies or any assignment which is to remain in force until the condition works out.

Shivaijama includes cases where permission has been given to occupy land for a particular period or for a particular purpose or where there has been unauthorized occupation which the revenue authorities do not consider objectionable. The principle underlying such collections is that no property passes to the cultivator. The land continues to be at the absolute disposal of the Government.

The non-issue of a patta will not take away the right of a ryot if otherwise there has been a grant to him. *Aleman Rama Rao v. The Secretary of State for India in Council*, (1914) M.W.N. 388=24 Ind. Cas. 904.

SADASIVA IYER and SESHAGIRI IYER, JJ.

Shrotriham Grant.

Grant whether includes Poramboke—Enfranchisement of the village—Effect—Right to minerals in the village—Scope of Board's Standing Orders—Prerogative right of Crown whether could be extinguished by limitation.

The plaintiffs were the owners of the Shrotriham village of Kollur in the South Arcot District and sued the Government, for a declaration of their exclusive title to all the rocks and hills lying within the village, for refund of

Shrotriham Grant—(Continued).

the sums levied from them by way of seigniorage or royalties and other reliefs. The inam title-deeds declared that "the inam will be your absolute property to hold or dispose of as you think proper, subject only to the payment of the quit-rent." *Held, per Sadasiva Iyer, J.*, that full freehold interest in the whole village was recognized by the Inam Commissioner on behalf of the Government as vesting in the Inamdars, the estate so vesting being not liable to any further imposition of burdens in the shape of revenue assessment by the Government, and that the Government have no right to impose further revenue burdens on the inam estate, whether they call it royalty or assessment (a).

The recognition of a freehold right is the same thing in the eye of the law as the recognition of a right to the soil of waste lands including the rights to all the minerals, rocks and stones up to the centre of the earth.

A permanent or inam settlement by which a fully authorized officer settles the revenue in perpetuity, recognizes the pre-existing right of the inamdar in rocky poramboke lands and confirms such right, cannot be repudiated by Government.

By enfranchisement the Government absolutely renounces its rights on the land and as between the Government and the inamdar, the grantee's title becomes absolute.

Per Spencer, J. (contra).—There is no language in the inam title-deed which can be regarded as depriving Government of its right to charge royalties on minerals (b).

The prerogative right of the Crown to minerals in mines would not pass under a grant of waste land from the Crown, unless the intention that it should so pass was expressed by apt and precise words (c). Though the Government could not claim exclusive rights over quarries and minerals in this shrotriham village, there was nothing to prevent them from claiming the State's share of the produce in the minerals.

By the process of enfranchisement what the Government did was to exchange its reversionary rights for a favourable quit rent or *jodi* and it gave an indefeasible right to property (d).

The Board's Standing Orders have not the force of law but are merely directions for the guidance of executive and administrative officers in the Revenue Department.

Any misdirection which appeared through a misconception of what rights were vested in the Crown would not operate as a forfeiture of such rights by its publication in a work of this sort, provided that Government had not expressly or by implication surrendered such rights to the holders of the inam lands by any previous grant or by the act of enfranchisement.

The right of the Crown to claim its share in minerals is a prerogative right which could not

Shrotriam Grant—(Concluded).

be extinguished by limitation (e). **The Secretary of State for India in Council v. Srinivasa Chariar**, 15 M.L.T. 277=23 Ind. Cas. 144.

SADASIVA IYER and SPENCER, JJ.

References:—(a) 26 M. 339; 30 M. 434; 32 M. 86; 26 M. 350; 10 M. 1, R. (b) (1913) 1 L. W. 41; 24 M.L.J. 36; 15 M.L.T. 269; 29 B. 415, R. (c) (1877) 46 L.J.P.C. 18; 33 O. 203, R. (d) 26 M. 339, R. (e) 27 M. 16, R.

Signature.

Comparison of—Powers of Courts. See EVIDENCE ACT, No. 17, (1914) M.W.N. 240.

Sind Civil Court Circulars.

Form 4—Form of vakalat—Authority to compromise—Delegation of, to vakil. See CIV. PRO. CODE (1908), No. 387, 8 S.L.R. 91.

Sind Encumbered Estates Act.

See BOMBAY ACT XX OF 1881.

Slander.

(1) *Slander—Calling a Hindu woman prostitute—Loss of caste—Ground for special damage—Malice—Meaning.*

Where the appellant said in the presence of several persons that the respondent, a Hindu woman, was a prostitute and she lost her caste in consequence of the slander uttered by the appellant, *held*, that the respondent was entitled to an award of special damages.

Malice signifies only the absence of just cause or excuse. **Changaram v. Raya**, 7 L. B.R. 86=23 Ind. Cas. 3.

TWOMEY, J.

(2) *Slander—Repetition of rumour—Equally actionable—English law about slanderous words—imputing unchastity to a woman—Slander of Woman Act now makes such imputations actionable per se.*

Repetition of slanders heard from others is actionable unless privileged.

In a civil suit for damages for slander, the criminal law of defamation has no application. The suit must be decided according to justice, equity and good conscience.

Proof of the truth of the slander is a complete defence in a civil suit for damages. **Mi Ngwe Hmon v. Mi Pwa Su**, 7 Bur. L.T. 253.

MC COYLL, J.C.

Small Cause Court.

(1) *Money decree—Execution—Attachment and sale of interest of judgment-debtor in joint family property—Latter partly consisting of immovables—Jurisdiction of Small Cause Court—Attachment and sale of 'half share out of whole estate'—Void on ground of uncertainty.*

The judgment-debtor and his minor brother were members of a joint undivided Hindu family, carrying on a money-lending business under the name and style of 'Khushalsing

Small Cause Court—(Concluded).

'Buddhusing,' the assets of which consisted of money, ornaments, negotiable instruments, bonds and mortgage-deeds. In execution of a decree for money, the Small Cause Court at A, attached and sold the judgment-debtor's "half share out of the whole estate" in the said business.

Held, that the attachment and sale were void on the ground of uncertainty and vagueness (a).

The Small Cause Court had no jurisdiction to attach a share in joint family property consisting partly at least of immoveable property. **Umraosingh v. Suganchand**, 10 N.L.R. 17=23 Ind. Cas. 156.

MITTRA, OFFG. A.J.C.

References:—(a) 2 B.L.R. 91 (97) (F.B.) and 14 M.I.A. 40 (51), R.

(2) *Civ. Pro. Code (1908), S. 115—Revision by High Court of Small Cause Court decree—Findings of fact by original Court, if can be reviewed by the Full Court of the Small Cause Court.* **Shamul Kissors Addy v. Rai Saheb Girindra Nath Mukhopadhyaya**, 18 C.L.J. 594=22 Ind. Cas. 32. See Final Part, 1913, Col. 1098.

(3) *Munsif not invested with Small Cause Court jurisdiction trying a case as such Court—Effect—Revision.* See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 6, 12 A.L.J. 109.

(4) *Jurisdiction—Small Cause Court—Suit for rent—Denial of plaintiffs' right as trustee—Right to kudivarum—Return of plaint—Validity.* See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 2, 15 M.L.T. 214.

(5) *Lease to cut grass—Suit for arrears of lease money—Jurisdiction of.* See ACT II OF 1901 (AGRA TENANCY), No. 2, 12 A.L.J. 36.

Small Cause Court (Presidency).

(1) *Full Bench of the—Jurisdiction to direct amendment of plaint—High Court when interferes with orders of Small Cause Court.* See AMENDMENT, No. 3, 22 Ind. Cas. 241.

(2) *Judgment of the Full Bench of the—Question of limitation—Revision.* See CIV. PRO. CODE (1908), No. 182, 16 M.L.T. 438.

(3) *Enquiry by Registrar of the, as to proper service of summons if judicial proceedings—Sanction to prosecute for false personation in service of summons.* See SANCTION TO PROSECUTE, No. 7, 18 C.W.N. 1323.

Small Cause Court Rules (Presidency).

O. XLI, r. 2 of the Rules—*High Court—Power to make rules for Presidency Small Cause Court—O. XLI, r. 2, ultra vires.*

The general rule is that "where a power to make regulation is given by a statute, no regulations made under the statute can abridge a right conferred by the statute itself." But if by statutory enactment a power is given to a rule-making authority to make rules, the rules, if they were within the power given, would be good even if they purported to abridge the rights given by the statute. There is no distinction

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between a right of appeal conferred by statute and the right to apply for a new trial. O. XLI, r. 2 of the Small Cause Court rules, which provides that no application for a new trial should be entertained unless the applicant at the time of application either deposits in Court the amount due from him under the decree or order, or gives security to the satisfaction of the Court or the Registrar for the performance of the decree or order, is *ultra vires* of the High Court making such a rule. **Madura Pillay v. T. Muthu Chetty**, (1914) M.W.N. 216=15 M.L.T. 156=26 M.L.J. 227=22 Ind. Cas. 775 (F.B.).

WHITE, C.J., SANKARAN NAIR and OLDFIELD, JJ.

Small Cause Suit.

- (1) *Provincial Small Cause Court Act (Act IX of 1887)—Suit for money—Accounts to be examined in order to ascertain the amount due—Jurisdiction.*

A suit for the recovery of a sum of money, the precise amount of which cannot be ascertained, unless the accounts of the parties have been examined, is a suit cognizable by a Court of Small Causes. **Indar Mal v. Baldeo Dass Parbhu Dial**, 12 A.L.J. 230=23 Ind. Cas. 424.

RYVES and TUDBALL, JJ.

- (2) *Jurisdiction—Small Cause side—Damages for breach of contract.*

A suit would lie on the Small Cause side for breach of contract between plaintiff and defendant to allow the plaintiff to drain the water from his field into the land of the defendants who received some consideration for such permission. **Sooriyan Mutherian v. Natesan Pillai**, (1914) M.W.N. 497=25 Ind. Cas. 44.

SESHAGIRI AIYAR, J.

- (3) *Jurisdiction—Small Cause Court suit—Defence of proprietary title raised—Whether jurisdiction ousted.*

Whether or not a suit is triable by a Court of Small Causes depends upon the frame of the suit and not upon the defence that the defendant may set up. Where a suit valued at Rs. 15 was brought in the Munsif's Court for recovery of the value of certain trees cut down, the suit was of the Small Cause Court nature and the jurisdiction of that Court was not ousted by the defendant raising a question of proprietary title. **Lala Ram v. Man Singh**, 12 A.L.J. 1032.

SUNDAR LALL, J.

References:—20 A. 480, F.; 6 C.L.J. 218, Not F.; 9 A. 591, R.

- (4) *Small Cause suit—Tried as an ordinary suit—Appeal—Jurisdiction.* **Indra Chandra Mukherjee v. Srish Chandra Banerjee**, 40 C. 537=21 Ind. Cas. 120. See Final Part, 1913, Col. 1099.

- (5) *Suit for sums payable by inferior holder to superior holder—Jurisdiction of Small Cause Courts.* See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 15, 16 Bom. L.R. 746.

Small Cause Suit—(Concluded).

- (6) *Suit for recovery of rent (other than house rent) in a suit of Small Cause nature—Second appeal if lies.* See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 12, 20 C.L.J. 494.

- (7) *Small Cause Court suit transferred to Munsif's Court and tried along with cross suit filed before Munsif—Decision in Small Cause Suit whether *res judicata*.* See CIV. PROC. CODE (1908), No. 44, 12 A.L.J. 853.

- (8) *Money spent by landlord under orders of Municipal Board—Suit for the money against tenants whether of Small cause nature.* See CONTRACT ACT, No. 58, 12 A.L.J. 931.

- (9) *Money paid to save property from sale—Suit to recover damages—Jurisdiction of Small Cause Court.* See DAMAGES, No. 5, 12 A.L.J. 1279.

- (10) *Small Cause Court—Clause cognizable by—No second appeal—High Court entitled to treat the appeal as a revision petition.* See LIMITATION ACT (1908), No. 101, 7 L.B.R. 138.

Sohag Grant.

Durbhanga Raj—Incidents of. See HINDU LAW (SUCCESSION), No. 6, 18 C.W.N. 1249.

Solicitor and Client.

Nature of relation between. See LIMITATION ACT (1908), No. 28, 22 Ind. Cas. 936.

Sonthal Parganas.

- (1) *Sonthal Parganas, mortgage of land in, not completely settled—Suit in Civil Court at Bhagalpur on mortgage, if lies—Limits of Civil Court's Jurisdiction—Exclusive Jurisdiction of special officers appointed by Lieutenant-Governor—Stipulation in bond that suit might be instituted at Bhagalpur—"Court having jurisdiction in Sonthal Parganas," if includes Civil Courts at Bhagalpur—Sonthal Parganas Reg. III of 1872 (read with Act XXXVI of 1855 and Act X of 1857) Ss. 5, 6—Interest—Usury rules enforceable by all Courts—Sonthal Parganas Justice Regulation (V of 1893), S. 9—Civ. Pro Codes (Act VIII of 1859, Act XXIII of 1861, Act X of 1877, Act XIV of 1882), how far applicable in Sonthal Parganas—Civil Courts Acts (Act VI of 1871 and Act XII of 1877) how far apply in Sonthal Parganas—Scheduled Districts Act (XII of 1874), if applied to Sonthal Parganas—Jurisdiction, objection to, taken at a late stage when entertainable.*

Where, exception being taken to the Court's jurisdiction to entertain a suit, an issue was raised, but the objection was overruled, and on appeal to the High Court the defendant did not raise the question, but did so before the Judicial Committee:

Held, that, inasmuch as the question was one of jurisdiction and it did not depend on disputed facts, the Judicial Committee could not decline to entertain it, specially as it necessarily presented itself in argument.

Sonthal Parganas—(Continued).

That, on 20th June, 1904, the date on which the present suit was instituted, in the Subordinate Judge's Court at Bhagalpur to enforce a mortgage of properties two-thirds of which was in the Sonthal Parganas, no suit could lie in any Court established under the Civil Courts Act of 1871 or 1887, in regard to any land or interest in or arising out of any land or for the rents or profits of any land, but such suits must have been brought under S. 5 of Sonthal Parganas Regulation of 1872 before the Settlement Officers or Courts of Officers appointed by the Lieutenant-Governor of Bengal, under S. 2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation of 1893, para. 2, so long as the land had not been settled and the settlement declared by a notification in the *Calcutta Gazette* to have been completed and concluded.

That as it appeared that portions only of the mortgaged land had been settled and notification made, prior to the institution of the suit, of the completion of the settlement in respect of such portions only, the suit came within S. 5 of the Sonthal Parganas Regulation of 1872 and the Subordinate Judge of Bhagalpur had no jurisdiction to entertain it.

The provision in S. 6 of that Regulation, which places all contractual stipulation as to compound interest in a position of non-enforceability and limits statutorily the total interest which can be decreed on any loan or debt, is not one of procedure, but of substance, and applies to all Courts having jurisdiction in the Sonthal Parganas and acting under and by virtue of such jurisdiction. "All Courts having jurisdiction in the Sonthal Parganas" in S. 6 do not refer only to Courts locally situated in the Sonthal Parganas and dealing with matters purely local.

A stipulation in the mortgage-bond that the mortgagees might enforce it in the Court at Bhagalpur was inoperative, as the parties could not by consent give the Court jurisdiction, thereby nullifying the express prohibition of S. 5 of the Regulation of 1872.

The Civ. Pro. Codes of 1861, 1877 and 1882 applied to suits cognizable in the ordinary Civil Courts, and these, since the enactment of S. 9 of Reg. V of 1893, were suits of which the value exceeded Rs. 1,000 and which were not excluded from their cognizance by, amongst others, the provisions of S. 5 of the Regulation of 1872.

Quære.—Whether the Civ. Pro. Code was intended by the Notification of 19th August 1867 to apply to Courts held by officers appointed by the Lieutenant-Governor of Bengal in those suits in which they were not required to try and determine the case according to the several laws and regulations prevailing in Bengal.

Seemle.—The true interpretation of cl. (1) of Act XXXVII of 1855 (before its operation was modified by subsequent enactments and notifications) was that even suits in which the matter

Sonthal Parganas—(Concluded).

in dispute exceeded Rs. 1,000 in value, were to be tried by the special officers appointed by the Lieutenant-Governor, but in trying and determining them, they were to observe the general laws and regulations obtaining in Bengal (a). *Maha Prasad Singh v. Ramani Mohan Singh*, 18 C.W.N. 994=16 M.L.T. 105=(1914) M.W. N. 565=16 Bom. L.R. 824=27 M.L.J. 459=20 C.L.J. 231=1 L.W. 619=42 C. 116=25 Ind. Cas. 451. (P.O.).

LORD SHAW, LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

Reference :—(a) 10 C. 761, Doubled.

(2) Constitution of Courts in the—Law applicable. See BENGAL ACT XXXVII OF 1855 (SONTHAL PARGANAS), No. 1, 19 C.L.J. 294.

Sonthal Parganas Civil Courts Rules.

No. 29. See ACT XXXVII OF 1855 (SONTHAL PARGANAS), No. 2, 18 C.W.N. 662.

Sonthal Parganas Justice Regulation.

See REG. V OF 1893.

Sonthal Parganas Rent Regulation.

See REG. II OF 1886.

Sonthal Parganas Settlement Regulation.

See Reg. III OF 1872.

Specific Performance.

(1) *Specific performance of contract—Delay and laches of plaintiff, effect of.*

In a suit for specific performance, where continuous delay and laches are found on the part of the plaintiff, the plaintiff is not entitled to a decree. *Abdul Aziz v. Narain Das Tewari*, 21 Ind. Cas. 35.

BANERJI, J.

(2) *Agreement to sell whole house—Promisor only part owner—Specific performance decreed to the extent of his share—Agreement to sell property for price without mentioning amount to be paid—Court ordering specific performance to fix amount.*

A, purporting to be the sole owner, agreed to sell a house, but in a suit for specific performance of the agreement he was found to be only a part-owner of the property :

Held, that the agreement could be enforced specifically to the extent of the share of A.

Where, according to the agreement, the vendee was to purchase the property in dispute (*malba*) and the vendor was to receive the price, the agreement, however, being silent as to the amount of such price, or as to the means by which it was to be assessed.

Held, that, in a case of this kind, it is the duty of the Court, while ordering specific performance of the agreement, to determine by itself or through a Commissioner the price which should in reason be paid. *Salamat Rai v. Tulai Das*, 71 P.L.R. 1914=22 Ind. Cas. 517=109 P.W.R. 1914.

RATTIGAN and BEADON, JJ.

References :—5 C. 932 (937); 7 I.A. 107, R.

Specific Performance—(Continued).

- (3) *Specific performance—Contract set up not wholly proved—Power of the Court to decree specific performance of so much as is proved.*

Where plaintiff has failed to prove the contract set up, i.e., for the sale of all the properties claimed, he is entitled to a decree for specific performance of such of the items as he proves to have been contracted to be sold. *T. S. V. Nazareth v. Jaffer Meghji Shet*, (1914) M.W.N. 339=23 Ind. Cas. 523.

SANKARAN NAIR and BAKEWELL, JJ.

- (4) *Specific performance—Contract to sell land—Subsequent purchaser—Payment of consideration—Good faith—Absence of notice of prior contract—Burden of proof—Hindu agreeing to sell land—Death prior to decree—Son's liability to perform father's contract—Question as to—Whether can be raised.*

Where, in a suit for specific performance, the plaintiff has proved the prior agreement to sell the plaintiff land, the burden of proving (a) that the subsequent purchaser paid valuable consideration, (b) that he acted *bona fide* and (c) that he had no notice, lies on the subsequent purchaser (a).

Where two Hindus, who entered into a contract to sell, die prior to decree in a suit for specific performance brought against them, it is open to their sons to raise a question as to their non-liability to perform their fathers' obligations. *S. Thiruvengkatachiar v. Venkatachiar*, 36 M.L.J. 218=23 Ind. Cas. 621.

SADASIVA IYER and TYABJI, JJ.

Reference :—(a) 36 B. 446, R.

- (5) *Specific Relief Act, S. 22—Contract Act, S. 16—Contract for sale of land in lieu of hushing up of departmental enquiry against a public servant, if enforceable—Court of Equity, jurisdiction of, to refuse specific performance of contract not invalid or void under the Contract Act.*

In a suit for a specific performance of a contract for a sale of land, it appeared that, in consequence of a charge being laid at the instance of the plaintiffs against one of the defendants who was the record-keeper of the Court of the District Judge, a departmental enquiry into the matter by a Subordinate Judge was ordered, and while this was in progress, the two defendants who were father and son were approached by the plaintiffs who promised to hush up the said enquiry if the defendants would execute a conveyance in their favour in respect of certain land and the result was the contract in suit.

Held, that the contract was one of which specific performance ought not to be ordered.

That there may be cases which cannot be brought within the four corners of any of the provisions of the Contract Act, as to the invalidity or voidability of agreements, but in which nevertheless a Court of Equity may properly

Specific Performance—(Continued).

refuse to exercise its jurisdiction under the Specific Relief Act. *Gobinda Chandra Chuckerbutty v. Nanda Kumar Das*, 18 C.W.N. 689=22 Ind. Cas. 910.

CARNDUFF and RICHARDSON, JJ.

- (6) *Specific performance of contract, suit for—Agreement—Sale to be completed within certain time—Sale not completed—Vendor not carrying out essential terms of agreement—Agreement, if subsisting—Transfer of Property Act, S. 55, sub-S. (1), cl. (b)—Subsequent transferee for value and with knowledge of previous agreement—Bona fide purchaser for value—Specific Relief Act, S. 22 and sub-S. (2)—Laches—Subsequent transferee making improvement, if entitled to value of improvement.*

On the 22nd April, 1910, the first defendant entered into an agreement with the plaintiff to transfer to him the disputed property and receive some amount as earnest money. Under the contract, the transaction was to be completed within 3 months, and the vendor agreed to satisfy the purchaser that she had valid saleable interest in the property by showing a copy of the Collector's order about the registration of her name in respect of the property, the will of her mother and other papers relating thereto, within the time specified in the contract. Notwithstanding repeated demands by the plaintiff, the vendor did not satisfy him as to her title to the property by production of above-stated papers. The vendor produced a copy of compromise-petition between the parties to the probate proceeding and certain unattested copies of will and title-deeds, after the expiration of the time mentioned in the contract. The original will was not shown by the vendor to the purchaser. On the 30th August, 1910, the first defendant sold the disputed property to the second defendant, who took the conveyance in the name of his wife, the third defendant, and with notice of the prior contract. This conveyance was registered on the following day. On the 5th November, 1910, the plaintiff instituted a suit for specific performance of the contract.

Held, that, as the vendor had not carried out one of the essential terms of the agreement, namely, to satisfy the purchaser as to her title to the property, the plaintiff was not, on the 22nd July, 1910, in default, and the contract was still enforceable at his instance, and as it remained unperformed, the vendor defendant was responsible for the situation. That as defendant No. 2, the subsequent transferee, entered into an agreement to purchase the property with full knowledge of the prior agreement, he was not a *bona fide* purchaser for value without notice, and the plaintiff was entitled to have the contract specifically enforced not only against the vendor but also against the transferee.

That there was not such delay in the institution of the suit as disentitled the plaintiff to a decree for specific performance.

Specific Performance—(Continued).

Sub-S. (2) of S. 22 of the Specific Relief Act contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances.

Mere improvidence or inadequacy is no hardship within the meaning of sub-S. (2) of S. 22 of the Specific Relief Act, but the bargain must be so hard as to be unconscionable, so that its actual performance would in the circumstances be inequitable. But where the hardship had been brought upon the defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance.

The rules that "where a purchaser for value is evicted in equity under a prior title, he will be credited with all money expended by him in necessary repairs or permanent improvements," does not apply where the improvements have been made after he has discovered the defect in title (a).

A person who entertains a doubt as to the existence, present or future, of a certain fact, cannot be said to be the victim of an honest mistake.

The position of the subsequent purchaser who has taken with notice of the prior contract and who has omitted to make an effective enquiry from the prior contractee, is no better than that of the vendor himself, and so far as the vendor is concerned, if he makes permanent improvements, the purchaser would be entitled to the benefit thereof without further payment (b). *Haradhone Debnath v. Bhagapati Dasi*, 19 C.L.J. 420 = 41 C. 852 = 23 Ind. Cas. 214 = 19 C.W.N. 89.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) (1796) 3 Ridgway P.C. 492 (518); (1848) 6 Hare 273; (1850) 8 Hare 51 (60), R. (b) (1850) 8 Hare 51; (1848) 6 Hare 273, R.

(7) *Specific performance—Hindu Law—Joint family—Contract to grant permanent lease—Contract by members of joint Mitakshara family—Certificated guardian executing contract on behalf of minor members—Legal necessity—Benefit of family—Contract that permission of Judge would be taken for grant of lease of minor members' shares—Validity of contract—Contract whether binding, upon minor members—Whether major members bound as far as contract relates to their shares.*

A contract for the grant of a permanent lease of certain immoveable properties was entered into and executed by the major members of certain Mitakshara joint family and by the certificated guardian of some of the minor members. It was in the contemplation of the parties then that the shares of the minor would be bound by an application being made to the District Judge for permission authorising their certificated guardians to lease out their shares. This contract was not entered into

Specific Performance—(Continued).

by the other members as being the *Karta* and adult members of the family. A suit was brought for the specific performance of the contract.

Held, (1) that, in order to enable the *karta* to transfer the properties, it was necessary that he should have the consent of the adult members of the family, and that the transfer, in so far as it would bind the shares of the minors, should either be for legal necessity or for the benefit of the family;

(2) that the provision in the contract that the approval of the District Judge would be obtained for the grant of the lease was incapable of being carried into effect owing to the fact that the Court had no jurisdiction to appoint a guardian of the property of a minor governed by the *Mitakshara* School of Hindu Law, unless it is shown that the minor has separate property;

(3) that, consequently the contract was not binding on the minors;

(4) that, in Bengal, until there has been a separation and partition, no member of a *Mitakshara* family has an interest in the property which he can transfer; and

(5) that consequently the adult members could not be ordered to specifically perform a portion of the contract so far as it related to their own shares.

Obiter dictum:—If a person knowing that he has no title to certain immoveable property agrees to sell it, he may be held liable for special damage which the purchaser suffers by reason of the vendor not having been able to carry out the contract. *Janaki Nath Singha Roy v. Jamini Kanta Singha Roy*, 22 Ind. Cas. 612.

FLETCHER and CHATERJEA, JJ.

Reference:—7 H.L. 158 = 43 L.J. Ex. 243 = 31 L.T. 387 = 23 W.R. 261, R.

(8) *Specific performance, grounds for refusing—Scope of—S. 22, Specific Relief Act—Effect of laches or delay in suing.*

Mere laches on the part of a person in bringing a suit for specific performance will be no defence in law.

There is nothing in the Specific Relief Act which says that laches will by itself be a ground for refusing specific performance. Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, the Legislature has not intended that mere laches should be one of the grounds for refusing specific performance.

It is an error of law to hold that mere delay amounts to a waiver or abandonment, apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on

Specific Performance—(Continued).

the plaintiff's part. *Chamarti Suryaprakasa-rayudu v. Aradhi Lakshminarasimha Charlu*, 26 M.L.J. 518=23 Ind. Cas. 560.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

References :—21 M. 42; 33 C. 633; 29 B. 234; (1879) 5 P.O. 221, F.; 27 A. 678, D.

(9) *Specific performance—Sale-deed executed but not registered owing to vendee's allowing registration period to expire—Suit by vendee to compel execution and registration of another sale-deed.*

Where a vendee did not present the sale-deed for registration in view of vendor's inconveniences and the time for registration expired, it was held that the vendee was not entitled to a decree that the vendor should execute and register another similar document. *Subba Reddiar v. Visvanatha Reddiar*, 22 Ind. Cas. 941.

SANKARAN NAIR and AYLING, JJ.

(10) *Specific performance—Agreement to grant permanent lease "hereafter"—Whether vague and uncertain—Postponement of grant of lease until promisor had paid off his debts—Whether putting off of execution of deed is refusal to perform contract—Limitation—Limitation Act (1908), Sec. 1, Art. 113—Allegation of new contract being substituted for old—No proof of new contract—Whether old contract may be enforced—Limitation not pleaded—Limitation not merely question of Law—Suit whether to be dismissed on that ground.*

An agreement to grant a permanent lease "hereafter" of a certain property to the plaintiffs was executed by the defendant's predecessor, who also issued a notice on the day the agreement was executed to his tenants to pay their rents to the plaintiffs, stating therein that he had "let out the property in *ijara*" to the plaintiffs. Some time, about a year after this, he approached the plaintiffs to agree to the postponement of the grant of the lease, until after he had paid off his debts. The plaintiffs made no objection, as they had confidence in him and fully believed that he would act up to his words. The lease not having been granted by the defendant's predecessor, the plaintiffs brought a suit for the specific performance of the contract.

Held, (1) that the putting off of the execution of the deed could not be taken as a refusal to perform the contract, nor could the arrangement come to between the parties that the grant of the lease should be postponed until after the defendant's predecessor had paid up his debts be looked on as a rescission of the contract to grant the lease, nor did the plaintiffs give up their rights under the contract; the highest that it could be put to was that the plaintiffs gave the defendant's predecessor a reasonable time within which to execute the deed;

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(2) that the plaintiffs' right to claim specific performance of the contract to grant a permanent lease was not barred by limitation under Art. 113, Limitation Act of 1908;

(3) that because the contract to grant the lease provided that the lease should be executed "hereafter," the contract was not vague and uncertain, the word "hereafter" only meaning after the date of the contract.

The mere fact of one party alleging that a new contract had been substituted for an old one does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true (a).

Where the question of limitation is not merely a question of law, and the point is not raised by the defendant, the Court ought not to dismiss the suit on the ground of limitation. *Kali Das Bhanja v. Giribala Das*, 23 Ind. Cas. 360.

FLETCHER and N. R. CHATTERJEE, JJ.

Reference :—(a) 8 C. 926, Rel.

(11) *Hindu joint family—Agreement by a member to sell his share in specified family property on partition—Agreement found to be not binding on his son—Father and son impleaded in suit for specific performance—Rights of plaintiff—S. 15, Specific Relief Act—Right to claim part performance.*

First defendant brought a suit for partition against his co-parceners for his $\frac{2}{3}$ share of the family properties and agreed to sell the plaintiff properties to plaintiff after the disposal of the partition suit and after obtaining his lands on partition. He also agreed to sell certain other properties which he claimed exclusively as the separate property of himself and his son the 2nd defendant. Defendants got their $\frac{2}{3}$ share in the partition suit and plaintiff now sued for specific performance against the 1st and 2nd defendants (father and son). First defendant pleaded coercion, and inadequacy of sale price and absence of necessity for him to enter into the agreement in question. Second defendant contended that the agreement to sell was not binding on him and could not be enforced against him under the Hindu Law. The Lower Court found that there was no necessity to sell and that the agreement was not binding on the family and dismissed the suit.

On appeal *held*, under the circumstances of this case, and as the agreement was not binding on the family, the suit for a decree directing the 1st defendant to sell the lands must be dismissed (a).

Plaintiff also offered to pay the full amount for a conveyance to him, of the lands which were alleged to be the separate property of the 1st defendant and of the 1st defendant's interest in the family lands.

Held, that this would require a determination of the question whether any of these lands formed the separate property of the 1st defendant and such a decree would only lead to litigation between the same parties to determine

Specific Performance—(Concluded).

their rights. *Held* therefore that the plaintiff was not entitled to a decree for part performance.

A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property. But there is no question of part performance in that case.

And where a junior member of a Hindu family agrees to sell any specific property belonging to his family, a decree cannot be passed against him to sell his share of that specific property. Because the junior member is unable to perform the whole of his part of the contract by conveying the entire property agreed to be sold and for the same reason that he is not entitled to claim any specific property till partition, conveyance of a portion is not a part of the contract "as he can perform" in the terms of S. 15 of the Specific Relief Act (b).

On the view that a co-parcener cannot alienate any specific property, no specific performance can be decreed (c). **Duyyur Subba Reddy v. Kakuturu Venkatrami Reddy**, 16 M.L.T. 370.

SANKARAN NAIR and SPENCER, JJ.

References:—(a) 26 M. 74; 32 M. 320; 33 M. 359, D. (b) 37 M. 387, *Cons.* (c) 15 M.L.T. 186; 16 M.L.T. 181, R.

(12) *Specific performance, suit for—Agreement to lease share of a member of joint family governed by Mitakshara law—Lease as to entirety if can be enforced for part. Sheikh Abdul Rahman v. Jadunandan Singh Jha*, 18 C.L.J. 344=21 Ind. Cas. 528. See Final Part, 1913, Col. 1101.

(13) *Suit for specific performance—Insolvency of defendant—Official Assignee whether necessary party—Execution of document—By whom. P. Purushotam Naidu v. L. Ponnurungam Naidu*, (1913) M.W.N. 897=15 M.L.T. 92=21 Ind. Cas. 576. See Final Part, 1913, Col. 1102.

(14) *Specific performance—Granting—Discretionary—Receipts—Contract to sell—No registration necessary—Amendment of plaint—Contract by father in favour of one member of joint family—Suit on behalf of family against father and son. Kondapaneni Kotayya v. Gagaru Seshyya*, (1913) M.W.N. 995=14 M.L.T. 496=21 Ind. Cas. 778. See Final Part, 1913, Col. 1102.

(15) *First suit for—Second suit for possession—Second suit not barred. See CIV. PRO. CODE (1908), No. 239, 15 M.L.T. 103.*

(16) *Agreement by managing director of Company to grant permanent lease—Whether binding on company—Right to claim. See COMPANY, No. 6, 24 Ind. Cas. 209.*

(17) *Agreement for reconveyance of property is not compulsorily registrable—Suit for specific performance. See REGISTRATION ACT (1908), No. 9, 16 Bom. L.R. 582.*

Specific Relief Act.

(1) *S. 9—Possessory suit—'Possession'—Suit by co-sharer, maintainability of—Joint possession.*

A party entitled to a moiety share in a property cannot proceed under S. 9 of the Specific Relief Act when the dispossession is in respect of the whole.

A Court has no jurisdiction to grant joint possession under S. 9 of the Specific Relief Act, as the word 'possession' in the section refers to exclusive possession. **Harl Narain Das v. Elemjan Bibi**, 19 C.L.J. 117=23 Ind. Cas. 618=29 C.W.N. 120.

STEPHEN and CHATTERJEE, JJ.

(2) *S. 9—Suit for possession—Whether under S. 9 of the Specific Relief Act or not—Inference from the fact that the suit was brought within six months—Also from the fact that the suit was for possession only and not declaration of title—Whether appeal lies to the Divisional Court.*

The sole question in this appeal was whether the suit was in fact brought under S. 9 of the Specific Relief Act. The Divisional Court held that it was, because (a) the plaintiff was entitled to bring such a suit, and (b) the suit was filed within six months of the dispossession.

In this Court the finding was supported on the further ground that the prayer in the plaint asks for possession only and not for a declaration of title.

Held that the second paragraph of S. 9 shows clearly that no one, though entitled to sue under that section, is bound to do so, but that he can always bring a regular suit founded upon title, either in addition to or instead of a suit under that section.

Held also that a person by seeking his remedy early does not thereby alter the nature of his suit.

Held further that there is no reason why a plaintiff who claims possession relying upon title need do more than set out his title and ask for possession.

The plaintiff in the present case set up a title as mortgagee in possession of certain land of which defendants had taken possession. Defendants alleged that they had redeemed the mortgage and so extinguished the plaintiff's title on which his claim to possession was based. Issues covering the question of title were framed and evidence taken, after which the Court of first instance held that the defendants had not redeemed the mortgage and that there was abundant evidence to prove the plaintiff's title to the land as mortgagee in possession, and on the strength of that title granted him possession.

Held that, both from the frame of the plaint and the course which the case took, it was always intended to be a suit based upon title and never a suit under S. 9 of the Specific Relief Act, and that the plaintiff cannot be heard to assert the contrary and that, therefore,

Specific Relief Act—(Continued).

an appeal lay to the Divisional Court. **Mg Lu Mg v. Maung Pu**, 7 Bur. L.T. 10=7 L.B. R. 88=23 Ind. Cas. 367.

PARLETT, J.

References:—15 A. 384; 9 W.R. 602; 25 M. 548, R.

(3) S. 9—*Suit for possession together with prayer for mesne profits—Powers of Court.*

Where in a suit under S. 9 of the Specific Relief Act, plaintiff claims mesne profits in addition to his prayer for possession, the mere fact that the profits cannot be recovered in a suit under S. 9 need not in any way affect the Court's ability to grant restoration to possession. It can reject the one prayer and grant the other without immediate or probable inconsistency. **Yalamanchilli Purnaya v. Pamu Ramaswamy**, 16 M.L.T. 190.

OLDFIELD, J.

References:—25 M. 448; 33 A. 174, D.

(3-a) S. 9—*Whether controls S. 110, Evidence Act—Scope of the two sections.*

S. 9 of the Specific Relief Act in no way controls the operation of S. 110 of the Evidence Act. S. 110 provides that peaceful possession shall be *prima facie* proof of title; while S. 9, Specific Relief Act, has no concern whatever with title, but is merely a law for restoring a possession which has been disturbed otherwise than in due course of law. The former will not avail a possessor against the true owner: the latter can properly be used to eject even a true owner who has disturbed a peaceful possession; because, in a summary case, the Court will not look at title, but only consider the question whether there has been an unlawful (using that word to mean "otherwise than in due course of law") disturbance of possession. **Sambhasheo v. Mahadeo**, 10 N.L.R. 188.

STANYON, A.J.C.

References:—7 W.R. 174; 8 W.R. 386 (389); 9 W.R. 71; 12 W.R. 472; 20 W.R. 458; 23 W.R. 293; 5 C.L.R. 278; 7 C. 591; 11 C.L.R. 133; 17 C. 256; 26 C. 579; 7 I.A. 73; 20 I.A. 99; 31 C. 647; 6 B. 215; 8 B. 371; 20 B. 270; 25 B. 287; 2 Bom. L.R. 628; 3 Bom. L.R. 246; 5 Bom. L.R. 225; 23 M. 179; 26 M. 514; 12 A. 46; 13 A. 537; 3 A.L.J. 775; 12 C.P. L.R. 59, R.

(4) S. 9—*Possessory title—Plaintiff in possession, but dispossessed by defendant who had no title—Suit for possession, maintainability of.* **Umrao Singh v. Ramji Das**, 11 A.L.J. 1012=36 A. 51=24 Ind. Cas. 622. See Final Part, 1913, Col. 1103.

(5) S. 9—*Decree under—Not open to revision by Chief Court.* See PUNJAB ACT I OF 1900 (LAND ALIENATION), No. 6, 7 P.R. 1914.

(6) S. 9—*Suit under S. 9 decided on wrong issue of title—High Court's power to interfere in revision.* See CIV. PRO. CODE (1903), No. 174, (1914) M.W.N. 95.

Specific Relief Act—(Continued).

(7) S. 9—*Possession for less than statutory period—Decree in possessory suit—Symbolical possession—Suit for recovery of possession—Title of defendant if to be investigated—Limitation.* See POSSESSION, No. 1, 21 Ind. Cas. 118.

(8) S. 15—*Contract entered into by managing member of joint Hindu family—Finding that the contract was not binding on the other members—Right to specific performance.* **Inturi Nagiah v. Ariparala Venkatarama Sastrulu**, 14 M.L.T. 199=37 M. 387. See Final Part, 1913, Col. 1104.

(9) S. 15. See SPECIFIC PERFORMANCE, No. 11, 16 M.L.T. 370.

(10) S. 15. See No. 11, *infra*.

(11) Ss. 17 and 15—*Hindu family—Divided brother—Agreement to sell—Part performance—Court's power—Execution of sale—deed.* **Govinda Naicken v. Apathashaya Iyer**, (1912) M.W.N. 87=11 M.L.T. 87=22 M.L.J. 257=18 Ind. Cas. 471=37 M. 403. See Final Part, 1912, Col. 1012.

(12) S. 22—*Scope—Laches or delay in suing—Whether ground for refusing specific performance.* See SPECIFIC PERFORMANCE, No. 8, 26 M.L.J. 518.

(13) S. 22—*Jurisdiction of Court of equity to refuse specific performance of contract not invalid or void under the Contract Act.* See SPECIFIC PERFORMANCE, No. 5, 18 C.W.N. 689.

(14) Ss. 22 and 22 (2)—*Scope—Specific performance when may not be refused.* See SPECIFIC PERFORMANCE, No. 6, 19 C.L.J. 420.

(15) S. 27 (b)—*Notice—Transferee without notice of previous transfer or lease—Tenant's right—Occupation of property by tenant—No inquiry of tenant made by intending transferee—Notice of tenant's rights—Agreement—Specific performance.* **Bacuram Bag v. Madhab Chandra Pallay**, 40 C. 565=19 Ind. Cas. 9=18 C.W.N. 341. See Final Part, 1913, Col. 1106.

(16) S. 27, *ill.* (3)—*Tenant in possession of land at the time of purchase by third person—Duty of purchaser to make enquiry of lessee—Notice of lessee's rights.* **Nandi Reddy Fakeer Reddy v. Trimmakka**, 14 M.L.T. 477=22 Ind. Cas. 250. See Final Part, 1913, Col. 1106.

(17) S. 31—*Rectification of instrument of an unilateral character—Oral evidence to prove how the description in a mortgage deed was related to existing facts, admissibility of—Evidence Act, Ss. 95 and 96.* **Radhe Lal v. Angne**, 16 O.C. 213=21 Ind. Cas. 423. See Final Part, 1913, Col. 1107.

(18) S. 41—*Minor—Mortgage by de facto guardian—Existence of just debt by deceased father—Invalidity of mortgage—Restoration of benefit received by father—Not allowed—Muhannadan Lrw—Compensation to defendant*

Specific Relief Act—(Continued).

—When granted. **Choghatta v. Asa Mal**, 30 P.R. 1913=17 Ind. Cas. 371=270 P.L.R. 1914. See Final Part, 1913, Col. 1108.

- (19) *S. 42—Suit for declaration—Defendant in possession—Real dispute between the parties as to nature of possession—S. 42, no bar.*

Under a deed of compromise the name of the widow of an unseparated Hindu was entered in the place of that of her husband and she was put in possession of the property that stood in his name. On an application being made for partition of one of the villages, the widow also applied for partition of the share which stood in her name. The plaintiffs objected on the ground that she was not entitled to partition, and they were referred to the Civil Court to have their rights established. They then sued for a declaration that the deceased died while living jointly with themselves, that the widow was not in possession as the heir of the deceased, and that she was not entitled to obtain partition. *S. 42 of the Specific Relief Act was set up in defence. Held, that, where the possession of the defendants was clearly admitted and the real dispute between the parties was one as to the nature of the possession of the widow, S. 42 of the Specific Relief Act did not bar a suit for declaration of title. The plaintiffs not being entitled to possession were not bound to sue for possession.* **Ram Manorath Singh v. Dillraj Kunwari**, 12 A.L.J. 66=36 A. 126=23 Ind. Cas. 252.

TUDBALL and RYVES, JJ.

- (20) *S. 42—Declaratory suit—Denial of title—Only one cause of action.*

When a plaintiff brings a declaratory suit under *S. 42 of the Specific Relief Act*, on the ground that the defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in plaintiff of the defendant's denial of his title (a).

The fact that, in consequence of such denial, a revenue or other authority has subsequently done some act in favour of the defendant, cannot give a fresh cause of action for a suit under *S. 42, Specific Relief Act (b)*. **Tirumala Rao v. Jungamma Shettithi**, (1914) M.W.N. 197.

AYLING and SADASIVA IYER, JJ.

References:—(a) 31 A. 9; 26 M. 410, F. (b) 22 M.L.J. 108; 10 A.L.J. 413, Diss.

- (21) *S. 42—Assignee from tenant, if may sue landlord for recognition of his tenant rights and declaration of incidents of tenancy—Landlord and tenant.*

The Court has power to pass a declaratory decree in a suit by an assignee of a lease against the lessor to have it declared that the lease is a permanent, heritable and transferable one, that the rent was fixed in perpetuity and that the lessor was bound to recognise the plaintiff a tenant of the leasehold.

Specific Relief Act—(Continued).

The law laid down in earlier rulings to the contrary has been modified by *S. 42 of the Specific Relief Act*. **Monmohan Ghose v. Equitable Coal Company, Limited**, 18 C.W.N. 596=24 Ind. Cas. 144.

NEWBOULD and RAI, JJ.

- (22) *S. 42—Suit for declaration of rights—Waste land—Plaintiff out of possession.*

Where the plaintiffs are admittedly out of possession of certain waste land and it appears that the defendants are keeping them out of it, the plaintiffs can and ought to sue for recovery of possession of that land, and a suit for mere declaration of their rights is barred by *S. 42 of the Specific Relief Act*. **Ishwar Singh v. Narain Datt**, 12 A.L.J. 408 36 A. 312=23 Ind. Cas. 555.

RAFIQ and PIGGOTT, JJ.

Reference:—8 M. 361, R.

- (23) *S. 42—Cause of action—Denial of title, enough—Acts done in consequence of such denial not different cause of action.*

When a plaintiff brings a declaratory suit on the ground that the defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in plaintiff of the defendant's denial of his title. The fact that, in consequence of such denial, a Revenue or other authority has subsequently done some act in favour of the defendant and that the defendant has thereby become still more interested in denying the plaintiff's title, does not give a fresh cause of action for a suit under *S. 42 of the Specific Relief Act*. **Thirumala Rao v. Kadekar Durgi Shettithi**, 22 Ind. Cas. 883.

AYLING and SADASIVA IYER, JJ.

References:—1 Ind. Cas. 557=31 A. 9=5 A. 1. J. 637=A.W.N. (1908) 252=4 M.L.T. 444; 26 M. 410, F.; 13 Ind. Cas. 96=22 M.L.J. 108=(1911) M.W.N. 531=10 M.L.T. 504=36 M. 383; 17 Ind. Cas. 675=10 A.L.J. 413, Diss.

- (24) *S. 42—Possession short of the statutory period whether sufficient for declaratory suit—Government's rights to levy penal assessment—Levy of penal assessment when amounts to unlawful interference with plaintiff's possession.*

If the plaintiff has been in possession even though for less than 12 years, he would, under *S. 42, Specific Relief Act*, be entitled to a declaration that he is in lawful possession as against a wrong doer who sought to interfere with his possession (a).

The levying of penal assessment on the land, if it was not justified, would amount to unlawful interference with the plaintiff's possession.

If the land is not shown to be communal land, the Secretary of State would have no right to collect penal assessment from a person in possession thereof, simply on the ground that

Specific Relief Act—(Continued).

he is not the legal owner of the land, but somebody else. **B. Ayyaparaju v. The Secretary of State**, 37 M. 298.

MILLER and ABDUR RAHIM, JJ.

References:—(a) 20 C. 834 (P.C.), F.; 25 B. 287, D.; 2 M.H.C.R. 171, R.

(25) S. 42—*Discretion—Suit for declaration—Suit by remote reversioner against Hindu widow—Declaration that deed of sale by widow void against plaintiff—Widow's daughter, immediate reversioner, living—Suit, whether maintainable—Where plaintiff old man of 50, daughter aged 18, whether suit should be decreed.*

A decree under S. 42 of the Specific Relief Act is only discretionary and the exercise of discretion must depend upon the peculiar circumstances of each case.

A suit by a remote reversioner, for a declaration that a deed of sale executed by a Hindu widow is without any legal necessity and, therefore, void and ineffectual as against the plaintiff, is maintainable even during the lifetime of the immediate reversioner, the widow's daughter (a).

But where the plaintiff is an old man of 50 and the widow's daughter, that is, the immediate reversioner, is aged 18 or 19 years and there is no chance of the plaintiff's getting the property, the Court would be exercising a wise discretion if it dismissed the suit refusing to grant the declaration prayed for. **Baldeo Dube v. Shamdhur Pande**, 23 Ind. Cas. 809.

COXE and CHATTERJEE, JJ.

References:—(a) 32 C. 62=9 C.W.N. 25, F.

(26) S. 42—*Creating evidence of title whether affords cause of action for suit for declaration—Discretion of Court—Scope and earlier history of S. 42, Specific Relief Act—O. II, r. 2, Civ. Pro. Code (1908).*

Plaintiffs claimed the suit property and were in possession of it as reversioners of N. The defendants 1 and 2 also claimed it as reversioners, but under a different title derived from V. In a suit of 1910 1st defendant obtained a decree against the 2nd defendant for a declaration of his title as V.'s reversioner. In a suit of 1911 the present plaintiffs obtained a decree against the present defendants declaring their right as reversioners of N, to certain properties other than those now in suit. The suit of 1910 was pending when the suit of 1911 was filed, but was decided before it. The plaintiff's present suit was for a declaration that the decree in the suit of 1910 was collusive and had no effect so far as they and the suit properties in their hands were concerned.

It was contended that the properties now sued for were in the defendants' possession when the suit of 1911 was filed and came into plaintiffs' possession only subsequently, that plaintiffs should have asked for the present relief in the suit of 1911 and that therefore their present suit was barred under O. II, r. 2, Civ. Pro. Code.

Specific Relief Act—(Continued).

Held that the suit was not barred under O. II, r. 2, Civ. Pro. Code. Their present cause of action, the alleged cloud on their title created by the decree in the suit of 1910, is a distinct grievance which, moreover, arose after the suit of 1911 was filed and therefore could not have been pleaded in it.

Held also that the suit for declaration would lie under S. 42, Specific Relief Act (a).

The history of the legislation which resulted in the enactment of S. 42, Specific Relief Act, referred to (b).

Per Seshagiri Aiyar, J.—The object of S. 42, Specific Relief Act, is really to perpetuate and strengthen testimony regarding the title of the plaintiff so that adverse attacks upon it may not weaken it. The policy of the legislature is not only to secure to a wronged party possession of the property taken away from him, but also to see that he is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon his title or legal character, he is entitled to seek the aid of the Court to dispel that cloud.

Wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff, he will have a cause of action to sue under S. 44 (c). **Gandia Pedda Naganna v. Sivanappa**, 16 M.L.T. 310=27 M.L.J. 520.

OLDFIELD and SESHAGIRI IYER, JJ.

References:—(a) 31 I.A. 67; 2 I.A. 83; 2 I.A. 169; 29 M. 48; 12 C.L.J. 336; 39 C. 704; 13 B. 34; 28 M. 560; (1800) 5 Vesey J. 286; (1802) 7 Vesey Jr. 3, R. (b) 8 C. 761; 1 A. 688; 11 B. L.R. 171, R. (c) 12 M. 134; 17 C. 933, R.

(27) S. 42—*Scope—'Legal character,' meaning of—Suit to declare that plaintiff is entitled to continue payment of subscriptions to the Kuri conducted by defendant—Maintainability.*

Defendant was the proprietor of a Kuri and plaintiff was the assignee of a ticket from another person who had entered into contract with the defendant for payment of subscriptions to the Kuri. Defendant refused to receive the subscription sent by the plaintiff for one of the drawings. This suit was to compel the defendant to receive the amount due by the plaintiff for that drawing, after declaring that plaintiff has right to pay subscription for the said Kuri.

Held that, though S. 42, Specific Relief Act, is not intended to be exhaustive as regards the circumstances under which the declaratory suits can be maintained, it did not contemplate a suit like the present.

A man's 'legal character' is the same thing as a man's status.

A man's status or 'legal character' is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him a part from the attributes which may be said to belong to normal humanity in general.

Specific Relief Act—(Continued).

A declaration that a valid personal contract still subsists between the plaintiff and the defendant is not a right to declare a title to a legal character or a title to a right to property. **Ramakrishna Patter v. Narayana Patter**, 27 M.L.J. 634 = (1914) M.W.N. 912.

SADASIVA AIYAR and **AYLING, JJ.**

References:—9 M. 55; 22 M. 270, R.

(28) S. 42. See ACT II OF 1901 (AGRA TENANCY), No. 9, 23 Ind. Cas. 705.

(29) S. 42. See CIV. PRO. CODE (1908), No. 109, 7 L.B.R. 260.

(30) S. 42—General policy of. See DECLARATORY SUIT, No. 5, 17 O.C. 354.

(30-a) S. 42—Government grant free of payment of land revenue—Sale of land in execution of mortgage-decree—Government refusing sale—Suit against Government, the judgment-debtor and the subsequent transferee—Maintainability—Discretion in granting declarations—Hearing of case on merits. See GRANT, No. 8-a, 17 O.C. 369.

(31) S. 42—Estate in defendants' possession—Plaintiff not entitled to eject—Declaratory suit without consequential relief—Maintainability. See HINDU LAW (WIDOW), No. 13, 20 C.L.J. 23.

(32) S. 42, ill. (c)—Declaration to establish heirship whether may be made before succession opens out—Reversioner if entitled to declaration that certain deed is invalid. See DECLARATORY SUIT, No. 3, 22 Ind. Cas. 928.

(33) S. 42, proviso—Whole property in possession of neither plaintiff nor defendant, but in possession of tenants paying rent to the parties—Declaratory suit without consequential relief—Maintainability—S. 117, Punjab Act XVII of 1887 (Land Revenue). **Mussamat Lachmi Bai v. Mussamat Hondi Bai**, 100 P.R. 1913 = 7 P.L.R. 1914 = 14 P.W.R. 1914 = 21 Ind. Cas. 719. See Final Part, 1913, Col. 1109.

(34) S. 45—Application for mandamus what must contain—Ss. 33, 52, 413—Madras Municipal Act, 1904—Objection to inclusion of applicant's name in list of candidates for Municipal Election—Rejection by President of the Corporation—Objection upheld by the Presidency Magistrate on revision, but applicant's name not directed to be removed—Application for continuance of name on the list—Mandamus—Magistrate considering irrelevant matters—Remedy.

In this case the applicant was nominated as a candidate for Municipal Election and his name was published in the list of candidates. Objection was made to the inclusion of his name in the list and was rejected by the President of the Corporation under the rules framed under S. 413 of the Madras Municipal Act. On revision, the Presidency Magistrate allowed the objection and decided that the applicant was not qualified for election as a Commissioner,

Specific Relief Act—(Continued).

under S. 33 of the Municipal Act. He did not, however, direct the applicant's name to be struck off the list. The applicant therefore prayed, under S. 45, Specific Relief Act, for an order that his name do continue to remain in the list, notwithstanding the order of the Magistrate. The application did not specify the person or the Court who should be ordered to act or forbear. *Held*, an application for mandamus under S. 45, Specific Relief Act, should point out clearly the specific act or forbearance and the individual against whom it is directed, and as this application is defective, it must be dismissed. On the contention that the Magistrate considered certain matters irrelevant to the enquiry before him, *held*, that assuming it was so, it cannot be said that he has acted outside his office, and his order must be sought to be reviewed under the Crim. Pro. Code (S. 45 (d), Specific Relief Act). *In the matter of Vijayaraghavulu Pillai*, 26 M.L.J. 310 = 24 Ind. Cas. 134.

BAKEWELL, J.

(35) S. 45—Mandamus—Omission of qualified candidate's name from election roll—Mistake of returning officer—Jurisdiction of High Court to interfere. See ACT VI OF 1914 (BENGAL MEDICAL), No. 1, 19 C.W.N. 129.

(36) S. 45—Requisites for granting relief under—Right must not be open to doubt and must be personal right—University lectureships, nature of. See MANDAMUS, No. 1, 18 C.W.N. 430.

(37) S. 56—Permanent injunction—Implied negative covenant—Charter of ship for twelve consecutive voyages—Laying and cancelling dates not filled in in eleven charter parties—Contracts complete—Statutory mortgage of ship—Subsequent mortgage—Mortgagee obtaining decree for sale—Sale of ship—Mortgagee and purchaser having notice of and bound by charter parties.

The plaintiffs entered into a contract with 3rd defendant on the 22nd November 1911 to charter his steamer the *Gymeric* for twelve consecutive voyages from Calcutta to Bombay for bringing coal. The twelve charter parties for twelve consecutive voyages were signed by the parties on the 15th December, 1911. The first charter party was a completed document; but the cancelling dates for the eleven following voyages were left blank and were to be filled in after the completion of each voyage. In the meanwhile, on the 6th December 1911, the 3rd defendant executed a statutory mortgage of the ship with A.M. Jeevanji & Co. The vessel accomplished the first four voyages under the charter. In July 1912, before the fourth voyage had been performed, A.M. Jeevanji & Co. sued defendant 3 to recover Rs. 2,03,481 odd by sale of the ship and for interim possession of the same. On the 11th October 1912, a consent decree was passed in the suit for Rs. 2,11,001 giving liberty to the mortgagees to sell the steamer when and as they should think fit in satisfaction of the decree. On the 25th October,

'Specific Relief Act—(Continued).

notice of the ship's liability to perform the eight remaining charter-parties was given to the mortgagees and the intending purchaser (defendant 4). On the 28th October the mortgage of A. M. Jeevanji & Co., and the consent decree were transferred to defendant 4 for Rs. 2,15,000. On the same day, an agreement was made between defendant 4 and defendants 1 and 2, witnessing that, if defendant 4 succeeded in obtaining transfer of the mortgage and the consent-decree, he would sell and defendants 1 and 2 would buy the *Gymetic* at a price exceeding by Rs. 5,000, the consideration paid by defendant 4. On the same day, defendant 4 wrote to the master of the vessel to hand over possession of the vessel to defendants 1 and 2 they having purchased the same from him. The vessel was thereafter despatched from Bombay to Calcutta where she loaded a cargo of coal for another firm of coal-shippers; she was next fixed by defendants 1 and 2 for December-January loading to Genoa, on the 3rd January, 1913. The plaintiffs filed this suit claiming an injunction against the defendants restraining them until the completion of the eight remaining voyages from dealing with the vessel in any manner inconsistent with the eight remaining charter-parties. The trial Court held that each one of the twelve charter-parties was a complete and valid agreement, that neither defendant 3 nor the mortgagees nor the purchaser could be restrained by injunction; but that the plaintiffs were entitled to claim damages for breach of contract from defendant 3 alone. The plaintiffs having appealed:—

Held, (1) that the agreement for chartering was complete on the 22nd November 1911, when the defendant 3 accepted the proposed charter of the steamer for twelve voyages with coal from Calcutta to Bombay; and that it was not affected by non-entry of laying and cancelling dates in the eleven charter-parties.

(2) That defendants 1 and 2 were mortgagees of the vessel in view of the fact that the whole transaction of transfers of the mortgage and decree to defendant 4 and by him to defendants 1 and 2 was initiated by defendant 3 to get the vessel out of the hands of A.M. Jeevanji & Co.

(3) That putting the rights of defendants 1 and 2 as mortgagees at their highest, they could only interfere with the contracts for the employment of the ship if they prejudiced the security.

(4) That defendants 1 and 2 would be restrained from interfering with the performance of the charter-parties, inasmuch as the mortgage was subsequent to the charter-parties and as both A.M. Jeevanji & Co. and defendants 1 and 2 took with full notice of the plaintiffs' rights.

(5) That an injunction should also issue against defendant 3, who must be treated from the purpose of the case as still the owner.

(6) That it was competent to the Court to grant the injunction in the form prayed for,

Specific Relief Act—(Concluded).

since an agreement for the letting of a ship to a certain charter implied that she should not, during the currency of the charter-party, provided the charterer was ready to supply the cargo, be employed for any person or purpose. *Andrew Yule & Co. v. Ardeshir Bomanji Dybhash*, 16 Bom. L.R. 178=24 Ind. Cas. 758.

SCOTT, C.J., and BATCHELOR, J.

(38) S. 56, ill. (i)—Suit for injunction if lies against trespasser in possession. See *INJUNCTION*, No. 1, 18 C.W.N. 545.

Stamp.

(1) Pro-note for balance due on accounts—Pro-note—Invalidity for want of stamp—Suit on original cause of action—When lies. See *ACCOUNTS*, No. 3, 15 M.L.T. 243.

(2) Hundis renewed from time to time—Last renewal of hundis on insufficiently stamped paper—Secondary evidence. See *EVIDENCE ACT*, No. 48, 12 A.L.J. 361.

(3) Pro-note on unstamped paper—Whether admissible—Whether there is any independent cause of action. See *PROMISSORY NOTE*, No. 6, 7 Bur. L.T. 95.

Stamp Act.

(1) Ss. 2, 3—Meaning of 'executed'—Unsigned instruments—Stamp duty—Evidentiary value. *In re the Application of Chet Po*, 7 L.B.R. 77=22 Ind. Cas. 75=7 Bur. L.T. 48. See *Final Part*, 1913, Col. 1114.

(2) S. 2 (14), Art. 5—Entries in a register—Sum payable for letting out certain machines—Thumb mark by parties—Memorandum of agreement—Instrument. *Mutsaqqi Lal v. Harkesh*, 11 A.L.J. 966=21 Ind. Cas. 601=36 A. 11 (F.B.). See *Final Part*, 1913, Col. 1115.

(3) S. 2 (15) and Art. 45 (c), Sch. I—Final order, meaning of.

The words "final order" in S. 2, cl. 15 and Art. 45 (c) of Sch. I of the Stamp Act, refer to the final order of the lowest Court of original jurisdiction empowered to give an order for effecting a partition at the time it is passed. *Stamp Reference by the Board of Revenue*, 12 A.L.J. 113=36 A. 137=23 Ind. Cas. 98 (F.B.).

KNOX, TUDBALL and PIGGOTT, JJ.

(4) S. 2 (17), Art. 40—Construction of document—'Specific property'—'Machinery'—'Stock in trade,' etc.—Declaration of trust—Document whether a mortgage—Formal declaration of trust not to be treated as letter of hypothecation—Stamp duty. *Board of Revenue v. Orr*, 14 M.L.T. 499=25 M.L.J. 613=21 Ind. Cas. 876 (F.B.). See *Final Part*, 1913, Col. 1116.

(5) S. 3. See No. 1, *supra*.

(6) S. 13, r. 7 of the Rules framed under S. 76—Promissory note—Instrument wholly written on one impressed sheet—Another sheet added to make up deficiency in value—Not duly stamped—Inadmissibility in evidence.

Stamp Act—(Concluded).

Where two impressed sheets have been used to make up the amount of duty chargeable in respect of a promissory note, but the whole of the instrument has been written on only one of the sheets. *Held*, that the instrument was not duly stamped, because it offended against the provisions of S. 13 of the Stamp Act and of r. 7 of the Rules framed under S. 76, and that it was therefore not admissible in evidence. *Messrs. Mohan Lal Kunialal v. Kesarimul Chordiya*, 15 M.L.T. 203=23 Ind. Cas. 110.

WALLIS, J. *

(7) S. 36—Unstamped acknowledgment received in evidence if it can be rejected—Acknowledgment whether requires to be stamped. See ACKNOWLEDGMENT, No. 1, 19 C.L.J. 87.

(8) Art. 5. See No. 2, *supra*.

(9) Art. 22. See REGISTRATION ACT, 1877, No. 7, 16 Bom. L.R. 236.

(10) Art. 40. See No. 4, *supra*.

(11) Art. 45 (c). See No. 3, *supra*.

Statutes 24 and 25 Vic., Ch. 104.

See CHARTER ACT.

See HIGH COURTS ACT.

Statutes 44 and 45 Vic., c. 58.

See ARMY ACT.

Stay of Execution.

(1) Appellate Court's order refusing to stay execution pending the appeal—Whether appeal lies against the order—Applicability of S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 441, 27 M.L.J. 171.

(2) Refusal to stay execution whether an interlocutory order. See EXECUTION OF DECREE, No. 17, 20 C.L.J. 512.

Stay of Proceedings.

(1) Stay by injunction—Injunction order set aside—Time whether excluded—S. 15, Limitation Act. See ACT I OF 1908 (MADRAS ESTATES LAND), No. 61, 27 M.L.J. 734.

(2) Suit instituted in the original side of the High Court—Application to stay the suit when entertainable—Abuse of process of Court—Inherent powers of Court. See CIV. PRO. CODE (1908), No. 55, 27 M.L.J. 645.

(3) Pending suit—Private reference to arbitration—Stay of suit—Legality. See CIV. PRO. CODE (1908), No. 477, 16 Bom. L.R. 653.

Step-in-aid of Execution.

(1) Accompanying serving peon to identify judgment-debtor—Whether a. See EXECUTION OF DECREE, No. 8, 20 C.L.J. 15.

(2) Application by decree-holder for continuance of sale to secure more bidders—Whether a step-in-aid of execution. Art. 182, Limitation Act (1908)—Construction. See EXECUTION OF DECREE, No. 9, 16 M.L.T. 103.

(3) Application for substituted service whether a. See LIMITATION ACT (1909), No. 157, 12 A.L.J. 785.

Step-in-aid of Execution—(Concluded).

(4) Judgment-debtor declared insolvent—Appeal by decree-holder against adjudication order—Appeal amounts to. See LIMITATION ACT (1908), No. 159, 16 Bom. L.R. 612.

Stoppage in Transit.

Telegram by vendor 'not to deliver' or to 'deliver to a third man'—Effect—No particular form necessary. See CONTRACT ACT, No. 84, 8 S.L.R. 65.

Subscriptions.

(1) Negligence—Liability for—Subscription for re-constructing a mosque—Collection by the treasurer of the Committee—Gratuitous act—Treasurer not agent of the Committee—Promise of subscription by the treasurer—Gratuitous promise.

A subscription is a gratuitous act of the intending donor and cannot be recovered from him or his heirs.

A movement having been set on foot for re-constructing a mosque, A and J subscribed Rs. 500 each. A was appointed treasurer of the Committee for collecting subscriptions. J gave a cheque for his promised subscription of Rs. 500, but owing, first, to some defect in endorsement and, later on, to its having become out of date, it was never cashed. The mosque was also never re-constructed. A having died, his heirs were sued by the members of the Committee for the amount of unpaid subscription. *Held*, that neither A nor his heirs were liable for payment of the money.

Held, further that acceptance of the office of a treasurer for subscriptions collected is a purely gratuitous act and the treasurer is not the agent of the Committee, and is not liable for gross negligence in not cashing the cheque given by one of the donors. Neither the treasurer nor his heirs were liable to the Committee for the unrealized amount of the cheque. *Abdul Aziz v. Masum Ali*, 12 A.L.J. 351=36 A. 268=23 Ind. Cas. 600.

RICHARDS, C.J., and BANERJEE, J.

Sub-Settlement Act (Oudh).

See OUDH ACT XXVI OF 1866.

Substitution.

(1) Substitution—Suit instituted against dead man—Substitution of heirs of defendant—Jurisdiction of Court.

The provisions as to the substitution of the heirs of a deceased defendant as parties to the suit in his place apply only to cases where the original defendant was alive at the date of the institution of the suit. *Msharajadhiraja. Sir Bejoy Chand Mahatab Bahadur v. Anulya Charan Mitra*, 24 Ind. Cas. 112.

FLETCHER and RICHARDSON, JJ.

References:—12 W.R. 45=3 B.L.R. (A.C.J.) 233; 31 M. 86=17 M.L.J. 551=3 M.L.T. 12, F.

Succession.

Rule of succession cannot be changed by colourable or fictitious endowment. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 1, 24 Ind. Cas. 72.

Succession Act.

See **ACT X OF 1865**.

Succession Certificate.**(1) Succession certificate—Nature of enquiry.**

Ordinarily, in awarding succession certificate, some enquiry must be held, even in cases in which many facts are admitted by both sides.

Where the widow denied that the debts belonged to her husband and his brothers jointly, and set up a will in her favour, held an enquiry ought to have been held by the District Court as to whether the will set up was genuine and whether the amount belonged to the deceased as his separate property. **Saraswathi Ammal v. R. Subbier**, (1914) M.W.N. 24 = (1914) M.W.N. 26 = 21 Ind. Cas. 867.

SADASIVA IYER and SPENCER, JJ.

(2) Succession certificate—Application for—Question whether debts belong to the deceased—Not to be decided on such application.

The question whether certain debts belonged to the deceased is not a matter which can be decided on an application for the grant of a succession certificate. **Srinivasachariar v. Gopalan by his father and guardian Ramaswami Aiyangar**, 26 M.L.J. 365 = (1914) M.W.N. 823 = 28 Ind. Cas. 424.

SANKARAN NAIR and AYLING, JJ.

References:—28 B. 119, F.; 25 C. 320, Diss.

(3) Succession certificate—Son suing on promise in father's name under Hindu Law—Necessary.

The son of a joint Hindu family cannot maintain a suit on a promissory note in the name of his adoptive father without a succession certificate. **P. Perayya v. Ahmed Abdul Rahiman Salt**, (1914) M.W.N. 671.

WALLIS, J.

(4) Suit adjourned to produce certificate—Default—Suit not to be dismissed but to be decided on merits. See **CIV. PRO. CODE** (1908), No. 298, 24 Ind. Cas. 353.

(5) Suit dismissed for want of—Maintainability of second suit. See **COMPROMISE**, No. 4, 12 A.L.J. 672.

Succession Certificate Act.

See **ACT VII OF 1889**.

Suit.

(1) What the term 'suit' includes. See **ACT VIII OF 1885 (BENGAL TENANCY)**, No. 74, 19 C.L.J. 310.

(2) Maintainability of—Devolution of interest *pendente lite*—Suit if can be continued by

Suit—(Concluded).

original plaintiff—Court when may take notice of events which have happened since the institution of the suit. See **CIV. PRO. CODE** (1908), No. 379, 20 C.L.J. 107.

(3) See **RIGHT OF SUIT**.

Suits Valuation Act.

See **ACT VII OF 1837**.

Summary Settlement Act.

See **BOM. ACT II OF 1863**.

Summons.

(1) Suit against firm—Names of partners not disclosed in plaint—Application for service of summons on certain person as partner—Representation made at the time of service—Effect—Refusal to accept—Service on outer door of firm office—No written notice as to capacity in which summons was served—Duty of person served. See **CIV. PRO. CODE** (1908), No. 81, 19 C.L.J. 581.

(2) Summons for final disposal—Mortgage suit—Practice—Procedure. See **CIV. PRO. CODE** (1908), No. 253, 16 Bom. L.R. 39.

(3) Defendant moving from place to place—Duty of plaintiff to take out fresh summons to which place. See **CIV. PRO. CODE** (1908), No. 254, (1914) M.W.N. 314.

(4) Defendant temporarily absent—Absence for indefinite period—Service by affixure—Validity—High Court when will interfere with order declaring service sufficient. See **CIV. PRO. CODE** (1908), No. 257, 15 M.L.T. 217.

(5) Service of summons through registered post—Refusal by defendant—Effect—Defendant disputing delivery or tender, of delivery—Onus. See **HIGH COURT RULES (BOMBAY)**, No. 1, 16 Bom. L.R. 204.

(6) Enquiry by Registrar of the Presidency Small Cause Court as to proper service of summons—If judicial proceedings—Sanction to prosecute for false personation, in service of summons. See **SANCTION TO PROSECUTE**, No. 7, 18 C.W.N. 1323.

Surety.

(1) *Sureties for appearance of judgment-debtor on the day the time for appeal expires—Surety's bond not in accordance with Court's order—Construction—Court's intention in asking for sureties—Responsibility of sureties—Its extent.*

D was summarily arrested under O. XX, r. 2 (1). Upon his praying for release on furnishing the security of three sureties for the payment of the decretal amount and costs, the Judge ordered his release on his sureties furnishing security for his appearance on the 1st August 1909, the date when the period for appeal against the decree expired, failing which the sureties would be held liable for the decretal amount and the judgment-debtor would be re-arrested and committed to jail. An appeal was duly preferred on the 27th July 1909 and dismissed on the 14th October 1909.

Surety—(Continued).

The bond which the sureties actually signed was for the due performance of such decrees as might ultimately be binding on the judgment-debtor and was to be operative upon the judgment-debtor's failure to satisfy it. It said nothing about his appealing or about producing him before the Court on the 1st August 1909.

Held that it was clearly not in accordance with the order of the Court.

Held that what the Court ordered and the appellant agreed to was that the judgment-debtor's appearance on the 1st August 1909 should discharge the sureties and that it was then the Court's duty to re-arrest the judgment-debtor and commit him to prison.

The next question was whether the surety had fulfilled his obligation.

The proceedings showed that the judgment-debtor appeared before the Court between the 10th August 1909 and the 5th April 1911 (both inclusive).

Held that not only did the judgment-debtor duly appear but that he appeared in Court on numerous occasions both before and after his appeal was dismissed, extending over a period of 2½ years and that therefore the purpose for which the appellant had been ordered to furnish security had been fulfilled and that the appellant had been discharged from liability. **Chandi Charan Sen v. Ram Coomar Chakravarti**, 7 Bur. L.T. 5 = 23 Ind. Cas. 349.

PARLETT, J.

(2) *Surety—Cause of action—Embezzlement by an employee—Surety binding himself in case embezzlement proved—Causes of action against surety and principal debtor different—Contract Act, S. 139. Clarence Kirkpatrick v. Chet Ram*, 41 A.L.J. 689 = 21 Ind. Cas. 437. See Final Part, 1913, Col. 1121.

(3) *Surety bond for judgment-debtor's appearance in Court—Death of the judgment-debtor before time of appearance—Liability of surety. Nabin Chandra Hazari v. Mritunjoy Barrik*, 17 C.W.N. 1241 = 19 Ind. Cas. 981 = 41 C. 50. See Final Part, 1913, Col. 1121.

(4) Entry of person's name as surety in creditor's and broker's book—Denial by—Effect. See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 2, 70 P.W.R. 1914.

(5) Surety for an administrator of estate if may be discharged or substituted. See ADMINISTRATION, No. 1, 18 C.W.N. 320.

(6) Hindu law—Suretyship debt—Decree against father—Partition between father and son—Execution against property in the hands of son—Liability of son to pay it—Restitution of money paid to a surety. See CIV. PRO. CODE (1882), No. 23, 27 M.L.J. 112.

(7) Surety for costs of Privy Council appeal—Decree for costs if may be executed against properties charged by surety. See CIV. PRO. CODE (1882), No. 64, 19 C.W.N. 178.

Surety—(Concluded).

(8) Arrest of judgment-debtor—Surety bond—Application to be declared insolvent and appearance when called upon—Two conditions—Breach of one of them—Effect—Surety not discharged. See CIV. PRO. CODE (1908), No. 99, 15 M.L.T. 224.

(9) Execution of Small Cause Court decree—Order directing arrest of surety if applicable. See CIV. PRO. CODE (1908), No. 68, 20 C.L.J. 129.

(10) Order refusing to enforce security bond against the surety—Appeal—Surety when deemed to be discharged. See CIV. PRO. CODE (1908), No. 208, (1914) M.W.N. 714.

(11) Liability of. See CIV. PRO. CODE (1908), No. 288, 246 P.L.R. 1914.

(12) *Ex parte* decree against debtor and his surety—Surety alone applying for setting aside of decree—Decree set aside against both. See CIV. PRO. CODE (1908), No. 289, 24 Ind. Cas. 115.

(13) Effect of "mere recommendation"—Person recommending whether liable as a surety. See CONTRACT ACT, No. 2, 16 M.L.T. 194.

(14) Suit against principal and surety—Non-service of summons on principal—Striking out his name—Surety's liability whether affected. See CONTRACT ACT, No. 89, 16 Bom. L.R. 696.

(15) Partnership agreement—Extent of liability of surety. See CONTRACT ACT, No. 104, 101 P.R. 1914.

(16) Extent of surety's liability. See EXECUTION OF DECREE, No. 3, 21 Ind. Cas. 612.

(17) Surety of a Receiver—Rights and liabilities of surety. See RECEIVER, No. 6, 20 C.L.J. 123.

(18) See PRINCIPAL AND SURETY.

Survey.

Dispute of owners of neighbouring mahals as to boundary—Determination by survey authorities—Value of decisions as evidence though not as estoppel. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.

Surveys and Boundaries Act (Madras).

See MAD. ACT XXVIII OF 1860.

Takia.

Takia—Takia Kashmirian Khisht Faroshan—To declare that Takia is the joint property of the parties—To render account of its income—Suit by persons not in actual possession—Presumption of their possession—Extinction of their right—Cause of action—Adverse possession—Evidence Act, Ss. 145 and 155—Mention of few members in the Settlement Record.

Held that the *Takia-i-Khisht Faroshan* outside the Shabalmi Gate, Lahore, is the joint property of the brotherhood of the Kashmiri brick-sellers of Lahore, and that in 1864 the land on which this *Takia* stood was taken up by the Municipal Committee for a public garden and by arrangement with the proprietary

Takia—(Concluded).

body of 'Killa Gujar Singh, the site of this *Takia* was given in exchange for the old *Takia* by a deed of gift of that year.

Although the names of only 11 persons belonging to the brotherhood were specifically mentioned in the said deed, the gift was intended to be made in favour of all the members of the brotherhood. The word '*waghaira*' used after 11 persons clearly indicates this intention. The fact of mentioning one or more persons' name only in the settlement papers as owners is not of much consequence. But the word *waghaira* clearly shows there are other owners besides.

Even the members of the brotherhood not in its actual possession are entitled to obtain a declaration that it is their joint property and can call upon the other members who are in its actual possession for rendering to them the accounts of the income derived from the said *Takia* and the land attached thereto. In such a case each individual member is not bound to adduce strict proof of his title to such property by the exercise of definite and overt acts of ownership in respect of it. All the members should be presumed to be in joint possession as co-shares, unless and until it is proved by clear and unequivocal evidence that their right of user has been expressly and continuously denied for 12 years by the members in actual possession of such property.

The cause of action in such a case arises when their rights are invaded by some overt act. Under S. 155, Evidence Act, a witness cannot be contradicted by his previous statement if his attention has not been drawn to it as required by S. 145 of the said Act. *Mt. Amir Begam v. Mt. Begam*, 9 P.W.R. 1914=127 P.L.R. 1914=22 Ind. Cas. 861.

JOHNSTONE and SHAH DIN, JJ.

Tanaka.

Meaning of 'Tanaka.' See TRANSFER OF PROPERTY ACT, No. 46, (1914) M.W.N. 270.

Tenancy Act.

See BEN. ACT VIII OF 1885.

See C.P. ACT IX OF 1883.

See C.P. ACT XI OF 1898.

See N.W.P. ACT II OF 1901.

See PUN. ACT XVI OF 1887.

Tenancy Amendment Act.

See BEN. ACT I OF 1907.

Tenants in-common.

(1) *Not in actual possession—Purchaser from them—Joint possession with other tenants found to be in possession—Decree for—Whether can be passed.* *Chakrapani Misro v. Sadasiva Sodangi*, 25 M.L.J. 352=14 M.L.T. 346=21 Ind. Cas. 314. See Final Part, 1913, Col. 1122.

(2) *Heirs of deceased person—Tenants-in-common—Exclusion from enjoyment necessary to claim title by adverse possession.* See ADVERSE POSSESSION, No. 15, 24 Ind. Cas. 436.

Tender.

(1) *Whether tender vitiated because receipt is asked.* See ACT VIII OF 1885. (BENGAL TENANCY), No. 5, 19 C.W.N. 112.

(2) *Tender when proper.* See CIV. PRO. CODE (1908). No. 385, 15 M.L.T. 206.

(3) *Conditional tender of mortgage money—Validity.* See MORTGAGE (GENERAL), No. 36, 16 M.L.T. 365.

(4) *Offer by postal letter to tender expenses of registration and execution of document—Invalidity.* See SALE, No. 11, 27 M.L.J. 482.

(5) *Tender by a letter whether a good tender.* See TRANSFER OF PROPERTY ACT, No. 75, 12 A.L.J. 111.

Tenure-holder.

Meaning of the term "Tenure-holder"—Tenure-holder reserving a portion of land to be cultivated by himself—Land partly cultivated by under-tenant and partly by tenant—Construction of lease. See ACT VIII OF 1885 (BENGAL TENANCY), No. 1, 20 C.L.J. 140.

Thak Survey.

Dispute of owners of neighbouring Mahals as to boundary—Determination by Survey authorities—Value of decisions as evidence though not as estoppel. See ACT XI OF 1859 (REVENUE SALE LAW), No. 1, 18 C.W.N. 1281.

Ticcadar.

Ticcadar's possession of land outside ticca if adverse to landlord. See LANDLORD AND TENANT, No. 36, 19 C.W.N. 149.

Time.

(1) *Time fixed by decree for doing a certain act—Powers of Court to extend the time.* See CIV. PRO. CODE (1908), No. 213, 16 M.L.T. 430.

(2) *Presumption as to time being of the essence of contracts.* See COMPROMISE, No. 1, (1914) M.W.N. 92.

Title.

Plaintiff's title by purchase—Defendant in possession under prior contract of sale for which purchase-money had been paid—Plaintiff's knowledge of position—Priority of title. *Puchha Lal v. Kunj Behary Lal*, 20 Ind. Cas. 803=18 C.W.N. 445=19 C.L.J. 213. See Final Part, 1913, Col. 1123.

Title-deeds.

Land, title to—Title-deeds, what are—Original grant not forthcoming—Subsequent conveyances through which title derived, if title-deeds—Court refusing to consider them as title-deeds and basing decision on conduct of parties—Error vitiating judgment—Real question not considered—Drainage channel, dispute between Municipality and private owner as to title to—Boundaries in title-deeds if may be ignored and title declared up to centre line of channel—Court if may vary boundaries in title-deeds.

Title-deeds—(Concluded).

Plaintiffs, who sued for recovery of possession of a strip of land lying between their premises and a public road, including a *khal* or *nulla* which lay between the said premises and the road, proved a clear title for over 50 years by a succession of duly registered conveyances, mortgages, reconveyances and other title-deeds, and also proved that during that period they had leased portions of the land by leases which themselves were registered. The Judge at the trial accordingly found in the plaintiffs' favour, dispossession having taken place within 12 years of the suit. On appeal, the High Court reversed that decision, observing that the original grant of the land made by Government about the year 1830 to one Smith to whom plaintiffs traced their title was not forthcoming, and that though, in the later conveyances referred to above, the *khal* appeared to have been treated as a part of the subject of the grant, it was unlikely that Government would include it in their grant without securing the continued maintenance in the public interest of a water channel which existed from time out of memory and played a conspicuous part in the drainage system of the local Municipality; and that in the absence of the original grant none of the other documents referred to in the case could be regarded as "being in any sense title-deeds," they being "obviously insufficient to create title" and being "at most mere assertions of title made from time to time by the predecessors-in-interest of the plaintiffs." In this view it treated the case as though it was one in which the Court had nothing relevant before it but the conduct of the parties to decide whether the plaintiffs or the defendant Municipality were entitled to the land;

Held, affirming the trial Judge, that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs, and the High Court was wrong in saying that the plaintiffs had no title-deeds in consequence of which error it never considered the real question in the case.

That, having regard to the boundary consistently found in the deeds, which was stated to be the public road, it was impossible to hold that the title of the plaintiffs went up only to the centre line of the *khal*, and thus make the deeds convey lands marked out by different metes and bounds from that which there appeared. *John King & Co. v. The Chairman of the Municipal Commissioners of Howrah*, 18 C.W.N. 898 = 27 M.L.J. 20 = 20 C.L.J. 407 (P.C.).

LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

Tort.

(1) Joint tort-feasors—Contribution—Decree against plaintiffs and defendants for mesne profits—Tort not wilful—Plea that plaintiffs sole wrong-doers to be specially pleaded and made a special issue. See CONTRIBUTION, No. 2, 18 C.W.N. 622.

Tort—(Concluded).

(2) Tort committed by father whether committed on behalf of sons also. See HINDU LAW (JOINT FAMILY), No. 7, 16 M.L.T. 163.

Trade-marks.

(1) *Trade-mark, law of, in India—Common Law of England as to trade-mark—Trade-mark if assignable or may descend in gross—Trade mark when and how assignable—Trade-mark when personal and inalienable—Trade-mark in selection of natural products—Trade-mark and good will of business—Good will, what is—License to use Trade-mark—Licensee if may question title of the licensor of the trade-mark—Evidence Act, S. 117—Estoppel—Merger—Contract, wrongful rescission—Public policy and contract—Partner's liability in respect of partnership debts and obligation prior to becoming partner.*

In India the law of trade-mark is not governed by statute and there is no statutory system of registration. The rights and liabilities in connection with trade-marks are determined by reference to the Common Law of England (a).

A trade-mark cannot be assigned or descend in gross.

The trade-mark in this case was not so personal as to be inalienable.

A selector of a natural product like jute may have a trade-mark in his selection and the mark in such cases is indicative of the quality certified by the selector (b).

A trade-mark can only be assigned together with the good-will of the business to which it relates.

Where the trade-marks along with the business of the jute baler were sold by the ex-outors and heirs of the proprietor, the legal requirements for the valid transfer of trade-marks was satisfied.

The good-will of a business is the benefit and advantage of the good name, reputation and connection of a business (c).

A transferee of the good-will of a business would be entitled to use the name in which the business was carried on and represent himself as carrying on that business.

When the plaintiffs, the transferees of the trade-marks and business of a jute-baler, gave, by a license to the defendants, the right to use and to authorise others to use exclusively the trade-marks and to hold the good-will of the business of original jute baler and the marks without any interference by the proprietors for a particular period on the payment of certain royalty, and the defendants sought afterwards to repudiate their obligation under the agreement, alleging that the plaintiffs' title to trade-marks was illegal and invalid:

Held that, under S. 117, Evidence Act, a licensee cannot be permitted to deny that his licensor had, at the time when the license commenced, authority to grant such license,

Trade-marks—(Concluded).

S. 117 would, at any rate, cast on the defendants the burden of proving the plea that was taken by the defendants, viz., that the goodwill of the business had lost its separate existence by merger and that the plaintiffs had not the authority they professed to exercise. **G. S. Hannah v. Messrs. Jaganath & Co.**, 19 C.W. N. 1.

JENKINS, C.J. and STEPHEN, J.

References:—(a) 38 C. 110, R. (b) L.R. (1908) 1 K.B. 712, R. (c) L.R. (1901) A.C. 217 (223), R.

(2) *Licensee of trade-mark—Estoppel of licensee—Assignment of trade mark—Validity—Public policy—Abandonment of trade-mark—Liability of incoming partner to creditors of the firm—Costs—Taxation.* **Jagarnath & Co. v. Cresswell**, 40 C. 814=22 Ind. Cas. 372. See Final Part, 1913, Col. 1125.

Trade Names.

Insurance companies—Similarity in names—Use of the word 'oriental'—Injury to plaintiff company—Injunction—Ss. 5, 6, Act V of 1912 (Provident Insurance Societies)—Act VI of 1912 (Indian Life Assurance Companies). **Oriental Government Security Life Assurance Co., Ltd. v. Oriental Assurance Co., Ltd.**, 40 C. 570=21 Ind. Cas. 258. See Final Part, 1913, Col. 1125.

Transfer of Case.

(1) Application to first Court to set aside *ex parte* decree—Application to District Court for transfers of case—Rule issued—Case decided by first Court pending hearing of Rule—Effect—Material irregularity—Revision. See CIV. PRO. CODE (1908), No. 175, 19 C.L.J. 258.

(2) Venue of suit—Plaintiff's option—Causes for transfer—Preponderance of convenience. See RIGHT OF SUIT, No. 2, 7 Bur. L.T. 1.

(3) Transfer of case—Evidence available outside jurisdiction—Whether sufficient ground. See CIV. PRO. CODE (1908), No. 54, 8 S.L.R. 43.

Transfer of Property Act.

(1) *Usufructuary mortgage—Decree for sale obtained before the passing of the—Sale in execution—Legality.* See MORTGAGE (GENERAL), No. 24, 12 A.L.J. 897.

(2) S. 2. See No. 22, *infra*.

(3) Ss. 2 (b), 55, 60, 72, 92—Unsuccessful redemption suit by mortgagor—Mortgagee whether entitled to add to his security the costs of defending such suit—Meaning of 'mortgage money'—Conditional tender—Validity. See MORTGAGE (GENERAL), No. 36, 16 M.L.T. 365.

(4) Ss. 2 (c), 106, 116—Meaning of 'Legal representative'—Tenant brought on land by lessee for term of years—Expiry of lease—Tenant holding over—Acceptance of rent by second lessee—Position of tenant—Creation of new tenancy. See LANDLORD AND TENANT, No. 85, 24 Ind. Cas. 188.

Transfer of Property Act—(Continued).

(5) Ss. 2 (c), 108 (j)—*Homestead land—Transferability—Tenancy created before Transfer of Property Act.*

S. 108 (j) of the Transfer of Property Act has no application to a tenancy created before the passing of that Act.

Therefore, when, at the time the parties entered into contractual relations for the lease of certain land for dwelling purposes, there was no right of transferability, that right could not be acquired by the operation of S. 108 (j) of the Transfer of Property Act. **Umakanta Saha v. Kashiram Bania**, 23 Ind. Cas. 246.

HOLMWOOD and SHARFUDDIN, JJ.

(6) Ss. 2 (c), 111 (d)—*Merger—Patni and Mokurari created before Transfer of Property Act—Both interests kept alive and separate—Acquisition of both interests piece-meal at different times—Patni—Kabuliat—Construction—Land acquired for "culverts, embankments or roads"—Words, whether illustrative or exhaustive.*

In 1855, a *zemindar* granted a *mokurari* lease in respect of certain lands to N. The lease was specially registered under the provisions of Act XI of 1859. Subsequently the *zemindar* granted a *patni* lease of the entire *zemindari* to D who purchased the *mokurari* interest from N. D dealt with the two interests separately. Ultimately, the entire *patni* and the entire *mokurari*, came piece-meal at different times into the hands of B, and eventually passed to claimant No. 2. The *mokurari* and the *patni* interests were kept separate all along.

Held, that there was no merger of the *mokurari* in the *patni* apart from the provisions of the Transfer of Property Act, because the *mokurari* was kept alive as a separate sub-tenure from the *patni*, and the provisions of cl. (d) of S. 111 of the Transfer of Property Act did not apply by reason of cl. (c) of S. 2 of the Act, as the *mokurari* was created before the passing of the Act (a).

A person may acquire the superior and the subordinate interests piece-meal at different times, but if ultimately the entire interests of the lessor and the lessee are vested in the same person at any point of time, there is a merger of the two interests at that particular point of time, in any case in which the provisions of S. 111, cl. (d) of the Transfer of Property Act are applicable.

There was a stipulation in a *patni kabuliyat* to the following effect:—"If you obtain from Government any remission in revenue on account of land acquired by N, for construction of culverts, embankments or roads, I also shall get from you reduction of *jama* on account of all the said remissions in the *jama* of this *patni*."

Held, that the words "culverts, embankments or roads" are merely illustrative and not exhaustive, and that even if land is acquired, though not for culverts, embankments or roads, and the *zemindar* gets remission in the revenue

Transfer of Property Act—(Continued).

payable by him, the *patnidar* will also get abatement in the *patni* rent. **Hirendra Nath Dutt v. Hari Mohan Ghose**, 22 Ind. Cas. 966 = 18 C.W.N. 860.

FLETCHER and CHATTERJEE, JJ.

References :—(a) 33 C. 1212 (1217) and 3 Ind. Cas. 994 = 36 C. 802, D.; 28 C. 744 and 19 C. 760, R.

(7) S. 2 (e)—Equitable mortgage made before extension of Transfer of Property Act to Burma—Assignment of such mortgage. See MORTGAGE (EQUITABLE), No. 2, 7 Bur. L.T. 140.

(8) Ss. 2, 20, 21, 123, 129. See MAHOMEDAN LAW (GIFT), No. 7, 7 Bur. L.T. 75.

(9) Ss. 3, 6 (e), 130—Breach of contract—Claim for damages—Whether an actionable claim—Assignment—Right of assignee to sue—Applicability of this Act to Punjab.

In August 1907, the defendant company of Lahore contracted for delivery of certain consignments of flour to a Delhi merchant named S. There were some deliveries and the contracts then fell through. S took no action for recovery of damages on breach of contract and became insolvent in 1909. In August 1910, the Receiver of the insolvent's estate at Delhi sold S's rights under the contract to one H and he resold immediately to the plaintiff who filed this suit for damages.

Held, the suit did not lie. The claim for damages for breach of contract, after the breach, is not actionable, but it is a mere right to sue which cannot be transferred (a). (Vide Ss. 3 and 6 (e), Transfer of Property Act).

Though the Transfer of Property Act is not in force in the Punjab, the Courts in the Punjab should follow its provisions in a case like the present not otherwise specifically covered by law.

S. 130 of that Act merely prescribes the procedure by which transfer of an actionable claim shall be effected. **Jangli Mal v. Pioneer Flour Mills**, 106 P.R. 1914.

KENSINGTON, C.J., and CHEVIS, J.

Reference :—(a) 36 C. 345 (F.B.), F.

(10) S. 6, cl. (e)—Claim for past mesne profits—Transferability. **Kocherla Seetamma v. Pillala Venkataramanayya**, 14 M.L.T. 319 = 25 M.L.J. 410 = (1913) M.W.N. 918 = 21 Ind. Cas. 387. See Final Part, 1913, Col. 1126.

(10-a) S. 6 (e). See No. 9, *supra*.

(11) Ss. 10, 11—Applicability to Hindus and Mahomedans—Restriction upon alienation whether valid—Grant for maintenance—Whether alienation by grantee may be prevented under Hindu Law. See GRANT, No. 1, 15 M.L.T. 361.

(11-a) S. 11. See No. 11, *supra*.

(11-b) S. 20. See No. 8, *supra*.

(11-c) S. 21. See No. 8, *supra*.

Transfer of Property Act—(Continued).

(12) S. 40—Annuity agreed to be paid to a person and his heirs—Covenant whether runs with the land. See HINDU LAW (GENERAL), No. 1, 27 M.L.J. 694.

(13) S. 41—Ostensible owner—Finding as to question of fact—Second appeal.

One M.B. entered into possession of the property adversely to the real owner. His daughter Z and her husband L.M. continued in possession of it with M.B., until his death, and after him both Z and L.M. remained in possession. After M.B. the property was managed by L.M.

Held, that L.M. was not the ostensible owner of the property within the meaning of S. 41 of the Transfer of Property Act and had no right to mortgage it.

Held also that whether a certain person is or is not an ostensible owner of a property is a question of fact and not of law. **Jamna Das v. Uma Shanker**, 12 A.L.J. 411 = 36 A. 308 = 25 Ind. Cas. 158.

RICHARDS, C.J., and BANERJI, J. :

(14) S. 41, Reasonable care—Good faith—Collector's certificate—Adverse possession. **P. P. Thungavelu Chetty v. Mangathayammal**, (1913) M.W.N. 674 = 21 Ind. Cas. 21. See Final Part, 1913, Col. 1127.

(15) S. 41—Applicability where neighbour knowing about the infirmity of transferor's title omits to make enquiry. See CIV. PROC. CODE (1908), No. 46, 22 Ind. Cas. 673.

(16) S. 41—Ostensible owner—True owner—Rights of. See LIMITATION ACT (1908), No. 79, 15 M.L.T. 221.

(17) S. 41—Applicability—Section not to be read so as to conflict with S. 47, Registration Act. See REGISTRATION ACT (1877), No. 10, 12 A.L.J. 993.

(18) S. 42—Consent by *lambardar* to transfer of absolute occupancy holding—Effect. See LAMBARDAR AND CO SHARERS, No. 3, 10 N. L.R. 89.

(19) S. 43—Ejectment, suit for—Transfer by unauthorized person who subsequently acquired interest in property transferred—Subsequent transfer—Subsequent transferee not a bona fide purchaser for value without notice—Prior mortgagee, suit by—Decree against transferor of subsequent transferee—Suit dismissed against subsequent transferee—Decree, effect of—Evidence Act, S. 115—Issues sent down—Whole appeal, if can be heard. **Hanuman Das v. Gursahay Singh**, 18 C.L.J. 181 = 21 Ind. Cas. 700. See Final Part, 1913, Col. 1128.

(20) S. 43—Lease—Dispossession—After-acquired title of lessor—Right of lessee. See CIV. PROC. CODE (1908), No. 57, 19 C.L.J. 408.

(21) S. 43—Applicability to Berar. See MORTGAGE (GENERAL), No. 41, 10 N.L.R. 170.

(22) Ss. 44, 2. See MORTGAGE (USUFRUCTUARY), No. 2, 16 M.L.T. 229.

***Transfer of Property Act—(Continued).**

(23) S. 50. See LANDLORD AND TENANT, No. 20, 7 Bur. L.T. 139.

(24) S. 51—Applicability. See GRANT, No. 3, 13 A.L.J. 717.

(25) Ss. 61, 108 (h)—Tenant's right to improvements. *Raja of Venkatagiri v. Mukku Narasayya*, 8 M.L.T. 258=7 Ind. Cas. 202=37 M. 1. See Final Part, 1910, Col. 1186.

(26) S. 52—*Lis pendens*—Maintenance-decree—Sale of property between the dates of decree and execution proceedings—Active prosecution of suit. *Bhoje Mahadev Parab v. Gangabai Vitthal Naik*, 15 Bom. L.R. 809=37 B. 621=21 Ind. Cas. 54. See Final Part, 1913, Col. 1129.

(27) S. 52—Suit filed on the same day on which the sale-deed was executed—'Dealing with property' meaning of the expression—Admission of execution of sale deed before the Registering officer whether such a 'dealing'—Time of filing plaint—Filing plaint whether judicial proceeding—Fractions of a day when will be distinguished. *Rafuddin v. Brijmohan*, 9 N.L.R. 155=21 Ind. Cas. 602. See Final Part, 1913, Col. 1131.

(28) S. 52—Order allowing claim—Purchaser attached properties after order on claim petition but within one year—Whether an alienee pendente lite—Rights of alienee. See CIV. PRO. CODE (1908), No. 337, 26 M.L.J. 449.

(29) S. 52—Applicability to moveables. See CIV. PRO. CODE (1908), No. 25, 16 M.L.T. 158.

(30) Ss. 52, 56, 81—Mortgage decree—Foreclosure—Foreclosed property included in earlier mortgage of other properties—Application for exclusion of foreclosed property from sale under prior mortgage decree—Appeal. See CIV. PRO. CODE (1908), No. 6, 41 C. 418.

(31) S. 53—Preference to one creditor over another, effect of, on the transaction—Data for determining the intention of the parties and the nature of the interest sought to be created.

The mere fact that preference has been given to one creditor over the other does not in itself render the transaction in favour of the preferred creditor voidable under S. 53 of the Transfer of Property Act, provided that the transferee should be innocent of the fraud intended by his debtor (a).

The motive with which a *benami* purchase is entered into, the position of the parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds thereof, the source and adequacy of the purchase-money and the previous and subsequent conduct of the parties to the transaction afford valuable data for determining the intention of the parties and the nature of the interest, if any, sought to be created (b). *Ahmadi Begam v. Raja Udit Narayan Singh and Mahomed Ibrahim*, 17 O.C. 173=25 Ind. Cas. 164.

PANDIT KANHAIYA LAL, A.J.C.

References:—(a) 8 A. 178; 34 C. 909; 30 M. 6; 17 M.L.J. 11, R. (b) 13 M.L.A. 232 (247), R.

Transfer of Property Act—(Continued).

(32) S. 53—*Fraudulent transfer*—Suit to avoid—Frame of suit—Intent, must be to defraud creditors generally—One creditor securing payment of his debt—Purchaser for present consideration—Difference in their liability—Proof, required of each—Relationship—Presumption.

A suit founded on S. 53 of the Transfer of Property Act must be framed as for or on behalf of all the creditors generally. An objection on this ground, to prevail, must be taken in the first Court, but if not so taken, cannot avail in the appeal Court.

The intent, which gives a creditor the right to have a transfer by his debtor of immoveable property avoided, must be an intent to defeat or delay his creditors generally. Therefore, a transfer, made with intent to defeat or delay any one particular creditor, cannot be avoided against that particular creditor, provided that there has been good consideration and the transaction is not a mere sham.

A transfer, with intent to defraud creditors generally, made in favour of a creditor securing payment of the debt due to himself by superior diligence, cannot be set aside, even if he was aware of the vendor's intention to defeat his other creditors. In other words, in the case of such a creditor, proof of valuable consideration is ordinarily sufficient, but not so in the case of a purchaser for present consideration who must prove not only valuable consideration but also the further fact that he was not aware of the vendor's fraudulent intent and that he did not enter into the transaction for the purpose of aiding the fraudulent transfer (a).

Relationship alone between the transferor and the transferee is not sufficient to establish such aiding, but it is a circumstance giving rise to suspicion and one that must, therefore, be very carefully considered. *Y.R. M.Y.A. Chetty Firm v. Maung Po Sin*, 23 Ind. Cas. 341=7 Bur. L.T. 257.

ROBINSON, J.

References.—(a) 25 B. 202=2 Bom. L.R. 986; 3 L.B.R. 188; 34 C. 999=6 C.L.J. 410=11 C.W.N. 889; 8 Ind. Cas. 965=5 L.B.R. 195.

(33) S. 53—*Family settlement on wife and mother*—Settler having no debts to pay—Defeating future creditors—Fraud—Burden of proof—Knowledge of creditor.

He made a settlement of some property on his wife and mother at a time when he was not indebted to any one. He then executed a Hundi in favour of the plaintiff which was antedated to a date prior to the settlement. The plaintiff obtained a decree on the Hundi and brought this suit for declaration that the settlement was bad as being a transfer made for defeating creditors. Held that, unless it can be shown that the transferor, at the time of making the transfer, had made it with the express intention of defeating future creditors, the transfer cannot be avoided (a).

Transfer of Property Act—(Continued).

Held also, that the creditor, having taken the precaution of fraudulently antedating the Hundi executed in his favour after the deed of settlement, must be taken to have knowledge of the settlement when the money was lent, and is not entitled to a declaration that the transfer was made to defeat future creditors, except on proof that such was the actual intention of the transferor, at the time he made the transfer. Chandar Bhan v. Halgopal, 12 A. L.J. 1098.

SUNDAR LAL, J.

References:—(a) 4 Bom. L.R. 180; 23 B. 156; (1900) 2 K.B. 508; 3 De G. and J. and S. 293, R.

(34) S. 53—Rights of future creditor. See CONTRACT ACT, No. 5, 26 M.L.J. 612.

(35) S. 54—Registration—Sale-deed—Where document executed for sale under Rs. 100—No option—Competition between an unregistered sale-deed accompanied by delivery and a subsequent registered sale-deed—S. 50, Registration Act.

The effect of S. 54 of the Transfer of Property Act read with S. 50 of the Registration Act is to make the later registered instrument prevail over the earlier unregistered instrument notwithstanding that there may have been delivery under the earlier instrument. S. 54 of the Transfer of Property Act virtually abolished the optional registration in the case of sales in which a document was actually executed. *Mohamed Kasim Ali Saheb v. Mir Gulam Ali Saheb*, (1914) M.W.N. 55=22 Ind. Cas. 285.

WHITE, C.J., and OLDFIELD, J.

(36) S. 54—Immoveable property below Rs. 100 in value—Oral sale—Vendee already in possession—Effect—Unregistered sale deed—Admissibility in evidence to prove nature of possession of purchaser—Establishment of title by adverse possession—Whether a transaction affecting immoveable property—S. 48, Registration Act.

If there was an oral sale of the properties, the fact that the vendee was already in possession as mortgagee would not render the sale invalid, if the vendor had by appropriate declarations or acts converted the possession of the vendee as mortgagee into one as purchaser. An arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession treated as one by the vendee with absolute title is sufficient to satisfy the requirements of S. 54, Transfer of Property Act (a).

Unless there is something in S. 54, Transfer of Property Act, which compels the Courts to do so, there is no reason for putting on this section a construction that would in effect require sales of properties below Rs. 100 to be only by registered instrument in the numerous class of cases where the vendee is already in possession as tenant or mortgagee.

Transfer of Property Act—(Continued).

The effect of S. 4 read with S. 54 of the Transfer of Property Act is to make all sale-deeds compulsorily registrable irrespective of the value of the property. So a sale-deed, if in writing, must be registered and it would be invalid for want of registration. Such an unregistered deed is not admissible in evidence even for the purpose of showing the nature of the possession of the purchaser (b).

The establishment of title by adverse possession is a transaction affecting immoveable property. *Muthokaruppan Samban v. Muthu Samban*, 16 M.L.T. 344=(1914) M.W.N. 768=27 M.L.J. 497.

SESHAGIRI IYER and KUMARASWAMI SASTRY, JJ.

References:—(a) 9 M. 267; 13 M. 324; 7 B. 452, R.; 35 C. 207, Diss. (b) 17 M.L.J. 469, R.

(37) S. 54—Sale in Barar—Document creating occupancy right—Registration whether necessary. See BEAR LAND REVENUE CODE, No. 1, 10 N.L.R. 78.

(38) Ss. 54, 55 (1) (f), 55 (4) (b)—Purchase-money, non-payment of portion—Sale if nevertheless complete—Registration if completes conveyance—Non-delivery to purchaser—Intention—Vendor's lien if may be given effect to in purchaser's suit for possession—Equities—Subsequent purchaser's rights—Costs—False allegations in plaint. *Nilmadhab Parhi v. Hara Proshad Parhi*, 17 C.W.N. 116=20 Ind. Cas. 325=19 C.L.J. 146. See Final Part, 1913, Col. 1135.

(39) S. 55 (1) (b)—Agreement—Sale to be completed within certain time—Sale not completed—Vendor not carrying out essential terms of agreement—Effect—Subsequent transferee for value and with notice of previous agreement—Not a bona fide purchaser—Right to value of improvements effected by him. See SPECIFIC PERFORMANCE, No. 6, 19 C.L.J. 420.

(39-a) S. 55 (1) (f). See No. 38, *supra*.

(40) Ss. 55 (1) (j), 108 (j). See OCCUPANCY, No. 5, 16 M.L.T. 192.

(41) S. 55, cl. (2)—“Contract to the contrary”—Covenant for title.

A covenant in a sale-deed that ‘if any dispute arise through me in respect of the land, I shall get it settled’ does not exclude a covenant for title implied by S. 55 (2) of the Transfer of Property Act. This covenant also means that the defendant will see that, if the plaintiff does not get full ownership, title and peaceable possession through the defect in the defendant's title or through the act of the defendant, the defendant is bound to remove such defect (a). *Raghava Iyengar v. Samachariar*, (1914) M.W.N. 57=22 Ind. Cas. 42.

SADASIVA IYER, J.

Reference:—(a) 25 C. 228, *Appl*.

(42) S. 55 (2)—Registered conveyance executed after Transfer of Property Act came into

Transfer of Property Act—(Continued).

force—Breach of covenant for title—Suit for compensation and possession—Limitation. See LIMITATION ACT (1908), No. 107, 16 M.L.T. 397.

(43) S. 55, cl. 2—Good title—Guarantee for—Whether affected by purchaser's knowledge of defect in title. See SALE, No. 5, 15 M.L.T. 240.

(44) S. 55, cl. (4)—Unpaid vendor's lien—Property sold pre-empted—Pre-emptor paying money which vendee was bound to pay—Effect of.

Certain property was sold to the defendant and some money was left with him to pay off a prior mortgage on property other than the property sold. Before the prior mortgage was discharged the plaintiffs brought a suit for pre-emption, obtained a decree and deposited the whole of the sale price. The vendee withdrew the whole money, the vendor or pre-emptors taking no exception to it. The mortgagee brought a suit upon his mortgage and obtained a decree which the vendor satisfied. He then brought a suit for recovery of the money which he had left with the vendee for payment to the mortgagee, both against the plaintiffs and the defendant. The plaintiffs did not appear and a decree was passed against them and they satisfied it. They then brought the present suit against the defendant (vendee).

Held, that the suit was misconceived. It was the duty of the vendor to see that money, when deposited by the pre-emptor, was paid to the right person. If, therefore, the plaintiff had defended the vendor's suit, a decree could not have been passed against him. He was therefore himself to blame in the matter. **Mahadeo Sahu v. Mahipal Rai**, 12 A.L.J. 921.

RICHARDS, C.J., and TUDBAL, J.

(45) S. 55 (4) (b)—Unpaid vendor's lien—Liability of vendee or his transferee—Limitation—Personal remedy barred—Effect on—Remedy against property.

Plaintiff sold property to K and left some money with him to pay off his creditors, M. K., who had obtained a decree against him and several others. K did not pay and M. K. executed their decree which was paid up by the plaintiff. M. K. then purchased the property from K. Plaintiff brought this suit to recover his money which K had not paid to his creditors by enforcement of his lien as unpaid vendor. *Held* that the plaintiff had a charge on the property which he could enforce both against the purchaser and his transferee.

Held also that, where a vendor has a lien on the property sold and he allows his remedy against the person of the vendee to become time-barred, his claim for enforcement of the charge does not necessarily fail (a).

Held also that, notwithstanding the acknowledgment of the receipt of consideration in the sale deed, the vendor can show that the whole consideration was not paid, and so long as it is

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not paid the unpaid vendor's lien subsists (b). **Meghraj Valsh v. Abdulla Khan**, 12 A.L.J. 1034.

SUNDAR LAL, J.

References:—(a) 30 A. 172, F.; 7 A. 502, R. (b) S.A. 1007 of 1909; 31 C. 57, R.; 33 M. 46, D.

(45 a) S. 55 (4) (b). See No. 38, *supra*.

(45-b) S. 56. See No. 30, *supra*.

(46) S. 58—Mortgage—'Tanaka,' meaning of—S. 58—Conditions, fulfilment of.

Tanaka is a phrase commonly used and perfectly well understood by the people of the Ganjam District as meaning a mortgage and in no other sense (a).

S. 58 of the Transfer of Property Act will be satisfied if the indication of the hypotheca is sufficiently precise to enable the land to be determined even after a lapse of time. **Dak-kata Thotapalli v. Sasnapuri Dali Setti**, (1914) M.W.N. 270=22 Ind. Cas. 524.

AYLING and OLDFIELD, JJ.

Reference:—(a) (1913) M.W.N. 335, Diss.

(47) S. 58—Mortgage—Document named—Diggu Bhogham—Rents and profits to go in liquidation of principal and interest.

A decision as to the nature of a transaction in one document is little or no guide for construing another document executed under a different set of circumstances.

Where a document called the *Diggu Bhogham* was executed by which the rents and profits of a certain land were to be received by the creditor for a fixed term of years in lieu of the principal and interest, *held* that the document was a mortgage, even though the creditor was not placed in possession of the property and the possession was with the tenant, the mortgagee being given such possession as the case would admit, i.e., the right to receive rent from the tenant, and even though the instrument does not give the creditor the right to proceed against the land or to enter on it even, in default of payment of the rent as provided in the document. Whether the interest transferred is the right to receive rent of the land specified in the document or the right to possession, in either case, there is a transfer of interest in specific immoveable property within the meaning of S. 58 (a) of the Transfer of Property Act. **Anantha Iyer v. Mittadar Ramasami Iyer**, 16 M.L.T. 444=(1914) M.W.N. 891.

AYLING and HANNAY, JJ.

(48) S. 58—Transaction whether a mortgage by conditional sale or sale with an agreement to reconvey—Evidence of surrounding circumstances—Admissibility. See MORTGAGE (BY CONDITIONAL SALE), No. 6, (1914) M.W.N. 906.

(49) S. 58—Deed of sale with power to re-purchase within certain time—Sale or mortgage—Construction. See SALE, No. 1, 21 Ind. Cas. 19.

Transfer of Property Act—(Continued).

(49-a) S. 58. See No. 3, *supra*.

(50) S. 58 (g)—*Mortgage by conditional sale—Absolute sale and counter-part to reconvey on payment within six years—Interval of two days between execution of each instrument—Single transaction—Right of redemption not lost.* **Palagiappan v. Subbaraya Gounden**, 14 M.L.T. 579=22 Ind. Cas. 4=(1914) M.W.N. 222. See Final Part, 1913, Col. 1139.

(51) Ss. 58, 60, 98—*Mortgage-deed—Construction—'Anomalous mortgages,' what are—Mortgagor covenanting to pay some monies along with mortgage amount on redemption whether amounts to a personal covenant—Hindu form of mortgage by conditional sale—Nature and validity—Right of redemption—Clog on redemption.* **Srinivasa Iyengar v. Radhakrishna Pillay**, 14 M.L.T. 547=(1914) M.W.N. 81=26 M.L.J. 47=22 Ind. Cas. 54. See Final Part, 1913, Col. 1140.

(52) Ss. 59, 67, 98—*Incidents of Kanom mortgage—Right to bring to sale.* See MORTGAGE (GENERAL), No. 28, (1914) M.W.N. 618.

(53) Ss. 58 and 100—*Mortgage—Charge—Intention of the parties—Property security for loan—Transfer of interest—Omission of words "mortgage or hypothecate" from the bond—Effect.*

The mere making of the property liable for the loan was not "a transfer of an interest" in the property.

Where a deed commenced by reciting that the executant had borrowed a certain sum of money and then proceeded to refer to a certain share in a property, and finally there was a clause in which the executant undertook that, until repayment of the amount, he would not transfer the property by sale, mortgage, gift or any other way, but there was in no part of the document any use of the word 'hypothecation' or anything equivalent thereto, nor was there any reference to any right of sale in the property, held (*per Richards, C.J.*) that it was the intention of the parties to make the property mentioned therein security for the loan and interest, and the document created a charge within the meaning of S. 100 of the Transfer of Property Act. But as there was no transfer of any interest, for the purposes of securing the loan in the property mentioned in the deed, it was not a simple mortgage within the meaning of S. 58.

Held (*per Banerji, J.*), that the intention of the parties was to transfer a portion of the borrower's interest to the lender by virtue of which he is entitled to bring to sale the property which is made security for the debt. The document is a simple mortgage within the meaning of S. 58 of the Transfer of Property Act.

A charge under S. 100 arises only when the transaction does not amount to a mortgage. **Jawahir Mal v. Indomatil**, 12 A.L.J. 290=36 A. 201=22 Ind. Cas. 973.

RICHARDS, C.J., and BANERJI, J.

Reference:—N.W.P.H.C.R. (1867), 124, R.

Transfer of Property Act—(Continued).

(54) S. 59—*Equitable mortgage—Deposit of title deeds—Property situate outside Bombay—Proof of intention.*

It is competent to create in Bombay, an equitable mortgage by deposit of title deeds of property situate outside Bombay.

An equitable mortgage, under S. 59 of the Transfer of Property Act, needs three facts to be proved: (1) a debt, (2) deposit of title deeds and (3) an intention that the latter should be a security for the former. No writing is necessary to create the mortgage. It comes into being by the mere conjunction of certain facts.

There must be evidence of intention to connect the deposit of title deeds with the loan borrowed. The mere fact that there was a subsequent or contemporaneous loan is not sufficient in law to warrant a presumption, apart from any other evidence, that the contemporaneous or antecedent deposit of title deeds was necessarily made as security for the loan. **Behram Rashid Irani v. Sorabji Rustamji Elavia**, 16 Bom. L.R. 35=23 Ind. Cas. 140=38 B. 372.

BEAMAN and MACLEOD, JJ.

(55) S. 59—*Mortgage—Immoveable property—Rights and interests of grove-holder in grove—Registration.*

Rights and interests of a grove-holder in a grove are rights and interests in immoveable property and a mortgage of these rights requires registration. **Sheo Naik Ram v. Sheo Ram**, 23 Ind. Cas. 963.

RICHARDS, C.J., and BANERJI, J.

Reference:—9 Ind. Cas. 478, D.

(56) S. 59—*Mortgage attested by one witness—Signature of scribe writer not as witness.*

It is necessary for the validity of a mortgage-deed that the attesting witnesses should be present to attest the actual fact of execution by the executant (a).

Therefore, a mortgage which is attested by only one witness and is signed by the scribe as writer and not as a witness is invalid. **Mg So v. O. A. R. Ramasamy Chetty**, 24 Ind. Cas. 375.

ORMOND and PARLETT, JJ.

References:—(a) 16 Ind. Cas. 250=16 C.W. N. 1009=23 M.L.J. 321=12 M.L.T. 398=(1912) M.W.N. 935=10 A.L.J. 359=14 Bom. L.R. 1034=35 M. 607=16 C.L.J. 596=39 I.A. 220 (P.C.), Rel.

(57) S. 59—*Unregistered mortgage-deed—Principal debt less than Rs. 100—Total amount payable by instalments above Rs. 100—Not registrable.* **Jodh Ram v. Lajja Ram**, 11 A.L.J. 729=21 Ind. Cas. 78. See Final Part, 1913, Col. 1142.

(58) S. 59—*Mortgage-deed—Two attestors—One of them a marksman—Other attestor dead—Proof of document.* See EVIDENCE ACT, No. 41, 12 A.L.J. 1114.

Transfer of Property Act—(Continued).

(59)* Ss. 59, 100—*Attestation—Signature witnessing acknowledgment of execution by mortgagor—Not valid—Mortgage and charge—Distinction between—Document called mortgage—Effect—Document creating charge—Nature of attestation—Meaning of 'rahn'.*

Where the attestors did not see the mortgagor touch the pen of the scribe in token of the mark appended thereto being his signature of execution, but merely witnessed his subsequent acknowledgment of execution.

Held that the attestation was not such as is required by S. 59 of the Transfer of Property Act (a).

Where a document is in terms a deed of mortgage, but has not been completed by proper attestation or other formality prescribed by law as indispensable for a valid mortgage, the instrument cannot be used to establish a charge (b).

Where an instrument embodies the true contract between the parties and is in terms an instrument which only creates a charge as defined in S. 100, Transfer of Property Act, then an erroneous belief of the parties that they had created a simple mortgage, and their conduct in calling it a mortgage and having it attested in that belief would not affect the true nature and validity of the transaction. In such a case the failure to effect an attestation in the form required for a mortgage would not obstruct the legal enforcement of the charge (c).

The question whether a transaction is a mortgage or a charge, turns, in India, upon whether there is, or there is not, an agreement, express or implied, governing the disposal of the property in some way, which comes into existence on default being made in payment of the mortgage money. If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien or directs the realization of money from a particular property, without reference to sale, it creates a charge (d). Distinction between a mortgage and a charge discussed.

The name given to the transaction will not be a sufficient guide where the document is written in a vernacular language which makes a customary use of the single word *rahn* to denote every form of transaction in which immoveable property is bound as security for the payment of a debt. Where, as in the present case, the document sued on embodies nothing but a mere lien on the property and, while expressly contemplating the possibility of a failure to pay, it does not contain an express or implied agreement to sell the property in the event of such failure, held that the deed creates only a charge and that execution has been duly proved by the witnesses who signed the deed, upon the personal acknowledgment of his signature

Transfer of Property Act—(Continued).

thereon made to them by the executant. **Khemchand v. Mallo**, 10 N.L.R. 81.

STANYON, A.J.C.

References:—(a) 14 C.P.L.R. 42; 2 N.L.R. 10, F. (b) 32 C. 529; 33 C. 985; 31 M. 327; 7 Bom. L.R. 234, F. (c) 6 M.I.A. 393, *Appl.* (d) 35 C. 837; 10 B. 519; 13 B. 97; 10 M. 509; 9 C.W.N. 1001; 32 C. 729; 13 A. 28; 23 Q.B. D. 239, R.

(60) Ss. 59 and 123—*Gift—Witnesses did not see the deed being executed—Duly attested—Personal acknowledgment of execution—Attested by witnesses, meaning of—Privy Council decision as to the meaning of certain words in a section—Interpretation of same words in some other section. Sahedha Koeri v. Raja Ram*, 11 A.L.J. 757=21 Ind. Cas. 83. See Final Part, 1913, Col. 1143.

(61) S. 60—*Right of redemption—Extinction by act of parties. See MORTGAGE (REDEMPTION), No. 3, 21 Ind. Cas. 87.*

(61-a) S. 60. See Nos. 3 and 51, *supra*.

(61-b) Ss. 60, 62—*Mortgage—Redemption of mortgage without payment of deeds of further charge—Deeds of further charge, payment of.*

Held, that S. 62 of the Transfer of Property Act is a special section supplementary to the general provisions of S. 60. It provides a summary remedy which is available, to a mortgagor in two special cases of usufructuary mortgage (a) where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the mortgaged property, (b) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money. It cannot apply to cases where from the condition contained in the mortgage accounts have to be made up between the parties.

Held further, that S. 62 contemplates the existence of only one transaction and does not at all touch the case where a usufructuary mortgage having been executed other mortgages by way of further charge have been executed by the same mortgagor. **Zahid Ali (Saiyed) v. Kedar Nath**, 17 O.C. 388.

LINDSAY, J.C.

(62) Ss. 60, 91—*Redemption after date fixed in mortgage-deed—Mortgage impugned as invalid, valid until rescinded.*

When mortgage money has become payable under the terms of the mortgage-deed, a redemption suit cannot be resisted on the ground that money is payable only within certain dates.

A mortgage impugned as invalid is valid until rescinded, and a mortgagee claiming under such a document is entitled to redeem under S. 91 (b) of the Transfer of Property Act. **Chakkangal Govinda Menon v. Chakkangal Chathu Menon**, 22 Ind. Cas. 907.

SADASIVA AIYAR and SPENCER, JJ.

(62-2) S. 62. See No. 61-b, *supra*.

Transfer of Property Act—(Continued).

(63) Ss. 63, 70, 72 (b)—*Mortgagee in possession of agricultural land—Construction of well by mortgagee without mortgagor's consent—Mortgagor whether bound to pay the cost of constructing the well on redemption.*

In this case a mortgagee in possession of agricultural land constructed on the property a brick well at a cost of Rs. 300 without obtaining the consent, expressed or implied, of the mortgagor. The value of the land no doubt increased thereby, but its construction was not necessary to preserve the property from destruction or even deterioration. In a suit for redemption, held that the case was governed by S. 63 of the Transfer of Property Act and the mortgagor was not bound to pay its costs to the mortgagee, and that, as separate possession or enjoyment of the well apart from the land was not possible, the well must be delivered with the property. **Rajaram v. Vithal Rao**, 10 N. L.R. 166.

HALLIFAX, A.J.C.

References:—19 M. 327, F.; 20 M. 120; 20 M. 124; 2 A.L.J.R. 24 (S.N.), D.; 49 E.R. 820; 21 Ch. D. 469, R.

(63-a) S. 67. See No. 52, *supra*.

(64) Ss. 67, 99. See CIV. PRO. CODE (1882), No. 64, 19 C.W.N. 178.

(65) Ss. 67, 99. See MORTGAGE (GENERAL), No. 80, 27 M.L.J. 213.

(66) S. 68—*Limitation Act, Arts. 62, 97—Suit to recover mortgage debt from mortgagor personally—Mortgage of joint Hindu family property by one of family members not void ab initio—Burden of proving undue influence and failure of consideration where execution of deed admitted.*

Where a mortgage has been declared invalid as executed by a member of joint Hindu family, the mortgagee is entitled, under S. 68 (b) of the Transfer of Property Act, to recover the mortgage debt from the mortgagor personally. Art. 97, Limitation Act, is applicable to such a suit. It is not governed by the last clause of S. 68 of the Transfer of Property Act, nor by Art. 62, Limitation Act (a).

A mortgage by a member of a joint Hindu family is not void but simply voidable at the instance of other members (b).

Where a defendant admits execution of a deed but pleads failure of consideration and undue influence, the burden of proving these pleas lies upon him. **Debi Prasad v. Sheo Narain**, 21 Ind. Cas. 581.

LINDSAY, A.J.C.

References:—(a) 1d A. 47, F. (b) 19 C. 123 = 18 I.A. 153, F.

(67) Ss. 63, 100—*Charge—Applicability of obligations under S. 68 to charge-holder—Mortgagor's heir—Whether liable for waste—Applicability of S. 68 to mortgagor's representatives or assignees.*

Transfer of Property Act—(Continued).

Where a document expressly says in several places that it is executed as a mortgage of certain immovable property and the profits of the properties are to be spent for the expenses of the mortgagee which is a religious endowment of which the plaintiffs are constituted trustees under the document.

Held that the document is a deed of mortgage (a).

The provisions of S. 63, Transfer of Property Act, as to the liability of a mortgagor who commits waste apply as well to a person creating a mere charge, as it does to one who creates a mortgage (*vide* S. 100, Transfer of Property Act).

The heir or the assignee of the equity of redemption (*e.g.*, a purchaser in a Court sale) is clearly liable to the mortgagee when he himself is responsible for the waste committed to the detriment of the mortgage security (a).

A provision in a statute which gives a right to or imposes a liability on a person must be deemed to confer that right and impose that liability on that person's legal representative, and if it confers that right or imposes the liability on that person as the owner of a certain property, such right or liability is conferred or imposed on the assignee of such ownership right, unless the reason of the rule of law cannot clearly apply to anybody but the original owner of the property or the original obligor. **Ramakrishnama Chetty v. Yuvvatti Chengu Aiyar**, 27 M.L.J. 494.

SADASIVA IYER and NAPIER, JJ.

Reference:—(a) 28 M. 208, R.

(68) Ss. 68, 100—*Essentials of simple mortgage and charge—Rights of holder of charge.* See MORTGAGE (GENERAL), No. 11, 26 M.L.J. 514.

(68-a) S. 70. See No. 63, *supra*.

(69) S. 72—*Mortgagee in possession, right of, to recover expenses incurred in suits to recover arrears of rent—Act of management.*

Held, that, in the absence of any foundation for a suggestion of bad faith, the filing of suits to recover arrears of rent by a mortgagee in possession is an act of management, and any expenses incurred in connection therewith are recoverable by the mortgagee under S. 72 of the Transfer of Property Act. **Basant Singh Thakur v. Mata Baksh Singh**, 17 O. C. 47 = 23 Ind. Cas. 456.

LINDSAY, J. C.

Reference:—12 M. 32, Not F.

(69-a) S. 72. See No. 3, *supra*.

(69-b) S. 72 (b). See No. 63, *supra*.

(70) S. 76—*Improvements effected by mortgagee—Water-tax—Introduction of water-pipes—Building of granary.*

A usufructuary mortgagee claimed that the following charges should be allowed to him in the settlement of accounts between himself and the mortgagor;

Transfer of Property Act—(Continued).

(1) Increase in the Municipal water-tax.

(2) Amount spent in building a granary.

(3) Amount spent in laying out water-pipes.

Held, (a) that as regards (1), the increase in the Municipal tax should be borne by the mortgagee himself as he enjoyed an increase in rent consequent on the introduction of pipe-water;

(b) that as regards (3), this was not "substantial repairs" within the meaning of S. 76, Cl. (d), so as to make the mortgagor liable for the same (a);

(c) that as to (2) the granary being a movable wooden structure, the mortgagee himself could remove the same, and he should not be allowed credit for it. **Kuttuva Narayanasami Iyer v. Soranamnal**, 22 Ind. Cas. 635=15 M. L.T. 374.

SADASIVA AIYAR and TYABJI, JJ.

References:—(a) 19 M. 327, F.; 26 C. 1=25 I.A. 241=2 C.W.N. 665, D.; 16 Ind. Cas. 635=10 A.L.J. 124, Diss.

(71) S. 76 (c)—Mortgagee in possession whether bound to pay enhanced Government revenue—Contract in mortgage deed—Construction.

Under S. 76 (c), Transfer of Property Act, the mortgagee in possession is bound to pay the revenue in the absence of a contract to the contrary.

In this case, a mortgage-deed contained the following words: "Out of this 60 paras 15 *nashies* of paddy is allowed for payment of revenue of 60 *fanams* 4 *visams* due on these, you having consented and undertaken to pay the same from 1883 and obtain receipt therefor."

This was followed by an appropriation of the balance of the total produce estimated at a specified quantity to interest at a specified rate.

Held that the mortgage-deed contained a 'contract to the contrary' such as is referred to in S. 76 (c). **Panambatta Kalathil Kunchu Menon v. Kalathinpadikil Narayanan Ezhussean**, 16 M.L.T. 317.

OLDFIELD, J.

References:—14 Ind. Cas. 590; 18 M.L.J. 31, D.; 17 M.L.J. 517, R.

(72) S. 76 (c)—Land Revenue—Liability as between mortgagor and mortgagee. See ACT II OF 1964 (MADRAS REVENUE RECOVERY), No. 2, 16 M.L.T. 226.

(72-a) S. 81. See No. 30, *supra*.

(73) S. 82—Contribution—Principle upon which it should be assessed—Execution sale set aside—Fees paid—Whether subject of contribution. See MORTGAGE (CONTRIBUTION), No. 1, 12 A.L.J. 394.

(73-a) S. 83. See No. 76, *infra*.

(74) Ss. 83, 103—Guardian ad litem appointment of, in proceedings under S. 83—Duty of Court to appoint guardian ad litem—Minor to

Transfer of Property Act—(Continued).

be allowed benefit of doubt in questions of procedure—Civ. Pro. Code (XIV of 1882), S. 443. **Shiva Nath Singh v. Manohar Lal**, 16 O.C. 261=22 Ind. Cas. 245. See Final Part, 1913, Col. 1146.

(75) S. 84—Mortgage—Tender of money—Tender by a letter—Whether a good tender.

An offer by letter of the amount due on a mortgage is not a good tender within the meaning of S. 84 of the Transfer of Property Act. It is necessary that the money should be actually produced, unless it could be shown that the person entitled to receive the money had waived this condition. **Chetan Das v. Gobind Saran**, 12 A.L.J. 111=36 A. 139=22 Ind. Cas. 659.

RICHARDS, C.J., and BANERJI, J.

Reference:—22 B. 440, R.

(76) Ss. 84, 83—Mortgagee's failure to take money deposited in Court by mortgagor—Mortgagor withdrawing money from Court after one year—Interest whether ceases from date of deposit.

Where the mortgagor deposited into Court the sum that was due for principal and interest on the mortgage and the sum was not taken out of Court by the mortgagees and was withdrawn about a year later by the mortgagor, *held*, in a suit by the mortgagees to recover the mortgage debt, *per* Ayling, J. (Tyabji, J. *contra*) that interest does not cease to run from the date of the deposit. **Thevayareddy v. Venkatachela Pandithan**, 16 M.L.T. 131=25 Ind. Cas. 96.

AYLING and TYABJI, JJ.

Reference:—35 M. 44, F

(77) S. 85—Person asserting title paramount or opposed to that of mortgagor—Whether can be impleaded as a party. See CIV. PRO. CODE (1908), No. 404, 22 Ind. Cas. 946.

(78) S. 85—Suit for foreclosure—Joint Hindu family—Managing members made defendants—Co-parceners not made parties if bound by decree—Suit by latter for redemption if lies. See MORTGAGE (GENERAL), No. 17, 18 C.W. N. 968.

(79) Ss. 85, 81—Attachment of mortgaged property by holder of a money-decree—Suit on mortgage—Decree—Attaching creditor not made party, effect of. **Titall Venkata Seetharamayya v. Vedvia Venkataramayya**, 15 Ind. Cas. 334=37 M. 418. See Final Part, 1912, Col. 1047.

(80) S. 88—Mortgage—Decree-holder's right to apply for order absolute barred under Art. 178 of the old Limitation Act—Right not revived by O. XXXIV, r. 5, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 412, (1914) M.W. N. 251.

(81) S. 89—Estate under Court of Wards—Mortgage decree against person of proprietor—

Transfer of Property Act—(Continued).

Not in accordance with S. 89, Transfer of Property Act—Effect—Propriety cannot be questioned in execution. See CIV. PRO. CODE (1908), No. 92, 27 M.L.J. 25.

(81-a) S. 91. See Nos. 62 and 79, *supra*.

(82) S. 92—Final decree for redemption—Amendment—Execution of decree—Limitation—Application under O. XXXIV, rr. 7, 8, Civ. Pro. Code—Maintainability. See MORTGAGE (REDEMPTION), No. 5, 22 Ind. Cas. 283.

(82-a) S. 92. See No. 3, *supra*.

(83) S. 95—Redemption of mortgage by one of original mortgagor's representative—Charge on shares of other representatives of original mortgagor for proportionate expenses. See MORTGAGE (REDEMPTION), No. 10, 22 Ind. Cas. 918.

(83-a) S. 98. See Nos. 51 and 52, *supra*.

(84) S. 99—Code of Civil Procedure (1908), O. XXXIV, r. 4—Money decree obtained by mortgagee against Hindu father—Sale of property—Purchase by mortgagee—Right of sons to redeem—Estoppel of mortgagor—Possession of mortgagee—Waiver of claim.

A mortgagee cannot, by obtaining a money decree for the mortgage debt and purchasing the equity of redemption in execution of his decree relieve himself of his obligation as mortgagee and deprive the mortgagor of his right to redeem. The sons of the mortgagor, who were no parties to the suit in execution of which the property was sold, can redeem the property after it has been purchased by the mortgagee in execution of his simple money decree (a).

The fact that a sale in favour of the mortgagee in execution of a simple money decree is confirmed does not prevent the mortgagor or his sons from impeaching it in a suit for redemption and it can be set aside in such a suit (b).

The rule of Hindu law that the sons in a joint Hindu family can avoid payment of a debt for which a decree was passed against their father only on showing that they were no parties to the decree and that the debt was such which they are not bound to pay, does not apply to the present case where the sons do not seek to evade payment of their father's debt but offer to pay it.

The failure of the mortgagor to object to sale before its confirmation does not amount to waiver of the benefit given him by law, and the mortgagor & his sons cannot be debarred from claiming redemption of the property on that ground. *Sardar Singh v. Ratan Lal*, 12 A.L.J. 855 = 36 A. 516 = 24 Ind. Cas. 612.

RAFIQ and FIGGOTT, JJ.

References:—(a) 32 C. 296; 14 C.W.N. 579; 1 C. 237, F. (b) 18 A. 325; 24 A. 549; 27 A. 450; 27 A. 517; 30 A. 146, R.

(84-a) S. 99. See Nos. 64 and 65, *supra*.

(85) S. 100—Will creating charge by way of annuity—Charge upon immoveable property, whether enforceable against bona fide

Transfer of Property Act—(Continued).

transferee for value without notice—Mortgage and charge, distinction between—Registration of charges not compulsory—Document, creation of charge by, not compulsory—Lien legal and equitable, admission of.

Where a charge upon an immoveable property was created by a will, the registration of which was not compulsory, and of the terms of which a stranger, the auction-purchaser, could not have been cognizant:

Held, that the charge could not be enforced as against the auction-purchaser, he being a bona fide purchaser for value without notice (a).

A charge does not operate to transfer to the charge-holder any interest in a specific immoveable property as a mortgage does. *Parbhu Dayal v. Babban Lal*, 23 Ind. Cas. 867.

LINDSAY, J.C.

References:—(a) 28 A. 655 = 3 A.L.J. 551 = A.W.N. (1906) 165, Diss.

(85-a) S. 100. See Nos. 53, 59, 67 and 68, *supra*.

(86) S. 101—Charge—Extinguishment of charge—Mortgagee having two charges—Purchase under the first mortgage—Rights under second mortgage cannot be enforced—Partition in mortgagee's family—Different members becoming entitled to the two mortgages—Extinguishment.

In 1886, certain property was mortgaged to G, and in 1894 it was again mortgaged to him. In 1895 G brought a suit on the mortgage dated 1886 and obtained a decree. In the sale that took place under the decree, G purchased the property with the permission of the Court subject to his mortgage dated 1894. At a partition in 1905, between G's grandson (plaintiff) and G's widowed daughter-in-law (defendant), the second mortgage went to the share of the plaintiff and the sale-certificate came to the share of the defendant. The plaintiff sued to enforce the second mortgage against the defendant. But the lower Courts dismissed the plaintiff's suit. On appeal:

Held, confirming the decree of the lower Courts, that inasmuch as G could have had no right, after suing on the first mortgage, to sue himself in a double capacity as mortgagee under the mortgage of 1894 and mortgagor under the sale-certificate of 1895, those claiming through him as heirs could not have any cause of action against each other upon the same materials. *Laxman Ganesh Rajendra v. Mathurabal Narayan Govind*, 16 Bom. L.R. 26 = 38 B. 369 = 23 Ind. Cas. 321.

BEAMAN and MACLEOD, JJ.

(87) S. 101—Doctrine of merger—Intention—Benefit of person in whom the two estates have become vested. See LANDLORD AND TENANT, No. 18, 23 Ind. Cas. 398.

(87-a) S. 103. See No. 74, *supra*.

Transfer of Property Act—(Continued).

(88) *S. 106—Landlord and tenant—Tenancy from year to year for a fixed period—Tenant holding over—Nature of the tenancy—Tenancy how determinable—Forfeiture in case of breach of express condition—Acceptance of rent after the breach—Waiver of forfeiture.*

Where a tenancy is from year to year, and is for a fixed period of time, but the tenant holds over after the expiry of that period, the tenancy would still retain the character of a yearly tenancy and would not be determinable under S. 106 of the Transfer of Property Act; but six months' notice would be required to terminate the lease.

Where a lease provides for the ejectment of a tenant after forfeiture of the lease for breach of express condition and the condition is broken, any subsequent acceptance of rent would amount to a waiver of the forfeiture. **Chatter Singh v. Nand Kishore**, 12 A.L.J. 1139.

PIGGOTT, J.

(88-a) S. 106. See No. 4, *supra*.

(89) *Ss. 106, 107, 116—Ejectment, suit for—Lease of immoveable property for a stationery shop—Holding over—Agreement to the contrary—Indirect agreement—Presumption of yearly payment of rent—Notice—15 days, calculation of—Exclusion of day of service—Post mark, use of, in evidence—Date of notice, if proof of being posted on that date—Delivery of article—Inference—Post mark of the receiving office—Refusal to take delivery—Endorsement on the cover of the registered article—Admissible in evidence—Evidence Act, Ss. 32 (2), 33, 114—Tender—Presumption.*

A tenant, holding on after the expiry of a lease of immoveable property taken for a stationery shop, is a monthly tenant and is liable to be ejected on 15 days' notice under S. 106 of the Transfer of Property Act.

The word 'agreement' in "an agreement to the contrary" in S. 116 of the Transfer of Property Act means an agreement as to the terms of the holding over (a).

The rule that the mode in which rent is expressed to be reserved, for example, at so much a year, affords a presumption that the tenancy is of a character corresponding to it, is not of universal application, and the presumption of a yearly taking does not always arise from the rent being payable yearly (b).

A notice served on the 16th Baisak which calls upon the tenant to quit on the 31st Baisak (the last day of that month) gives the tenant 15 days' notice excluding the day on which the notice is served and expiring with the end of a month of the tenancy (c).

The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the

Transfer of Property Act—(Continued).

official mark that the mark was genuinely affixed by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In the second place, the question arises, whether if the post mark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The answer is in the affirmative. In the third place, the post mark is evidence that the place or office mentioned therein was actually the place where it was affixed.

The mere fact of a notice bearing a certain date is no proof that it must have been posted on the same date.

An article posted and delivered may be inferred to have been delivered in due course of post (d).

A Court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other like facts involved in such an enquiry (e).

The date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the receiving office. This rule is applicable with special force to registered articles which are delivered by the Post Office only between specified working hours (f).

An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of a statement by the peon and would be admissible either under S. 32 (2) or S. 33 of the Evidence Act, if the requirements of those sections are fulfilled (g).

Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office, may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee.

The presumption mentioned in S. 114, Evidence Act, is not a presumption of law but a presumption of fact, and when the defendant pledges his oath that the cover was never tendered to him, the presumption of regularity of official business cannot be treated as conclusive against him. **Gobinda Chandra Saha v. Dwarka Nath Patita**, 20 C.L.J. 455.

MOOKERJEE and WALMSLEY, JJ.

References:—(a) 32 C. 123 (127), R. (b) (1837) 3 Bing. N.C. 308 = 43 R.R. 728; (1841) 2 M. & G. 511 = 10 L.J.N.P. 115; (1824) 3 B. & C. 88, R. (c) 28 C. 118 = 4 C.W.N. 790, D. (d) (1895) 66 Conn. 376 = 50 Am. St. Rep. 96, R. (e) (1869) 10 Wallace 199, R. (f) (1855) 1 Patt & H. 228, R. (g) 15 C. 681, *Expl. & Dist.*

Transfer of Property Act—(Continued).

(90) Ss. 106, 111, 116—*Tenant by sufferance—Notice to quit determines tenancy—Position of tenant after determination of tenancy—Trespasser—Liability for damages after determination of tenancy—Res judicata—Rent suit—Basis of title—A thika—Suit dismissed for want of proof—Subsequent suit for posterior period.*

Where a tenancy is determined by the issue of notice to quit, the position of the tenant after the expiration of the period fixed in the notice is no better than that of a trespasser. He is, therefore, after that date, liable to the lessor to pay rent at fair and reasonable rate and not at the rate contracted during the subsistence of the tenancy.

Where a suit for rent for a certain period is dismissed on the ground that plaintiff has failed to prove the *thika* on which he relies, the plaintiff can, in a subsequent suit for rent of a period posterior to the period for which he previously sued, obtain a decree on proof of his *thika*. *Munna Lal v. Buchchu Lal*, 22 Ind. Cas. 7.

BANERJI, J.

(91) S. 107—'Term' of the lease—Period for which lessee protected if he fulfils the conditions—Lease by Government in the ordinary way of business—Application of Crown Grants Act. See REGISTRATION ACT (1908), No. 12, 12 A.L.J. 219.

(91-a) S. 107. See No. 89, *supra*.

(92) Ss. 107, 116—*Oral lease for a year, with delivery of possession—Renewal every year by annual oral leases—Leases if valid—Non-delivery of possession—Holding over.*

Where a lessee, to whom possession of the demised land was delivered under an oral lease for one year, continued to hold the land under successive oral leases each of one year's duration.

Held, that, even if these later leases be invalid on the ground of non-delivery of possession (a), there was a holding over by the lessee with the lessor's assent, within the meaning of S. 16 of the Transfer of Property Act.

A series of successive leases each for one year is quite different from a lease from year to year. *Mitarjit Mahton v. Sheikh Leakut Hosain*, 18 C.W.N. 858 = 23 Ind. Cas. 318.

COXE and CHATTERJEE, JJ.

Reference :—(2) 34 C. 207, R.

(93) S. 108 (h) — *Estoppel—Mortgage suit—Defendant setting up permanent tenure created before mortgage—Decree that defendant was subsequent incumbrancer and could redeem—Defendant, if estopped from setting up tenancy before mortgage—Improvement by tenant—Fixtures—Right to remove after determination of tenancy—Equitable right—Benamidar defendant in mortgage suit, estoppel against, whether binds beneficiary.*

Transfer of Property Act—(Continued).

In a mortgage suit the mortgagor's tenants were made defendants on the allegation that they had taken their tenancies from the mortgagor after the date of the mortgage. The tenants pleaded that they held a permanent tenure created prior to the mortgage. The Court held that the tenants were subsequent incumbrancers and could redeem the mortgage within a time fixed. They having failed to redeem, the property was sold by order of the Court and the sale certificate was not made subject to any tenancies whatsoever :

Held, that the tenants were estopped from saying subsequently that their tenancy was prior to the interest of the auction-purchaser.

The right of a tenant to remove buildings, if he has not removed them before the determination of his lease, is an equitable one, and in accordance with the usages and customs of the country (a).

Where a lease was not determined by any notice to quit, and the decree in the suit, under which the tenant lost his right, did not give him any opportunity to remove the buildings, the High Court allowed three months' time to remove them.

A *benamidar* defendant in a mortgage suit represents the interest of the person beneficially entitled, and an estoppel created against the *benamidar* by the judgment and decree in the suit binds the beneficiary (b). *Kanai Lal Jalan v. Rasik Lal Sadhukhan*, 23 Ind. Cas. 762.

FLETCHER and CHATTERJEE, JJ.

References :—(a) B. L. R. Sup. Vol. (F.B.) 595 = 6 W. R. 228, *Rel.* (b) 21 Ind. Cas. 979 = 19 C.L.J. 34, *F.*

(94) S. 108, cl. (h) — *Permanent tenant—Land Revenue Code (Bom. Act V of 1879), S. 83—Right to cut trees planted by the tenant.*

A permanent tenant who has planted trees on his land has the right of cutting down and making use of them. This principle has found legislative sanction in S. 108, cl. (h), of the Transfer of Property Act. *Sitabai Raghunath Karmakar v. Shambu Sonu Gajana*, 16 Bom. L.R. 595 = 38 B. 716.

BEAMAN and HAYWARD, JJ.

(94-a) S. 108 (h). See No. 25, *supra*.

(95) S. 108 (i) — *Tenant's rights—Common law principle. See MADRAS ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 5, (1914) M.W.N. 160.*

(95-a) S. 108 (j). See Nos. 5 and 40, *supra*.

(96) Ss. 108 (f) and 111 (g) — *Principles of Application—Sub-letting—Forfeiture of lease—Meaning of the words 'Dokandari Khud.'* See LANDLORD AND TENANT, No. 20, 35 P.W.R. 1914.

(97) S. 111 — *Agricultural lease—Disclaimer, what constitutes—Forfeiture. See LANDLORD AND TENANT, No. 30, 16 M.L.T. 442.*

(97-a) S. See No. 90, *supra*.

Transfer of Property Act—(Continued).

(98) S. 111 (d)—*Merger—Leases created prior to passing of Transfer of Property Act—Vesting of superior and leasehold interests in one person after passing of Act—Doctrine of merger in mofussil—Sikmi taluq—Specified boundaries—Creation of new taluq.*

S. 111 (d) of the Transfer of Property Act is applicable to leases created prior to the passing of the Act when the vesting of the superior and leasehold interests in one and the same person occurs subsequent to the passing of the Act (a).

Where a document purports to convey to the plaintiff lands within specified boundaries to be held by him at a specified rent on a *sikmi taluq* tenure, it may have the effect of either reviving an old *sikmi taluq* or of creating a new *sikmi taluq* on the same terms.

Obiter dictum :—Prior to the Transfer of Property Act, the doctrine of merger did not apply to property in the mofussil. **Abdul Karim v. Ahmad Ali Meaji**, 23 Ind. Cas. 612.

TEUNON, J.

Reference :—(a) 3 Ind. Cas. 994 = 36 C. 102, Rel.

(98-a) S. 111 (d). See No. 6, *supra*.

(99) S. 111 (g)—*Lease—Forfeiture—Breach of express condition providing that on breach thereof lessor may re-enter or lease shall be void—Condition that lessee should dwell on land—On failure to dwell lessee to have no interest in connection with land—Failure of lessee to dwell after taking possession whether entails forfeiture.*

A lease contained the following conditions :—
“ You will enjoy the profits from generation to generation by erecting houses upon the land and dwelling therein. If you fail to dwell upon the land, you will have no interest in or connection with the land.”

Held, that there was no express condition in the lease which provided that on breach thereof the lessor might re-enter or the lease shall become void within the meaning of cl. (g) of S. 111 of the Transfer of Property Act, and that, therefore, if the lessee, after he had entered into possession, should cease to dwell upon the property, no forfeiture would take place and the lessee could not be ejected. **Nabakumar Datta v. Trailokya Nath Bose**, 24 Ind. Cas. 354.

MUKERJEE and BEACHCROFT, JJ.

(99-a) S. 111 (g). See No. 96, *supra*.

(100) Ss. 111, 114, 117—*Agricultural lease—Forfeiture—Breach of condition—Landlord's right to eject—Overt act showing intention to determine tenancy—Not necessary—Relief against forfeiture—Offer to pay before High Court—Not made in lower Court—High Court's power to grant relief. Yidyapurna Thirtha Swamilar v. Rangappayya*, 14 M.L.T. 344 = 25 M.L.J. 486 = (1913) M.W.N. 901 = 21 Ind. Cas. 405. See Final Part, 1913, Col. 1153.

Transfer of Property Act—(Continued).

(101) S. 114—*Non-payment of rent and transfer, grounds of forfeiture—Payment in Court when suit filed—Discretion of Court—Transfer by one of several lessees—Forfeiture.*

In a case in which non-payment of rent entails forfeiture and the lease can be determined by reason of such forfeiture, if the lessee pays or tenders the rent in arrears together with interest thereon and the full costs of the suit, at the hearing of the suit, the Court has a discretion not to make a decree for ejectment and may pass an order relieving the lessee against the forfeiture.

Where a transfer by the lessees of the premises leased makes them liable to ejectment and transfer is made by only one of them of his interest in the premises leased, such of the lessees or their representatives as did not make any transfer are entitled to continue in possession on payment of the rent agreed upon. **Kundanlal v. Kallu**, 12 A.L.J. 650 = 24 Ind. Cas. 79.

BANERJI, J.

(102) S. 114—*Ejectment of tenant for non-payment of rent—Forfeiture—Payment by transferee of the tenant—Sub-lessee entitled to be relieved of the forfeiture.*

Where a lessee is permitted by law to transfer, mortgage or sub-lease his rights, the transferee of these rights must be deemed to stand in the shoes of the transferor for the purpose of making payment of the rent in arrears and costs of the suit under S. 114 of the Transfer of Property Act, and the transferee is under the above section as much entitled to be relieved of the forfeiture as the original tenant. **Ahmad Husain v. Riaz Ahmad**, 12 A.L.J. 1085.

SUNDAR LAL, J.

(102-a) S. 114. See No. 100, *supra*.

(102-b) S. 116. See Nos. 4, 89, 90 and 92, *supra*.

(102-c) S. 117. See No. 100, *supra*.

(103) S. 123—*Mercayers of Southern India—Gift—Mushaa. See MAHOMEDAN LAW (GIFT)*, No. 8, 23 Ind. Cas. 547.

(103-a) S. 123. See Nos. 8, 60, *supra*.

(104) Ss. 123, 130, 137—*Making over of promissory notes without endorsement if constitutes valid transfer or gift—Transfer of chose-in-action. See ACT XXVI OF 1881 (NEGOTIABLE INSTRUMENTS)*, No. 9, 19 C.W.N. 494.

(104-a) S. 129. See No. 8, *supra*.

(105) S. 130—*Trusts Act, S. 81—Chose-in-action—Assignment—Fixed deposit receipt—Depositor asking Bank on due date to renew the deposit on donee's name—Valid gift—Resulting trust cannot be implied from the transaction.*

W had a fixed deposit of Rs. 10,500 at a Bank which fell due on the 7th August, 1912. On the due date, W sent the receipt duly endorsed, and sent a letter to the Bank asking that

Transfer of Property Act—(Concluded).

the amount of the deposit with interest may be handed over to his nephew (defendant). The defendant drew interest and Rs. 500 and deposited Rs. 10,000 with the Bank for a fixed term in his own name. On W's death, which took place on the 18th October 1912, plaintiff, one of the heirs of W, filed a suit to obtain a declaration that the amount of Rs. 10,000 formed part of W's estate. The lower Court held that the endorsement of the receipt by W was not evidence of a gift to defendant; that there was no effective transfer of the debt due by the Bank to W, and that, if there was, there would be a resulting trust for the legal representatives of W under S. 81, Trusts Act. The Court having granted the declaration, the defendant appealed:—

Held (1) that the defendant was the owner of the money secured by the existing receipt; because an order on a Banker to pay money which he held to the credit of a customer was not an assignment of the debt but an authority to deliver property which, if acted on, was equivalent to delivery by the customer;

(2) that the evidence in the case negatived the idea of any resulting trust;

(3) that there was an absolute gift to the donee (defendant) with the expectation that he would look after the donor till the latter's death.

A deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly endorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. **R. D. Sethna v. Grace Edith Hemmingway**, 16 Bom. L.R., 534=38 B. 618.

SCOTT, C.J., and BATCHELOR, J.

(106) S. 130—*Debt—Hypothecation of—Promissory note—Neglect of hypothecatee to collect debt under—Debt allowed to become barred—Liability of hypothecatee to account—Transfer of actionable claim.* **Muthukrishnan v. Veeraraghava Aiyar**, 25 M.L.J. 356=14 M.L.T. 411=(1913) M.W.N. 839=21 Ind. Cas. 316 (F.B.). See Final Part, 1913, Col. 1154.

(106-a) S. 130. See Nos. 9, 104, *supra*.

(107) S. 137—*Applicability to Sind—Assignment of Railway receipt in Sind—Effect.* See **CONTRACT ACT**, No. 80, 7 S.L.R. 163.

(108) S. 137—*Mate's receipt—Whether goods pass upon its transfer.* See **SHIPPING COMPANY**, No. 1, (1914) M.W.N. 163.

(109) S. 137. See No. 104, *supra*.

Trees.

(1) Ejectment of tenant—Compensation for trees planted. See **LANDLORD AND TENANT**, No. 23, U.B.R. (1914) 1st Cr., p. 11.

(2) Trees planted by tenant on his cultivatory holding before accrual of tenancy—Effect of

Trees—(Concluded).

ejectment decree. See **LANDLORD AND TENANT**, No. 27, 23 Ind. Cas. 957.

(3) Suit for possession of land free of house and trees—Claim merely for removal of trees—Limitation. See **LIMITATION ACT** (1908), No. 132, 17 O.C. 252.

Trespass.

(1) Trespassing on another's land and building costly buildings thereon—Removal of buildings—Money compensation—Acquiescence. See **BUILDING**, No. 1, 12 A.L.J. 1026.

(2) Trespass committed upon plaintiff's land—Recurring cause of action—No right of easement acquired—Declaratory suit—Limitation. See **LIMITATION ACT** (1908), No. 111, 12 A.L.J. 1150.

(3) Suit against trespasser—Possessory title—Cause of action. See **POSSESSION**, No. 7, (1914) M.W.N. 784.

Trial.

Trial of case piecemeal—Effect. See **CIV. PRO. CODE** (1908), No. 197, 20 C.L.J. 426.

Trust.

(1) *Trust—Property settled by Government on certain persons—Order mentioning the name of old proprietors—Whether any trust in favour of old proprietors.*

Property in dispute was sold for arrears of revenue and was purchased by the Government. The Government in course of management gave leases of the property to some of the old proprietors including one Hannu. Hannu died, and Bhagia claiming to be his widow was recorded as a tenant in his place in the *khasra* and the *khewat*, and the objections of Madho to the effect that he was the heir were disallowed. The Government, thereafter, made up its mind to make over the property to the old proprietors "as represented by the *khewatdars*" and, without making any enquiry as to the title of old proprietors, settled the share held by each *khewatdar*, upon him. The share held by Hannu was settled upon Bhagia. Madho brought this suit for declaration of his right upon the ground that it was the intention of the Government to give the property back to its former owners, and that Bhagia had no right, not being the lawful wife of Hannu, that the settlement of property on Bhagia created a trust in favour of the lawful heirs of Hannu and as such he was entitled to his share. **Held** that Bhagia did not stand to Madho in a fiduciary or semi-fiduciary position. **Madho v. Bhagia**, 12 A.L.J. 4=22 Ind. Cas. 624.

TUDBALL, J.

(2) *Religious trust—Property completely dedicated—No power to sell—Bequest subject to performance of services—Power to sell.*

If the bequest in favour of a legatee amounts to a complete dedication of the property to a religious trust, then he could not sell it. If it was merely a bequest to him subject to an

Trust—(Continued).

obligation to perform certain services, then he could. **Tahilram Pessumal v. Allmal Khe-moomal**, 7 S.L.R. 120=24 Ind. Cas. 221.

HAYWARD and BOYD, A J. CS.

References:—(a) 13 Bom. L.R. 101=35 B. 156, R.

(3) *Public trust — Non-resident foreigner whether can claim to be hereditary trustee.*

The plaintiff in this case claimed to be the hereditary trustee for public charitable purposes of certain property in British India under the terms of a deed of trust created by his ancestor, who like the plaintiff was a non-resident foreigner. The lower Court dismissed the suit on the ground that plaintiff was a non-resident foreigner and so disqualified.

Held that a Hindu is not incapable of succeeding to the office of hereditary trustee of property situated in British India merely on the ground that he resides outside British India, and that there is no such disqualification in the case of a public charitable trust, which does not come within the terms of the Trusts Act. **Yenkatashella Mudali v. Arunachella Mudali**, 16 M.L.T. 104=25 Ind. Cas. 80.

WALLIS, OFFG. C J., and KUMARASAMI SASTRI, J.

(4) *Trust — Dedication — Revocation.*

It is not open to a settlor to revoke a completed settlement. There can be no revocation after a valid dedication to charitable uses. Where the terms of a trust have not been given effect to, the defaulting trustee cannot claim to revoke the trust. In a case of public trust there can be no revocation if there has been a complete dedication of property.

Where a woman dedicated her property in the following words "I have given away by this deed of gift this day to the said Ambal the said shops, etc. . . . I shall establish a kattalai in my name for charity in the right time." Held that there was a complete dedication and that the last sentence only indicated that the details in respect of the dedicated property shall be settled later on. **Krishnasami Pillai v. Kothandarama Naicken**, (1914) M. W.N. 709=27 M.L.J. 582=16 M.L.T. 513.

SESHAGIRI IYER and KUMARASAMI SASTRI, JJ.

(5) *Trust — Several trustees — Suit by one trustee to eject tenant — No previous consultation with other trustees prior to filing suit — Notice to co-trustees to join in suit given — Later impleaded as defendants — Maintainability of suit.*

Where one of several uralans (trustees) of a Devaswom sued to eject a tenant of the Devaswom to whom the other uralans, who were impleaded as defendants Nos. 4 to 9 in the suit, granted, without consulting the plaintiff, a few days prior to suit, a renewal of the lease, and where, prior to filing suit, plaintiff gave a notice to those co-uralans calling on them to join him in the plaint:

Trust—(Continued).

Held that the suit was maintainable and could not fail merely because plaintiff had not held a consultation with the other uralans before suing. **Cherukat Madathil Edakramancheri Illal Damodaram Nambudri v. Mangathayee Damodaram Nambudri**, 14 M. L.T. 250=(1914) M.W.N. 834.

AYLING and SESHAGIRI IYER, JJ.

References:—34 M. 406 (414), R.; 14 M. 489; 23 M. 82, D.

(6) *Trust — Plaintiff holding property as trustee — Right to trusteeship negated by suit — Plaintiff cannot now turn round and claim the benefit of such possession for himself — Animus possidendi, decisive factor in determining adverse possession — Defendant, a kanom demiset from plaintiff's father as trustee, not estopped from denying plaintiff's title to redeem, on the ground that he was not a trustee at date of suit. Paramathan Thuppan v. Choo akkapathil Munde-kottil*, (1912) M.W.N. 445=11 M.L.T. 355=14 Ind. Cas. 168=37 M. 373. See Final Part, 1912, Col. 1060.

(7) *Gift for 'Dharmakarmarthe' (religious acts) and 'dharmaodeshe' (religious purposes) — Gift for 'works of public good' — Validity — Trusts when void for uncertainty. Sarat Chandra Ghose v. Partap Chandra Ghose*, 40 C. 232=21 Ind. Cas. 194. See Final Part, 1913, Col. 1159.

(8) *Religious endowment — Devasthanam or temple — Costs of litigation — Suit dismissed for technical defect — Trustee's right of reimbursement — When recognised — Suit by person not trustee — Substitution of proper trustee — Proper representation — Validation from commencement of suit — Cure of defects — Not affected by Limitation Act, S. 23 — Limitation Act, S. 10 — Suit against trustee not validly appointed — Plea of bar by limitation — Not to be raised — Order substituting proper trustee — Confirmation in appeal — Finality — Civ. Pro. Code, 1882, S. 591 (=Civ. Pro. Code, 1909, S. 105). Subramania Aiyar alias Pichu Aiyar v. M. Subba Naidu (dead) 2. Anantha Krishna Naidu, L. R. of the 1st respondent, 25 M.L.J. 452=14 M.L.T. 437=21 Ind. Cas. 421. See Final Part, 1913, Col. 1161.*

(9) *Trust, charitable and religious trust — Appointment of committee of trustees and of a Superintendent under them — Donor appointed first Superintendent — Superintendent if may be removed by trustee — If may sue for injunction to restrain removal — Contract of service or trust — Remedy. Ram Chunder Bajpye v. Rakhal Das Mukerjee*, 17 C.W.N. 1045=20 Ind. Cas. 157=41 C. 19. See Final Part, 1913, Col. 1162.

(10) *Civ. Pro. Code (1909), S. 100 — Second appeal against decision of lower appellate Court — Reference to the original Court's decision erroneous — Trustee's power to divest himself of his office. S.K. Subramaniam Pillay v. P. Govindaswamy Pillay*, 7 L.E.R. 39=21 Ind. Cas. 232=6 Bur. L.T. 180. See Final Part, 1913, Col. 1163.

Trust—(Continued).

(11) Powers of local bodies to sue in respect of trust properties in the absence of trustees. See ACT V OF 1884 (MADRAS LOCAL BOARDS), No. 1, 27 M.L.J. 284.

(12) Representation of estate by one of three administrators—Compromise by him—Effect on sale—Rights of *bona fide* auction purchaser—Limitation to set aside sale. See ADMINISTRATOR, No. 2, (1914) M.W.N. 921.

(13) Nature of benami transaction—Resulting trust. See BENAMI TRANSACTIONS, No. 6, 24 Ind. Cas. 10.

(14) Alienation by trustee—Suit for removing trustee and for declaration of alienation to be invalid—Voluntary transferee—Transferee for consideration but not in good faith—Transferee for consideration and in good faith—Distinction—Limitation—Appeal by alienee—Death of trustee pending appeal—Whether appeal abates—Whether alienee or trespassers can be joined as parties to suit under S. 92, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 129, 26 M.L.J. 537.

(15) Claim petition filed by trustees claiming under trust deed—Trust-deed found to be for benefit of judgment-debtor—Claim disallowed—Finality of order—Appeal. See CIV. PRO. CODE (1908), No. 335, 21 Ind. Cas. 748.

(16) Suit for removal of trespasser in possession of trust property—Applicability of S. 92, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 123, 22 Ind. Cas. 677.

(17) Suit under S. 92, Civ. Pro. Code, compromised and trustee discharged from liability to account—Compromise decree attacked as fraudulent and collusive—Declaration sought that discharge of trustee from liability to account is void—Sanction of Advocate-General whether necessary. See CIV. PRO. CODE (1908), No. 128, 23 Ind. Cas. 111.

(18) Suit to remove mutwali of mosque—Compromise by which plaintiff agrees to withdraw suit for consideration whether lawful. See CIV. PRO. CODE (1908), No. 125, 18 C.W.N. 1264.

(19) Alienation of trust property—Suit under S. 92, Civ. Pro. Code—Alienees whether proper and necessary parties. See CIV. PRO. CODE (1908), No. 126, 16 M.L.T. 178.

(20) Heir taking under a trust deed—His liabilities not affected. See HINDU LAW (GENERAL), No. 1, 27 M.L.J. 694.

(21) Father-in-law and son-in-law—Solicitor and client—Deposit and banker—Principal and agent—Creditor and debtor—Relationship between them—Whether that of an express trustee. See LIMITATION ACT (1908), No. 28, 22 Ind. Cas. 936.

(22) What amounts to dedication to temple—Mortgage by trustee for his own purposes—Decree upon mortgage and delivery to purchaser in execution—Suit by succeeding trustee to recover on behalf of the temple—Adverse possession—Limitation. See LIMITATION ACT (1908), No. 135, 27 M.L.J. 195.

Trust—(Concluded).

(23) Uralans—Alienation and delegation of trusteeship invalid—Custom—Appointment of agent by two out of three without giving notice to the third Uralan invalid. See MALABAR LAW, No. 3, (1914) M.W.N. 251.

Trusts Act.

(1) Trust by a Hindu—Revocation of trust—Withdrawal of revocation. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.

(2) S. 5—Composition deed—Test—Registration whether necessary. See REGISTRATION ACT (1877), No. 7, 16 Bom. L.R. 236.

(3) S. 8—Fixed deposit receipt—Depositor asking Bank on due date to renew the deposit on donee's name—Valid gift—Resulting trust cannot be implied from the transaction. See TRANSFER OF PROPERTY ACT, No. 105, 16 Bom. L.R. 534.

(4) S. 64. See CIV. PRO. CODE (1908), No. 129, 26 M.L.J. 537.

(5) S. 90. See MORTGAGE (GENERAL), No. 30, 27 M.L.J. 213.

Unconscionable Bargain.

Mortgage fixing 30 years for redemption—Whether unconscionable. See MORTGAGE (REDEMPTION), No. 9, 12 A.L.J. 432.

Under-proprietary Rights.

(1) *Oudh Sub-Settlement Act* (XXVI of 1866), rr. 2, 10—Under-proprietary right—Grant of cash nankar by mortgagee for mortgagor's maintenance whether amounts to grant of under-proprietary right—Nankar, meaning of—Under-proprietary right not granted by Settlement Court whether can be subsequently set up before Civil Court—Right to cash Nankar whether connotes right to possession as under-proprietor—Theka malikana—Long lessee whether under-proprietor—Proof required to establish under-proprietary right—Sir or nankar, under-proprietary right in respect of—Refusal of Settlement Court to grant Sub-Settlement, effect of—Estoppel—Payment of nazrana and cesses, effect of—Adverse possession—Ejectment of lessee through Civil Court.

The grant of an annual cash nankar by a usufructuary mortgagee to the mortgagor for his maintenance, during the subsistence of the mortgage or even at the time of its execution, does not indicate that such grant was intended to operate after the mortgage became irredeemable as a grant of an under-proprietary right. The claim for an under-proprietary right not established before, and not granted by, the Settlement Court having the powers of a Civil Court, cannot be subsequently set up before the Civil Court.

A right to cash nankar does not necessarily connote a right to possession of land as an under-proprietor (a).

A long lease, even a perpetual lease, does not constitute the lessee an under-proprietor, and

Under proprietary Rights—(Continued).

unless a claimant to an under-proprietary right shows a decree of the Settlement Court in his favour or a grant or a right acquired by prescription, the mere fact of his possession, when it is traceable to a lease granted by the ancestor of the *Talukdar*, does not invest him with an under-proprietary right (b).

Under r. 10 of the Oudh Sub-Settlement Act, a former proprietor, who is not entitled to a Sub-Settlement, can claim an under-proprietary right in respect of the land held by him as *sir* or *nankar* when he was in proprietary possession of the same within the period of limitation, either by himself or by some other person or persons from whom his title is derived (c).

The right to claim a Sub-Settlement under r. 2 of the Oudh Sub-Settlement Act, if negatively by the Settlement Court, cannot be subsequently revived.

Lessees are estopped from denying the title of persons stepping into the shoes of the original lessor.

Where it is proved that persons claiming under-proprietary rights have been paying *nazrana* and cesses to the landlord, their possession cannot be regarded as adverse, but they are not liable to ejectment as lessees through the Civil Court. *Tirbhuwan Bahadur Singh v. Mukta Prasad*, 22 Ind. Cas. 125.

KANHAIYA LAL, A.J.C.

References:—(a) 2 Ind. Cas. 297=12 O.C. 124, F. (b) 11 Ind. Cas. 920=14 O.C. 196, F. (c) 15 Ind. Cas. 181=15 O.C. 33 (38), R.

(2) *Declaration, Suit for, that defendants are not under-proprietors—Previous decision of Revenue Court holding defendants to be something more than ordinary tenants—Subsequent decision of Revenue Court holding defendants to be under-proprietors—Cause of action, accrual of—Lessee under Settlement Court decree vacating holding for five years and getting it back on new lease not different from terms of decree, effect of—Ouster—Dahyak right, when confers under-proprietary right, upon holder of former right—Cash dahyak right, whether connotes right to possession—Jurisdiction of Civil and Revenue Courts—Transferability of dahyak right—Preferential right to lease whether transferable—Holder of dahyak right and of preferential right to lease, whether an under-proprietor—Refusal of Settlement Court to grant sub-settlement to lessee of whole village, effect of—Costs—Court-fee paid on withdrawn part of claim, whether allowable as costs.*

In a suit between the parties, the Revenue Court decided that the status of the defendants was not that of ordinary tenants. In the next case between the parties, the same Court held that the defendants were under-proprietors. Then the plaintiff brought a suit in the Civil Court for a declaration that the defendants were not under-proprietors:

Under-proprietary Rights—(Concluded).

Held, that the cause of action for the civil suit arose not with the previous decision but with the entry of the defendants' names in the under-proprietary *khewat* under the subsequent order of the same Court.

Where a lessee under a Settlement Court decree vacated his position as such for five years and then had a new lease of the holding granted to him not materially inconsistent with the terms of the Settlement Court decree:

Held, that the rights of the successors-in-interest of the lessee under the Settlement Court decree were not destroyed or diminished, as the ouster did not last long enough to bar their rights by limitation.

A *dahyak* right, i.e., a right to ten per cent. of the rent roll unless accompanied by possession otherwise than by favour or force, does not necessarily connote that the holder of that right has also an under-proprietary right in the land.

A cash *dahyak* right does not necessarily carry a right to possession.

It may be open to a Civil Court to declare that a tenant holds under a decree of Court, leaving it to the Revenue Courts to decide in detail upon the rights, liabilities and other incidents of that tenancy (a).

A *dahyak* right is, ordinarily speaking, transferable.

A preferential right to a lease does not become transferable even if coupled with a *dahyak* right.

A *dahyak* right coupled with the right to claim a lease over the total of villages by preference to all comers does not, therefore, confer on the lessee an under-proprietary right.

The refusal of a Settlement Court to grant a sub-settlement to a lessee of the whole village conclusively shows that the lessee is not an under-proprietor.

The Court-fee paid on that part of the claim which is subsequently withdrawn cannot be allowed as costs. *Ram Jiyawan v. Raja Mohammad Abdul Hassan Khan*, 28 Ind. Cas. 231.

KANHAIYA LAL and SABONADIÈRE, A.J. CS.

References:—(a) Select Cases (Oudh) 282; 2 Ind. Cas. 297=12, O.C. 124; 13 Ind. Cas. 809=14 O.C. 335 and 5 C. 198 (206, 207), R.

Undue Influence.

Mortgage-deed—Execution admitted—Burden of proving failure of consideration. See TRANSFER OF PROPERTY ACT, No. 66, 31 Ind. Cas. 581.

Universities Act.

See ACT VIII OF 1904.

University Regulations:

Calcutta University—Duty to appoint University lecturers if discretionary or obligatory—Effect of part performance. See MANDAMUS, No. 1. 18 O.W.N. 480.

Upper Burma Civil Courts Regulation.

See REG. I OF 1896.

Valuation of Suit.

- (1) *Valuation of suit—Further appeal—Pre-emption suit—Pre-emption money declared to be payable by pre-emptor is not the criterion to determine the course of appeal in land suits.*

In land suits, where the value of the claim for purposes of jurisdiction is calculated according to the revenue payable on the land claimed, the course of appeal is determined by such value and not by the amount of money decreed to be payable to the vendee by the pre-emptor. *Teja Singh v. Sundar Singh*, 10 P.L.R. 1914 = 21 P.W.R. 1914 = 23 Ind. Cas. 89.

SHAH DIN and BEADON, JJ.

- (2) *Valuation of suits for cancellation of bond.* See ACT VII OF 1897 (SUITS VALUATION), No. 3, (1914) M.W.N. 767.

- (3) *Value of a suit, what is the.* See ACT XII OF 1887 (BENGAL, N.W.P. AND ASSAM CIVIL COURTS), No. 4, 23 Ind. Cas. 964.

- (4) *Suit for possession of colony land—Valuation—Court fee—Jurisdiction—Suit improperly valued—Procedure.* See CIV. PRO. CODE (1908), No. 269, 194 P.L.R. 1914.

- (5) *Suit for declaration by decree-holder under O. XXI, r. 63, Civ. Pro. Code—No dispute as to title between the judgment-debtor and the objector—Value of suit for purposes of jurisdiction.* See CIV. PRO. CODE (1908), No. 340, 253 P.L.R. 1914.

- (6) *Cognizance of plaintiff's valuation of relief sought when acceptable.* See COURT FEES ACT, No. 5, 24 Ind. Cas. 316.

- (7) *Undervaluation of property and filing of suit in wrong Court whether ground for exclusion of time.* See LIMITATION ACT (1908), No. 34, 17 O.S. 210.

Verification.

Importance of. See ATTORNEY, No. 1, 41 C. 118 = 14 Cr.L.J. 305.

Village Chaukidar.

Register of Births and Deaths kept by—Entries written to his dictation—Evidentiary value. See EVIDENCE ACT, No. 81, 12 A.L.J. 945.

Village Chaakidari Act.

See BEN. ACT VI OF 1870.

Village Site.

Gramanathram—Storing straw ricks—Possession and enjoyment—Whether adverse—Madras Act III of 1905. See ADVERSE POSSESSION, No. 5, 16 M.L.T. 48.

Vinehur Court.

Decision of—Appeal—Special appeal. See CIV. PRO. CODE (1908), No. 144, 16 Bom. L.R. 75.

Vrittis.

- (1) *Vrittis—Alienation—Special custom.*

Vrittis are as a rule inalienable. They can only be alienated in special cases and under special conditions, provided that such alienations are supported by local usage and custom. *Manjunath Subrayabhat v. Shankar Manjaya Apartha*, 16 Bom. L.R. 593 = 39 B. 26.

BEAMAN and HEATON, JJ

Reference:—23 B. 131, F.

Wagering Contract.

- (1) *Wagering contracts—Teji and Mundi contracts explained—Practice and intention of the parties—Milling notice—Effect of delivering it—Double option—Does it differ from a single option so as to make it a wager?—Resources of the contracting parties.*

A *teji* (rise in price) contract is a contract in which all the usual formalities of an ordinary contract are observed except that the seller only signs his (i.e., the seller's), note and gets an extra amount as consideration for his promise not to proffer delivery unless called upon. It is virtually the purchase of an option or right to call for delivery, the *teji* eater being bound to supply if called upon.

In a *mundi* (fall in price) contract the procedure is the same, a similar premium is paid to the *mundi* eater who signs a bought note, but the other party signs no sold note, merely purchasing an option to sell.

As to the question whether the *teji* contract, in the present case was an honest contract or was void as a wager:—

Held, that the practice and intention of the parties were that the holder of the option should, if the market rose, call for and the other party (the *teji* eater) should give delivery of milling notices.

Held, also that, in the rice trade, the delivery of a milling notice is considered to be tantamount and equivalent to the delivery of the actual rice.

Held, that the purchase of an option or right to call for shares is not necessarily a wagering contract, and the test to be applied in such contracts is whether differences *only* are intended to be paid.

Held further that a double option is no more necessarily a gamble than a single option.

Held that a contract cannot be proved to be a wagering contract unless neither of the parties intended under any circumstances to give or take delivery.

Held that the transactions in question were within the genuine commercial resources of the parties who were doing a large legitimate business and cannot therefore be classed as wagering contracts. *Dhunjee Deesai v. Pokermall Anandray*, 7 Bur.L.T. 54 = 24 Ind. Cas. 441,

YOUNG, J.

Wagering Contract—(Concluded).

(2) Grain pit actually purchased—Transfer of the pit not contemplated—Intention of the purchaser to resell it through the vendor—Whether gambling transaction. See CONTRACT ACT, No. 34, 12 A.L.J. 817.

(3) See PAKKA ADATIA, No. 1, 16 Bom.L.R. 213.

Waiver.

(1) *Waiver—Acceptance of overdue instalment, whether amounts to.*

The question whether the acceptance of an overdue instalment amounts to waiver of the lateness in payment is one to be determined in the circumstances of each case.

In the course of proceedings in execution of a money-decree for the sum of Rs. 782, a compromise was executed by the parties under which the decree-holder was to accept Rs. 650 in full satisfaction of the judgment-debt, provided that the judgment-debtor paid Rs. 100 at once, Rs. 250 in October 1908 and the balance of Rs. 300 in October 1909. In case of default, the decree-holder was to be entitled to execute his decree for Rs. 782. The judgment-debtor paid Rs. 100 on the spot, but he did not tender the sum of Rs. 250, which was due in October 1908, at the stipulated time. The decree-holder demanded payment of the entire balance remaining due on the footing of the original decree, but he subsequently accepted the payment of Rs. 250. Subsequently, the decree-holder sought to execute his decree for Rs. 782 giving the judgment-debtors credit for what they had paid :

Held, (1) that the acceptance of the overdue instalment of Rs. 250 under the compromise was sufficient to constitute a waiver ; and

(2) that, by accepting it, the decree-holder condoned the default and could execute his decree only on the footing of its being a decree for Rs. 650 in accordance with the compromise. *Pitambar Saha v. Krishna Mohan Das*, 23 Ind. Cas. 391.

CARNDUFF and RICHARDSON, JJ.

(2) Default in payment of instalments—Mere failure to sue whether sufficient proof of waiver. See LIMITATION ACT (1909), No. 96, 8 S.L.R. 63.

(3) Provision as to waiver enacted only in favour of promise. See LIMITATION ACT (1908), No. 4, 24 Ind. Cas. 507.

Wajib-ul-arz.

(1) *Pre-emption—Wajib-ul-arz, not the custom but a mere record of custom—Language ambiguous—Evidence insufficient.*

The record in the *Wajib-ul-arz* as to the custom of pre-emption is not the custom. It is a mere record of custom, and if its language is ambiguous it may, when unsupported by other evidence, be insufficient either to prove the custom as a whole or any particular incident of that custom. *Jahangira v. Amir Singh*, 12 A.L.J. 19 = 23 Ind. Cas. 245.

RICHARDS, C.J., and TUDBALL, J.

Wajib-ul-arz—(Concluded).

(2) *Grazing right—Non-proprietor or ghair malik—Wajib-ul-arz—Shopkeepers—Permissive grazing, whether confers right.*

A clause in a *Wajib-ul-arz* the heading of which referred only to proprietors and others who were in any way connected with the settlement of the land revenue, laid down that the cattle of every owner and non-owner shall graze in the *shamilat banjar* without charge. Relying on this clause of the *Wajib-ul-arz* as well as on the fact that in the past they had been grazing their cattle in the *shamilat* free of charge, the shopkeepers of various castes, who were neither proprietors nor tenants in the village, claimed grazing rights in the *shamilat* land :

Held, that, as they were outside the pale of the village community properly so called, they were not parties to the agreement which was embodied in the *Wajib-ul-arz* and, therefore, had no right of grazing in the *shamilat* land.

Held, further, that the mere fact that they had been permitted by the proprietary body to graze their cattle in the *shamilat* free of charge did not give them the right they claimed.

The word "*ghair malik*" explained. *Munshi Ram v. Rulia Ram*, 223 P.L.R. 1914 = 126 P.W.R. 1914 = 95 P.R. 1914 = 24 Ind. Cas. 980.

* SHAH DIN and SCOTT-SMITH, JJ.

(3) Evidentiary value of. See CUSTOMS (PUNJAB—ALIENATION), No. 1, 7 P.W.R. 1914.

(4) Construction of, as to exclusion from inheritance. See HINDU LAW (EXCLUSION FROM INHERITANCE), No. 1, 22 Ind. Cas. 138.

(5) *Wajib-ul-arz* for a settlement for certain period—Reference to pre-emption in the—Custom or contract. See PRE-EMPTION, No. 10, 12 A.L.J. 527.

(6) Entry in, clear and distinct—No evidence of custom—Effect. See PRE-EMPTION, No. 21, 12 A.L.J. 800.

Warrant.

Penal Code, S. 225—Civil warrant not addressed to bailiff by name—Arrest—Legal.

A civil warrant not addressed to a particular bailiff by name but addressed "to the bailiff of the Court" is not invalid, therefore, the rescuer of a person arrested under such warrant is guilty of an offence under S. 225 of the Indian Penal Code. *In re Abdul Rahman Sahib*, 15 Cr. L.J. 439 = 24 Ind. Cas. 175 = (1914) M. W.N. 498 = 15 Cr. L.J. 576 = 25 Ind. Cas. 328.

AYLING, J.

References :—5 C.W.N. 843 ; 26 C. 748 = 3 C. W.N. 741, D.

Warranty.

(1) Damages for breach of warranty—Measure of damages. See CONTRACT ACT, No. 72, 23 Ind. Cas. 949.

Warranty—(Concluded).

(2) Whether Court gives warranty of title in execution sales. See MORTGAGE (BY CONDITIONAL SALE), No. 3, 23 Ind. Cas. 871.

Waste Land.

Dispossession of.—Dispossession.—Adverse possession.—Onus of proof.—Limitation. See LIMITATION ACT (1908), No. 134, 106 P.W.R. 1914.

Water.

(1) *Water—Use by villagers—Appeal by Government or parties interested.*

Though a channel is constructed by Government for the sole use of certain villagers, the villagers would not be entitled to all the water flowing through the channel, unless they could show that they had been using all the water or that the water flowing through the channel was insufficient for agricultural purposes. A Ryotwari proprietor is only entitled to the customary supply.

Though Government does not appeal from an order granting a declaration against it, it is competent for the villagers, who rely upon the paramount right of Government to distribute, to do so. *Sivasailam Iyer v. Ramakrishna Iyer*, (1914) M.W.N. 788.

AYLING and HANNAY, JJ.

(2) *Civ. Pro. Code, 1908, S. 102—Right to flow of water to another's land—Culvert for passage of water—Natural right to discharge of water—Easement by grant—Culvert closed—Flood water remaining on land for long time—Impossibility of sowing crop—Suit for damage after 5 years—Decree for Rs. 50—Right of second appeal doubted—Misapprehension of evidence no ground for second appeal—Limitation—Suit not barred—Liability of defendant—Act of God.*

The plaintiff's case was that his land lay higher than the land to the east and that the surplus water on his land accordingly flowed away in that direction. Some 25 years ago, the District Board made a road to the east of his land and, recognising his right to the flow of surplus water, to the east, made a culvert in the road by which the water passed. This was blocked by the defendants, the Light Railway Company, in 1902. In 1907, there was a flood and as the water could not flow away through the culvert, the plaintiff's house and crops were damaged and he could not sow another crop. The lower Court held that the opening of the culvert could not have saved the house and crops, but that it would have rendered it possible to the plaintiff to grow his crop. The suit was accordingly decreed for Rs. 50 only:

Held, on appeal by the defendants;

(1) that if the lower appellate Court had misapprehended what the evidence on a particular point was, that was not a ground for second appeal;

(2) that the plaintiff might be regarded either as having a natural right to the discharge of his surplus water over lower land, or as having

Water—(Continued).

an easement by grant from the District Board. In the first contingency, limitation would run from the date of the damage (a) and it might be open to doubt whether an appeal was permitted by S. 102 of the Code of Civil Procedure; in the second contingency also no question of limitation would arise (b);

(3) that the defendants themselves having blocked the culverts, it did not affect their liability whether the District Board ought to have cleared it or not.

(4) that the defendants were made liable, not for the flood, but for the flood water remaining in the land for a long period owing to the culvert being closed, and hence it did not matter that the flood was the act of God. *Behar Bukhtiarapore Light Railway Co., Ltd. v. Jhandoo Mahton*, 21 Ind. Cas. 393.

COXE and CHATTERJEE, JJ.

References:—(a) E. B. and E. 622, R. (b) 6 C. 394=7 C L.R. 529=7 I.A. 240, R.

(3) *Right to discharge water, not claimed as easement but as ancillary to ownership of land.*

The plaintiffs were the owners of land on the south of that of the defendants, on a higher level, and the water falling on the land of the plaintiffs flowed on to the land of the defendants who built a bund on their land so as to obstruct the water accumulated on the plaintiff's land from flowing towards the north through the defendant's land. The plaintiffs alleged that they were entitled to have the water on their land discharged through the defendant's land; but they did not claim it as an easement but as a right ancillary to their property which they had not parted with;

Held, that there was such a right as that claimed by the plaintiffs, although the plaintiffs did not claim the right to discharge their water and did not in fact discharge their water on to the defendant's land by any definite channel.

That the duty of the defendants was to allow the water from the plaintiff's land to pass on through their land. It was then open to them to dispose of it in the way they thought best. *Ramadhin Singh v. Jadunandan Singh*, 19 C. W.N. 54.

STEPHEN and MULLICK, JJ.

(4) *Natural stream—Attributes of a natural stream—Rights of upper and lower land owners—Right of lower owner to obstruct the flow by a dam—Easements Act, S. 7, Ills. (h) and (i).*

Suit for removal of a bund erected by defendant across a stream known as the Nallavagu in the Guntur District. This stream originated in Ongole taluk, and up to a certain point it had a defined course. There was a bifurcation at that point in 2 directions (north-western and south-eastern), and in the south eastern direction it had all the requisites of a running stream up to

Water—(Continued).

a certain place and then diffused itself over a large area and ultimately emptied itself into the Buckingham Canal.

Held that the Nallavagu was a natural stream in its south-easterly course and the defendant was not entitled to put up the dam complained of (a).

Per Wallis, C. J.—The plaintiff, as owner of the upper land in an open country, has a natural right that water naturally running in or falling on his land and not flowing in defined channels should be allowed by the owner of adjacent lower land to run naturally thereto; and the latter has no right to erect just over the border of his land a barrier which has the effect of throwing back the water upon the land of the upper owner (b).

Per Seshagiri Iyer, J.—A volume of water which has acquired a distinctive character as a stream up to a point does not lose it by the fact that in the rest of its course it is not well defined. The attributes of a natural stream are:—It must have a fairly defined course. It must move. Its water must be capable of identification. It need not always be confined within banks. Its width need not be of particular dimensions (c).

Though it is open to a person to protect himself against extraordinary floods in anticipation, the rule relating to such floods does not apply to conditions where the ordinary flow of water in a natural stream is concerned. The fact that a large volume of water will year after year flow in a channel during well known periods will not constitute the water an extraordinary flood (d).

The distinction between illustrations (h) and (i) to S. 7 of the Easements Act amounts to this: In the former case the water must flow in a natural stream. In the latter although there may be no defined channel, the water must have a regulated course. The one deals with the developments of a stream, while the other deals with its beginnings.

The putting up of a dam to enable the defendant to better cultivate his fields is not an ordinary agricultural operation (e).

The observations in 29 M. 539 must be limited to the erection of buildings in an urban area and should not be extended to agricultural areas in rural parts (f). *Gopala Krishna Yachendrala Yaru v. Secretary of State*, 16 M.L.T. 597.

WALLIS, C. J. and SESHAGIRI IYER, J.

References:—(a) 12 C. 323; 8 C. 46, R. (b) and (d) (1828) 3 Bligh. N.S. 414 (420); (1828) 8 B. and C. 255; (1874) 10 Ex. 4; (1876) 2 Ch. D. 692; (1878) 3 C.P.D. 168; (1884) 18 Q.B.D. 181; L.R. 7 Eq. 377, R. (c) 1 B. and Ad. 301; 30 Conn. 180; 108 Mass. 219; L.R. 8 Ex. 107; 2 H.N. 870; 37 M. 304, R. (e) L.R. 3 H.L. 330; (1877) 2 App. Cas. 839; L.R. 10 Ex. 10; 1 I.A. 364; 12 M.P.C. 131; 18 M. 19, R. (f) 29 M. 539, D.; 25 M.L.J. 276, *Appr.*

Water—(Concluded).

(5) *Rights in a natural stream of owners of lands through which it flows—Damming it up—Reasonable use of flowing water without diminishing the quantity or impairing the quality.*

A riparian proprietor may take from a flowing stream as much water as he really requires for ordinary purposes, such as for drinking, washing and so on, even though he seriously diminish the quantity available for the proprietors below him, but for purposes of irrigation he can only take a reasonable amount, and what is a reasonable amount must be decided according to the particular circumstances of each case.

Where it was found that the defendants-appellants took the whole of the water that reached their land for irrigating purposes and thus completely cut off the water from the plaintiff respondent's land.

Held, the user was illegal, unless he had acquired any right of such user by prescription. *Nga Pi v. Nga Kyan Tha*, 7 Bur. L.T. 282.

MCCOLL, J.C.

(6) *Right to water in a running stream—Surface water—Test.* *Villuri Adinarayana v. Polimera Ramudu*, 12 M.L.T. 697=24 M. L.J. 17=17 Ind. Cas. 648=37 M. 304. See Final Part, 1912, Col. 1069.

(7) *Owners of upper and lower land—Right to drain water.* *Sankarappa Naicker v. Pari Naicker*, (1913) M.W.N. 640=25 M.L.J. 276=21 Ind. Cas. 62. See Final Part, 1913, Col. 1172.

(8) *Suit to recover Kulivettā—Jurisdiction.* See ACT IX OF 1887 (PROVL. S. C. COURTS), No. 14, 22 Ind. Cas. 144.

(9) *Water-tax paid to Government by landlord—Not entitled to recover from tenant.* See CONTRACT ACT, No. 65, (1914) M.W.N. 66.

(10) *Surplus water passing through defendant's land and across the land of other owners—Defendant's right to use wholly for his own purpose.* See EASEMENTS, No. 2, 19 C.L.J. 45.

(11) *Prescriptive right to discharge water—Tenements not contiguous—Channel across the public way—Right of easement in channel.* See EASEMENTS, No. 1, 19 C.L.J. 42.

(12) *Right to take water from tank—Right to reach water by definite mode of access—Servient owner if can substitute some other means of access.* See EASEMENTS, No. 5, 20 C.L.J. 97.

(13) *Right to regulate on the lower land rain water flowing from the higher.* See EASEMENTS ACT, No. 3, 12 A.L.J. 685.

(14) *Tidal navigable river—Grant of exclusive fishery in river—Shifting of river from its bed—Effect on grantees—Right to 'follow the river'—English law of waters—Applicability to Lower Bengal.* See JALKAR, No. 2, 18 C.W.N. 1217.

Water-fowl.

Right to snare water-fowl if included in jalkar. See JALKAR, No. 1, 22 Ind. Cas. 844.

Way.

(1) Caste—Right of way—User by a few on behalf of the caste—Prescription. See CASTE, No. 2, 27 M.L.J. 110.

(2) Private right of way and a highway where they may exist over the same road—Right of easement of private individual over public property. See EASEMENTS, No. 1, 19 C.L.J. 42.

(3) Right of way by prescription—Period of user to be 20 years or more. See EASEMENTS ACT, No. 4, 12 A.L.J. 415.

(4) Public road—Metalled and unmetalled parts—Right of public way. See PUBLIC ROAD, No. 1, 12 A.L.J. 1137.

Weighing.

• Right of weighing in old market—Old market closed and a new one opened—Permission to weigh—License—Right of licensees. See MARKET, No. 1, 12 A.L.J. 447.

Will.

(1) Will—Revocation—Will not forthcoming—Presumption of revocation—Revocation must be pleaded—Execution of will duly proved—Pleadings—If no plea of revocation taken, Court not to presume revocation—Succession Act, S. 57—Probate and Administration Act, S. 24.

When a Will is shown to have been in the custody of a testator, and is not found at his death, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it. But this rule of law bears only on revocation when that is an issue in the suit. Then the presumption may be rebutted by the facts (a).

When the due execution of a will is proved in the manner required by law, it lies upon the objector to plead and prove revocation. If revocation is not pleaded, then the Court will not presume revocation from the fact that the Will (in this case a registered one) is not forthcoming. *Sarat Chandra Bysack v. Golap Sundari Dasl*, 21 Ind. Cas. 121=18 C.W.N. 527.

COX and RAY*JJ.

References:—(a) (1876) 1 P.D. 154=45 L.J. P. 49=34 L.T. 372=24 W.R. 860; 27 L.J.Q.B. 173=8 E. & B. 876=4 Jur. (N.S.) 163=120 Eng. Rep. 327=112 R.R. 813, *Rel.*

(2) Will—Interpretation—Intention of testator to be gathered from language of will and surrounding circumstances—Illegitimate son of Hindu by Mahomedan concubine, treated as Hindu and living and marrying a Hindu lady according to Hindu rites—Issue if legitimate—"Aulad" and "Khandan," meaning of, *prima facie* refer to legitimate issue.

Where it appeared on the evidence that the testator, a Hindu, treated J, an illegitimate

Will—(Continued).

son of his by a Mahomedan woman, as a Hindu in religion and desired that others should so treat him, that he had been married twice to two Chhatti ladies, and he treated these marriages as lawful marriages and desired that others should so treat them, and consequently resolved to regard and treat the offspring of these unions as legitimate and desired that they should be so treated and regarded by others; and by a testamentary disposition, dated the 15th of May 1878, made a settlement of certain properties for the maintenance of J and his *aulad* issues for generation after generation in which it was provided *inter alia* that the grant was to be perpetual, impartible, indivisible and incapable of being otherwise charged or encumbered and was not to be the subject of any co-ownership, and that, on the death of J, his representative was to succeed him as proprietor without "division" as a *rais* and this proprietor was to be one of the issues (*aulad*) of J "on whom the right may devolve," the other issues (*aulad*) of the family (*khandan*) of J, being only entitled to get food and raiment out of the grant, with the further provision that the marriage and funeral expenses of the male and female children of the family of J were to be paid also out of the grant.

Held, that, in interpreting the document, the Court had to determine what were the wishes and intention of the testator as revealed by its language, viewed through the light of the circumstances which surrounded him at the time he made it, and that the intention of the testator was that, on J's death, only those of J's issue whom he wished to be regarded as J's legitimate issue by his Chhatti wives were to benefit by the gift.

That there was nothing in the will to suggest that the word *aulad* should be given a meaning different from its *prima facie* meaning of "legitimate issue." Nor was there any reason for extending the meaning of the word "*khandan*" which ordinarily refers to the group of descendants who constitute the family of the progenitor, so as to include illegitimate offspring.

Quære:—Whether J who was found to have done his utmost to become an orthodox Hindu and to pass as such in society and whose father from his youth upwards aided and encouraged him in those efforts and procured his marriage, when he was only 15 years of age, to be celebrated according to strict Hindu rites with a Hindu lady, did in fact thereby become a Hindu and whether the issue of such marriage was legitimate according to law. *Bhalya Sher Bahadur v. Bahiya Ganga Baksh Singh*, 18 C.W.N. 401=12 A.L.J. 188=(1914) M.W.N. 184=15 M.L.T. 169=26 M.L.J. 291=19 C.L.J. 277=22 Ind. Cas. 293=35 A. 101=16 Bom. L.R. 306=17 O.C. 69 (P.C.).

LORD ATKINSON, LORD SHAW, SIR JOHN EDGE and MR. AMEEB ALI.

(3) Will by Hindu, construction of—Hindu testator, bequest by, to nephews, contingent

Will—(Continued).

upon the death of son directed to be adopted without issue and after the life of widow—Conditional bequest—Beneficial interest—Estate if in abeyance—Bequest by implication—Contingent bequest—Annuity by will—Succession Act (X of 1865), S. 107, illustrations.

Where a Hindu testator by his will authorized his widow to adopt a son and provided that, if she died without adopting a son or if the son adopted predeceased her without leaving any male issue, in such event, his estate, after the death of his wife, who was also appointed sole executrix, should pass to testator's sister's sons who might be living at his death :

Held, that the widow and the adopted son took a qualified interest and on the death of the adopted son without issue and of the testator's widow thereafter, the property passed on to the nephews as directed in the Will.

An estate on a future contingent event would be within the meaning of S. 107 of the Succession Act as contemplated in the illustrations thereof (a). *Bhupendra K. Ghosh v. Amarendra Nath Dey*, 18 C.W.N. 360=41 C. 642=24 Ind. Cas. 458.

JENKINS, C.J., and WOODROFFE, J.

Reference :—(a) 9 M.I.A. 135, R.

(4) *Will of Hindu — Interpretation, fundamental principles of, common to Hindu and English wills—Court's duty to give effect to intention as expressed, not to add to will—Surrounding circumstances to be looked at as aid to interpretation only—Religious opinion and race, in what way relevant—"Liberal construction" of native wills, meaning of—Contemporaneous deed, referred to in will, and interpretation by persons interested, if may be referred to—English rules of construction, if in applicable—Joint power of adoption given to two wives—Joint discretionary power to donees personæ designata, if may be exercised by survivor alone—Power to adopt when discretionary, whether given for secular or religious purpose—Intention as expressed—Hindu Law—Joint power to co wives to adopt, if legal and how to be interpreted—Child if may be received in adoption by more than one wife—Custom if may override logic.*

Only one of several widows left by a Hindu can receive a child in adoption so as to step into the position of being its adoptive mother.

But because this is so, it does not follow as a matter of necessity that a power given to more than one wife to adopt must be an invalid power, for in many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view.

The Judicial Committee refrained from deciding, upon the imperfect materials on the record of this case, a question of such far-reaching importance as the validity and the

Will—(Continued).

interpretation of a joint power of adoption given by a Hindu by will to his two wives.

When a discretionary power of adoption was given to the testator's two widows and the power had to be exercised by the joint donees in agreement, it was clear law, independent of any English legal doctrines or decisions, that the death of one of the donees puts an end to the joint power.

When, on a proper construction of the Will, the words of the Will permitting adoption referred only to the period of time when both widows were living and to the choice and adoption of the two widows acting jointly, and when the will was silent as to the period after the death of one of the widows, to hold that the surviving widow could adopt would be to provide for a period of time which the testator left unprovided for and unnoticed in the will, and to do so would be to make an addition to the testamentary dispositions.

The words used in the Will being "You (his two wives) should adopt a boy who is our *sannihita* (one closely related) whenever it strikes that our *samastanam* (family) should continue."

Held, that the religious motive of procuring for himself an heir by adoption did not, on the terms of the Will, appear to be so overmastering that the Court must regard his intentions to be dictated by it alone, but that the language of the Will pointed rather to the predominance in the testator's mind of the secular motive.

When the exercise of a power is vested in the discretion of joint donees *personæ designata*, the death of one of the donees puts an end to the joint power; the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague. The case is different when the power is vested not in the donees *personæ designata*, but in occupants for the time being of a specified office such as executors or trustees, which is not the case here.

In construing a Will, a Court must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things including the race and religious opinions of the testator and influences and aims arising therefrom—but all this solely as an aid to ascertaining the meaning of the language used by the particular testator in the particular Will. Once the right construction is settled, the duty of the Court is loyally to carry out the intentions as expressed and none other. This duty is universal, and is true alike of Wills of every nationality and every religion or rank of life. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If any even-uality arises which the will leaves unprovided for, there will be intestacy.

This fundamental principle does not clash with the principle that the Court will not

Will—(Continued).

necessarily apply English Rules of construction to a Will of a Hindu like the present, nor does it clash in any way with what is sometimes called "giving a liberal interpretation to native Wills."

The native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect, is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained, they must not be departed from.

It is legitimate in construing a Will to look at a contemporaneous document referred to in the Will which the testator wrote or caused to be written with the express intent to render clear his wishes with regard to his succession.

The interpretation placed on the power by the testator's widows was referred to "for what it was worth." *Yenkata Narasimha Appa Row v. Parthasarathy Appa Row*, 18 C.W.N. 554 = 12 A.L.J. 315 = (1914) M.W.N. 299 = 19 C.L.J. 869 = 26 M.L.J. 411 = 15 M.L.T. 285 = 16 Bdm. L.R. 328 = 23 Ind. Cas. 166 (P.C.).

LORD SHAW, LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

(5) *Hindu Law — Will, construction of — Executory devise — Time of distribution, death of testator if — Event happening after testator's death, gift over if to take effect on — Principles of interpretation.*

Where a Hindu by a Will, not governed by the Hindu Wills Act, purported to give his properties in equal shares to two of his sons named, with a proviso that "should either of these two sons die without leaving any male issue, the survivor is to take the whole of the property appertaining to the share of the deceased son who may leave no male issue after undertaking to defray the expenses in connection with the maintenance of his widow and the maintenance and marriage of his minor daughters?"

Held, that the words clearly contemplated survivorship whenever it should occur—whether before the testator's death or after—and that, on the death, without leaving male issue, of one of the two sons, both of whom survived the testator, the share bequeathed to him passed to the surviving son, subject to the obligations specified.

It has for many years been a settled principle that words of this class, being in general terms, must receive their full and not a restricted meaning, though there may be older cases warranting a suggestion that the terms employed in this will should be limited to death occurring before the death of the testator himself.

Will—(Continued).

There is nothing specifically, either English or Indian, in the idea that a will of a testator must be construed on that principle which would enable Courts of law most fully to give effect to the intention expressed by his words. It may be that, if the words he employs are *voes signatas*, they must be so accepted, whatever the suspicion may be as to the testator having had that particular view of his own language. But, in ordinary circumstance, ordinary words must bear their ordinary construction, and the whole Will, *i.e.*, the whole of the words employed by the testator must be looked at together so as to determine his whole intention. Furthermore, it is not on this principle legitimate to take words which have a general meaning and subject them to limitations which the words do not necessarily imply.

The period of distribution to which an executory devise will be referred, will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition (a). *Chuni Lal Parvatishankar v. Bai Samrath*, 18 C.W.N. 844 = 26 M.L.J. 647 = 19 C.L.J. 563 = 16 Bom. L.R. 866 = 88 B. 399 = 16 M.L.T. 59 = 23 Ind. Cas. 645 = 12 A.L.J. 742 = (1914) M.W.N. 441 (P.C.).

LORD SHAW, LORD MOULTON and MR. AMEER ALI.

Reference :—(a) (1874) L.R. 7 H.L. 388, F.

(6) *Rent, suit for—Letters of administration without copy of will—Succession Act (X of 1865), S. 189—Hindu Wills Act (XXI of 1870), S. 2—Probate and Administration Act (V of 1881), Ss 24, 25—Court, if has jurisdiction to decide as to inaccurately drawing up of letters of administration—Tenant, if can invite Court to decide as to the ownership of rent—No issue between parties set up by the tenant as to right to receive rent—Instrument, validity of, if can be challenged by a stranger.*

The terms of a Hindu will can be proved only by a reference to the probate or letters of administration as the case may be.

Where the original will has been lost and its terms have been satisfactorily proved by secondary evidence, a copy of the terms as found by the Court should be annexed to the probate or letters of administration as the case may be (a).

A person to whom the letters of administration have been granted without the copy of the will annexed, can apply only to the Court which has granted it, for amendment.

No Court other than the Court of probate is competent to hold that the letters of administration had been imperfectly or inaccurately drawn up, or, in an investigation of the proceedings of the probate Court, to hold that the letters of administration have the same effect as if a copy of the terms of the will had been annexed thereto.

Where it is conceded that either A or B is the landlord of C, and A institutes a suit to

Will—(Continued).

recover rent from C to which B is joined as a party, if it is agreed between A and B that A is entitled to the rent, it is not open to C to invite the Court to determine whether A or B is entitled to recover rent from him. **Sukumari Gupta v. Bharat Mandal**, 20 C.L.J. 148.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—(a) L.R. 1 P.D. 154, F.

- (7) *Will of which probate has not been taken, whether can be proved—Succession Act (X of 1865), S. 187—Proper representation of testator's estate, where no probate taken.*

Sarbamangola Debi v. Mahendro Nath Nath (4 C.509) is authority for holding that a will of which probate has not been taken, may be proved in a proceeding other than a proceeding under the Probate Act.

But a will uncovered by a probate or letters of administration cannot prove that anybody named therein has title to the estate of the testator.

A legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the sale under the will. **Basanta Kumar Chuckerbutty v. Gopal Chunder Das**, 18 C.W.N. 1136.

D. CHATTERJEE and N. R. CHATTERJEE, JJ.

*References:—*4 C. 509; 4 C. 341; 30 C. 1044, R.

- (8) *Mult—Document, if a will—Asthali properties—Successor, appointment of—Title, question of—Letters of administration.*

No letters of administration can be granted in respect of properties held by a person in his capacity of Mohunt (a).

On a *bona fide* application for probate or letters of administration, the Court will not go into a question of title, with reference to property, of which the deceased purported to dispose or in respect of which he died intestate.

Where a Mohunt by a document purported to appoint his successor on the *gaddi*, and to make over to him as Mohunt all the properties of the *Asthal* and the right of performing the *Debheba* and did not purport to deal with any property of his own:

Held, that the document was not a will and could not be admitted to probate (b). **Maharaja Jagadindra Nath Roy v. Madhusudan Das Mohunt**, 20 C.L.J. 307.

CHITTY and TEUNON, JJ.

References:—(a) 16 C.W.N. 798; 17 C.L.J. 65, F; 12 C. 375, D. (b) 32 C. 1082, F.

- (9) *Will—Construction—Donee not in existence at testator's death—Rule in Tagore case—Life estate to daughter—Gift over to cousins—Gift takes effect if daughter has no son in testator's lifetime.*

A testator devised that his daughter should have a life-estate of Rs. 150 and the rent of a

Will—(Continued).

house. If the daughter had a son or sons, he or they was or were to take the whole estate of the testator on attaining the age of 18 and then bearing a good character. If the daughter had no male issue, then on her death the whole of the testator's estate was to go to his cousins, who were appointed executors of the will. The daughter had no son at the time of the testator's death; but she had a son born to her after her father's death. She and her son brought a suit for the construction of the will and for administration of the testator's estate. The lower Courts held that in the events that had happened there was an intestacy and that the daughter was entitled to succeed to the testator's estate. On appeal to the High Court,—

Held, that the dominant intention of the testator was to give the whole of his property to his grandson, but as no grandson was in existence at his death, that intention was defeated; and that his intention next was that his estate should be retained in his family, i.e., with his cousins. **Narandas Vrijbhukhandas v. Bai Saraswati**, 16 Bom. L.R. 577=38 B. 697.

BEAMAN and HAYWARD, JJ.

- (10) *Will—Bequest—Gift over if minor legatee do not attain full age, whether valid—Failure of prior bequest, not as contemplated—Validity of gift—Succession Act (X of 1865), Ss. 111, 116.*

A gift over to a person in the event of a minor legatee not having attained full age is valid. The specified uncertain event in this case, under S. 111 of the Succession Act, is the failure of the minor to attain his majority.

S. 116 of Succession Act, which merely incorporates the rule of the English law, provides that a gift over shall take effect on the failure of a prior bequest, although the failure may not have occurred in the manner contemplated by the testator.

Where a testator contemplated that, if his son died a minor and his widow survived him, she would acquire the property before the two daughters:

Held, that this would not deprive the two daughters of the benefit of the legacy if the widow predeceased the son. **Durga Prasad v. Raghu Nandan Lal**, 28 Ind. Cas. 537.

FLETCHER and RICHARDSON, JJ.

- (11) *Will—Succession Act (X of 1865), S. 46—Testamentary capacity—Burden of proof—Witness's assertion that the testator was in full possession of his senses, value of—Will, Terms thereof, unusual—Evidence of Testamentary character, doubtful—Mental powers—Valid requisites—Sound and disposing mind—Signing of one's name.*

The testator must be of sound and discerning mind and memory, so as to be capable of making a disposition of his property with sense and judgment in reference to the situation and

Will—(Continued).

amount of such property and to the relative claims of different persons who are or might be the objects of his bounty.

Where a testator is of sound mind when he gives instructions for a will, and at the time of signature, accepts the instrument drawn in pursuance thereof, even though not able to follow its provisions, he is deemed to be of sound mind when it is executed (a).

b Mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of property. Nor is it sufficient to show that the testator was conscious when he executed the instrument.

c The burden is upon the propounder of the will to show that the testator had testamentary capacity, that is, capacity to comprehend the nature and effect of his act; to discharge this burden, it must be shown that he was able to dispose of his property with understanding and reason, that he was able to realise his position, to appreciate his property and to form a judgment with respect to the parties whom he decided to benefit.

An assertion by a witness that the man was in full possession of his senses at the time of making of the will, is of little value; it is merely an expression of his opinion, the value of which depends in a large measure on the facts observed by him (b).

A Court will not reject a will, merely because its terms appear extraordinary, against clear evidence of due execution by a competent testator. But where the terms are unusual and the evidence of testamentary capacity doubtful, the vigilance of the Court will be roused, and, before pronouncing for the will, the Court will require to be satisfied beyond all reasonable doubt that the testator was fully cognisant of its contents, and in a condition to exercise and did exercise thought, judgment, and reflection respecting the act he was doing.

It is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusion of fact of those who have. This principle embodies the general rule, but is not of universal application; and where the case is one not so much of estimate of credibility of the witnesses for the propounder of will, who have been belied by the trial Court, as of the effect of their statements on the assumption that they have spoken the truth, the appellate Court will not hesitate to reverse the judgment of the primary Court. If good grounds are made out. *Suall Kumar Banerjee v. Apsari DabI*, 20 C.L.J. 501.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) (1901) A.C. 354, R. (b) (1831) 9 Conn. 102. R.

(12) *Will, construction of—Succession Act (X of 1965), S. 111, rule of construction in—Legacy with power to sell, make a gift, etc., in respect of properties bequeathed, if absolute gift to legatee.*

Will—(Continued).

A Hindu in his Will provided as follows: I bequeath to both of you (the testator's widow and his brother's daughter) the rest of the properties. . . . You will become entitled to sell or make a gift or *heba*, etc., in respect of the said properties and hold and enjoy the same. If by the will of God one of you should die before the other, whoever will survive will hold and enjoy the whole of the property as *malik*."

Held, that the case fell within S. 111 of the Indian Succession Act, and the widow not having predeceased her husband and having survived the period of distribution took an absolute interest under the will.

That the ordinary rule of construction, when the testator has given an absolute gift to a legatee and then has made a gift over *simpliciter* on a contingency of death, is that he was referring to death before the period of distribution. This is clearly provided for in S. 111, Succession Act, which applies to Hindu Wills.

The rule in this section is an absolute rule of construction and not a rule of construction which may be contradicted by other evidence appearing on the face of the will. *Nistarini Debbya v. Behary Lal Mukherjee*, 19 C.W.N. 52.

FLETCHER and RICHARDSON, JJ.

(13) *Will—Construction of document—Disposition in consideration of protection—No contract—Revocation.*

Where a document calls itself a will and is not written on stamp paper and the beneficiaries are to take only after the death of the executants and the rights of the executants have not been restricted by themselves, such an instrument is a will and not a deed of settlement. Where the testator makes a disposition in such an instrument to his daughter and son-in-law on their protecting him till his death, *held*, there was no binding contract but only a motive for a bequest and the will was revocable. The mere raising of expectations in the mind of a person that a bounty in the shape of a legacy would be left by will does not amount to a contract, and even if some acts are performed by that person owing to the raising of such expectations, such acts will be referable to the expectation and not to a contract. *Aiyasami Udayan v. Appasami Udayan*, (1914) M.W.N. 889.

SADASIVA IYER and NAPIER, JJ.

References:—8 App. Cas. 467, p. 4, F.; 19 M. L.J. 106, F.

(14) *Will—Appointment by implication.*

The mere fact that a testator has appointed by will his elder son to be trustee of his minor younger son and directed him to deal with a certain house as the trustee of the minor in the event of the testator's death during the younger son's minority is not sufficient to indicate that the elder son was appointed the executor of his

Will—(Continued).

will. *Jannat Ally In the matter of the Will of Mohamed Ally*, 7 L.B.R. 266=25 Ind. Cas. 820.

HARTNOLL, OFFG. C.J. and ORMOND, J.

(15) *Codicil neither registered nor deposited according to S. 105, Succession Act—Effect—Ss. 105, 159, Succession Act—Bequest for repair of graves—Charitable bequest—Perpetuities—Conditions in will as to election of deacons and communion services—Validity—Gift over to another charity—Validity. Administrator General of Bengal v. Hughes*, 40 C. 192=21 Ind. Cas. 183. See Final Part, 1913, Col. 1176.

(16) *Hindu Will—Perpetuities, rule against—Hindu Wills Act (XXI of 1870), Ss. 2, 3—Succession Act (X of 1865), Ss. 101, 102—Gift to grandsons after all of them have attained majority, if valid—Primary and secondary intention—Gift if may be sustained as to grandsons in existence at testator's death. P. V. Subramania Pillai v. P. V. Murugesu Pillai*, 17 C.W.N. 488=21 Ind. Cas. 282 (P.C.). See Final Part, 1913, Col. 1177.

(17) *Hindu testator making a will of his ancestral property—Subsequent birth of a son—Son pre-deceasing the testator—Effect—Will not revoked—S. 14, Act V of 1881 (Probate and Administration), Scope and effect—Will revoked whether subsequently revived—Provision for widow's maintenance in will—Construction. Bodi v. Venkateswami Naidu*, 14 M.L.T. 181= (1913) M.W.N. 779=25 M.L.J. 363=21 Ind. Cas. 73. See Final Part, 1913, Col. 1179.

(18) *Will—Proof of—Presumption in favour of a natural will execution of which is proved—Attesting witnesses' position of—Evidence, admissibility of—Civ. Pro. Code, S. 568. Jagarani Koer (Mussammat) v. Koer Durga Parshad*, 16 O.C. 386=12 A.L.J. 125=26 M.L.J. 153=15 M.L.T. 125=19 C.L.J. 165= (1914) M.W.N. 137=18 C.W.N. 521=16 Bom. L.R. 141=36 A. 93=22 Ind. Cas. 103 (P.C.) See Final Part, 1913, Col. 1180.

(19) *Dismissal of suit brought on the basis of adoption—Whether bars second suit brought on the basis of a will. See CIV. PRO. CODE (1908), No. 200, 12 A.L.J. 441.*

(20) *Compromise—Construction—Matters between legatee and heirs settled—Heirs to pay money—Condition precedent—Equity. See COMPROMISE, No. 2, 12 A.L.J. 513.*

(21) *Will or non-testamentary instrument—Test. See CONSTRUCTION OF DOCUMENTS, No. 1, 22 Ind. Cas. 661.*

(22) *Rights to make bequest implies right to transfer inter vivos. See CUSTOM (GENERAL) No. 1, 20 C.L.J. 183.*

(23) *Will in the mofussil—Probate proceeding—Refusal of probate—Taking away the legal character from the executor—Probate proceedings—Suit—Res judicata. See EVIDENCE ACT, No. 27, 16 Bom. L.R. 5.*

Will—(Continued).

(24) *Grant of probate by District Court—Grant secured by fraud of executor—Application by caveator to revoke the grant dismissed—Executor filing suit in Subordinate Court to recover portion of testator's property from tenant's possession—Tenant and caveator pleading forgery of will and fraud in the grant—Defence not permissible. See EVIDENCE ACT, No. 30, 16 Bom. L.R. 459.*

(25) *Power of executor—Legatee when can sue executor. See EXECUTOR, No. 1, 12 A.L.J. 274.*

(26) *When right in a will is not abandoned. See HINDU LAW (ALIENATION), No. 9, 215 P.L.R. 1914.*

(27) *Will—Provision for maintenance to wife—Construction of—No condition to be added. See HINDU LAW (MAINTENANCE), No. 4, 27 M.L.J. 305.*

(28) *Construction of—Construction put on terms of will with reference to events that had then happened, if binding on happening of a fresh event—Gift to daughters in equal shares and each share to each daughters' sons on her death—Gift to class some of whom not in existence at testator's death—Effect. See HINDU LAW (WILL), No. 2, 25 M.L.J. 653.*

(29) *Will—Construction—Gift to a woman for life and after her death to her heirs, executors, administrators and representatives—No disposition of the corpus—Intention to tie up immoveable property and to distribute only the income—Validity. See HINDU LAW (WILL), No. 1, 15 M.L.T. 405.*

(30) *Construction—Devise in favour of widow and nephew—Nephew to take properties on widow's death, if both lived amicably—Absence of words of disposition—Effect—Right of remote reversioner to sue for declaration when arises—Grant of declaratory relief—Practice—Reference to provisions relating to will made in Presidency Towns as embodying the principles of justice, equity and good conscience—Contingent interest when becomes vested—Pronouncement on construction of will may be made to prevent further litigation. See HINDU LAW (WILL), No. 3, 26 M.L.J. 616.*

(31) *Will in favour of females—Construction—Absolute estate or life estate—Intention. See HINDU LAW (WILL), No. 4, 24 Ind. Cas. 20.*

(32) *Residuary legatee—Right to claim accounts for ascertaining the residuary share—Suit to recover legacy—Limitation. See LEGACY, No. 1, 41 C. 271.*

(33) *Case governed by Act V of 1881—Executor's right to sue when begins—Probate not obtained before suit—Effect—Suit by executor for recovery of amount deposited with defendant by testator—Limitation. See LIMITATION ACT (1908), No. 93, 37 M. 176.*

(34) *Non-transferable occupancy holding if may be disposed of by will—Title by estoppel—Testator or heir-at-law if estopped. See OCCUPANCY, Nos. 4 and 3, 18 C.W.N. 1290 and 1294.*

Will—(Concluded).

(35) Will creating charge by way of annuity—Charge upon immovable property whether enforceable against *bona fide* transferee for value without notice. See TRANSFER OF PROPERTY ACT, No. 85, 23 Ind. Cas. 867.

Withdrawal of Application.

Withdrawal of application for execution with permission to bring fresh application—Not allowed. See CIV. PRO. CODE (1882), No. 49, 18 A.L.J. 235.

Withdrawal of Suit.

- (1) *Withdrawal of suit by plaintiff—Effect on claim between defendants—Can proceed.*

Where plaintiff brings a suit on partnership and the 1st and 2nd defendants put in statements claiming each some amount and requesting that accounts be taken, and the plaintiff later on withdraws the suit, the defendants can insist on the suit going on as regards the claims set up by them. *Tirumedi Adeyya v. Chelunnin Venkataragadu*, (1914) M.W.N. 155=15 M.L.T. 245=23 Ind. Cas. 392.

SANKARAN NAIR and AYLING, JJ.

Reference :—11 Q.B.D. 464, F.

- (2) *Civ. Pro. Code (1882), S. 373—Civ. Pro. Code (1908), S. 10, 9. XXIII, r. 1—Suit, withdrawal of, with liberty to bring a fresh suit, on payment of costs—Proper order to be passed in such a case—Costs, non-payment of—Subsequent suit whether barred.*

A suit was allowed to be withdrawn by the plaintiff, with liberty to bring a fresh suit on the same cause of action if not barred, on condition of paying costs to the defendants. A subsequent suit having been brought on the same cause of action without paying the said costs, of the defendants, the Munsiff held that the suit was barred for non-payment of costs and dismissed the suit :

Held, that the Munsiff was not entitled to dismiss the suit; all that he could do was to regard S. 40 as a bar to his proceeding with the trial of the suit, inasmuch as the permission was not operative until the costs were paid, and so there was no withdrawal, with liberty to bring a fresh suit, and until there was such withdrawal, the former suit was still pending.

Held further, that the lower appellate Court was right when on payment of the costs the decree of dismissal by the Munsiff was set aside and the case sent back to be tried on the merits, for on payment of these costs there was the withdrawal complete under S. 373 (Act XIV of 1882) or O. XXIII of the Code of 1908 (a).

Held, also, that, in cases of this kind, the proper order is one which limits the time within which the payment should be made and which goes on to direct that, on failure to pay within that time, the original suit is dismissed with costs. *Shital Prasad v. Gaya Prasad*, 19 C.L.J. 529=23 Ind. Cas. 210.

JENKINS, C.J. and WOODROFFE, J.

References :—(a) 31 O. 965 ; 1 Dowl. 152, R.

Withdrawal of Suit—(Continued).

- (3) *Withdrawal of Suit—Arguments closed—No finding as to formal defect being fatal to suit—No order as to payment of costs of defending—Order allowing withdrawal with liberty to bring fresh suit—Irrregularity—No revision—Civ. Pro. Code, 1908, S. 115—Charter Act, S. 15.*

Where a suit was fought out to the bitter end, arguments of both sides had been heard and a few days previously the plaintiffs had been given an opportunity of amending their plaint, and where, in their petition for withdrawing the suit, the plaintiffs did not specify any legal defect and the lower Court mentioning only one defect allowed the application without finding that by reason of such defect the suit must fail and without making the grant of application conditional on payment of the defendant's costs, and where the defendant, after the plaintiffs instituted a fresh suit, moved the High Court to set aside the order.

Held that the order of the lower Court was hardly defensible.

Held also that, however irregular the order may be, the High Court cannot revise it under S. 115, Civ. Pro. Code (1908) (a).

To allow a suit to be withdrawn with liberty to bring a fresh suit is not deciding a "case."

Held, further, that the High Court had no power to interfere with the order under S. 15 of the Charter Act. *Bansi Singh v. Kishun Lal Thakur*, 41 C. 632.

COXE and D. CHATTERJEE, JJ.

References :—(a) 11 C.L.J. 45 ; 15 A. 169 & 11 M. 322, *Distgd.*

- (4) *Withdrawal of portion of claim in suit—Application for withdrawal in second appeal whether may be granted. See ACT VIII OF 1885 (BENGAL TENANCY), No. 38, 23 Ind. Cas. 777.*

(5) *With permission to bring fresh one—Omission to include all inconsistent causes of action—Whether ground for—Revision. See CIV. PRO. CODE, 1908, No. 200, 12 A.L.J. 441.*

(6) *Suit dismissed in lower Court and appeal preferred—Power of appellate Court to permit appellant to withdraw from appeal with liberty to bring fresh suit. See CIV. PRO. CODE (1908), No. 380, 16 M.L.T. 186.*

(7) *Ill advised grant of leave to withdraw with liberty to bring fresh suit—Material irregularity—Revision. See CIV. PRO. CODE (1908), No. 382, 16 M.L.T. 253.*

(8) *Partition proceedings—Order by Revenue Court to file a suit—Civil Court seized of the case—Withdrawal with permission to bring it afresh on same cause of action—Second suit filed beyond the time given by Revenue Court—Effect. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 4, 12 A.L.J. 989.*

(9) *Several plaintiffs suing jointly—Withdrawal of suit with permission to bring fresh suit—Separate claims—Not barred. See LIMITATION, No. 4, 163 P.L.R. 1914.*

Withdrawal of Suit—(Concluded).

(10) With permission to file fresh suit—Fresh suit instituted—Plea of *res judicata* cannot be raised. See MORTGAGE (REDEMPTION), No. 10, 22 Ind. Cas. 918.

(11) Without permission to bring fresh suit—Effect. See RES JUDICATA, No. 4, 19 P.L.R. 1914.

Witnesses.

(1) Examination of witness without notice to pleaders and parties—Legality—Decision based on such evidence—Effect. See CIV. PRO. CODE (1908), No. 117, 22 Ind. Cas. 407.

(2) Practice—Procedure—Compelling a party to call his adversary as his witness—Not to be allowed. See PARTNERSHIP, No. 3, 7 S. L. R. 85.

(3) Witnesses when can be contradicted by their previous statement. See TAKIA, No. 1, 9 P.W.R. 1914.

Worshippers.

(1) *Worshipper's right to sue for possession of mosque properties.*

A suit for possession of the mosque properties cannot be maintained by the worshippers in their individual or collective capacity. Noor

Worshippers—(Concluded).

Mahomed Sahib v. Karimabibi Ammal, 16 M.L.T. 165 = 27 M.L.J. 270.

SADASIVA IYER and NAPIER, JJ.

References:—16 M. 31; 23 M. 99; 33 A. 660, F.

(2) Suit by—Maintainability. See CIV. PRO. CODE (1908), No. 121, 7 S. L. R. 129.

(3) Hindu temple—Right of worship—Ilaiwaniyars—Exclusion from right—Burden of proof. See RELIGIOUS ENDOWMENTS, No. 2, 27 M.L.J. 253.

(4) Palas or turn of worship—Transferability—Incidents of Palas of Kalighat temple. See CUSTOM (GENERAL), No. 1, 20 C.L.J. 183.

Written Statements.

Whether written statements are 'transactions' within S. 13, Evidence Act. See EVIDENCE ACT, No. 7, (1914) M.W.N. 779.

Zemindari.

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